UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SHAWN R. HULL
United States Air Force

ACM 37470
(Misc. Dkt. No. 2010-09)

15 September 2010

Sentence adjudged 29 January 2009 by GCM convened at Hill Air Force Base, Utah. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Darrin K. Johns, Major Jennifer J. Raab, Major David P. Bennett, and Major Bryan A. Bonner.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

In accordance with his plea, the appellant was convicted of one specification of adultery with JH in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his pleas, the appellant was convicted of one specification of the rape of TB, one specification of adultery with TB, and one specification of negligent dereliction of duty for providing alcohol to a minor in violation of Articles 120, 134 and 92, UCMJ, 10

U.S.C. §§ 920, 934, 892.[1] The adjudged and approved sentence consists of a dishonorable discharge, confinement for three years, and reduction to E-1.

The issues on appeal are: whether the staff judge advocate (SJA) erred by advising the convening authority (CA), pursuant to Rule for Courts-Martial (R.C.M.) 1106, that no new trial was warranted and whether the CA erred by failing to order a new trial despite the SJA's acknowledgement that the appellant had presented new evidence that fell within the parameters of R.C.M. 1210. Further, the appellant filed a petition for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873.[2]

Finding no errors prejudicial to the appellant, we affirm the findings and sentence and deny the appellant's Petition for New Trial.

Background

On 22 September 2007, the appellant was at TB's apartment visiting with his girlfriend, JH,[3] and their infant daughter. The appellant provided wine which they all consumed.[4] Additionally, he and TB drank shots of rum. During that evening, TB was texting her boyfriend, MSgt RF. The two agreed that MSgt RF would pick TB up and they would go to his house. TB left the living room[5] and went to change her clothes and to get ready to go to MSgt RF's house.

JH prepared for bed and then could not find the appellant. She discovered him in TB's room. The evidence presented at trial is that the appellant raped TB, JH ran from the apartment while partially clothed,[6] and JH screamed for a neighbor to call the police and to help her get her daughter out of the apartment.[7] JH returned to the apartment and retrieved her daughter, the police arrived, the appellant left the scene, and statements of all the witnesses were taken. After hearing all the evidence, to include the conflicting accounts of JH and TB[8] and the evidence of faulty memories and the untruthful character of the victim,[9] the military judge convicted the appellant of rape, adultery, and negligently providing alcohol to a minor.

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[1] In this judge alone trial, the appellant was acquitted of assaulting JH.
[2] As all the issues relate directly to the appellant's request for a new trial, they are addressed together.
[3] JH was the roommate of TB at the time.
[4] JH was 19 years old at the time.
[5] JH's bed was a fold-out couch in the living room.
[6] She was naked from the waist up.
[7] As with most trials of this type, there was conflicting testimony. However, in addition to the conflicting testimony of JH and TB, there was testimony from a neighbor, the police, and MSgt RF. There was also a 911 tape and a taped interview of TB.
[8] It is interesting to note that at the time of trial JH and the appellant were living in a house belonging to JH's parents, who were then living in another state. The appellant was paying for all utilities and was providing medical care for their daughter.
[9] The defense called an expert witness, one of TB's co-workers, and one of TB's former roommates.

Through the clemency process after trial, the trial defense counsel requested the CA set aside the conviction or grant a new trial. The request was based upon a statement, dated 8 April 2009, provided to the defense by TS, a co-worker of JH and TB. In this unsworn statement, TS indicated that TB had told her that what happened between the appellant and TB was not rape and had been consensual.

When presented with the evidence, the SJA had his office investigate it. TS was an uncooperative witness and she failed to provide any additional evidence except to indicate that both TB and JH continually changed their stories. The SJA recommended against setting aside the conviction and recommended denial of the appellant's request for a new trial. The rationale was that although this statement fell under the requirements of R.C.M. 1210, it would not produce a substantially more favorable result for the appellant.

Petition for New Trial

Under Article 73, UCMJ, and R.C.M. 1210, an accused may petition The Judge Advocate General for a new trial within two years of the CA's approval of the court-martial sentence. The proper venue for a petition for a new trial depends on the stage of appellate proceedings in the case at the time the petition is filed. The appellant's petition is appropriately before us because his appeal was pending before us at the time the petition was filed. *See* Article 73, UCMJ; R.C.M. 1210(e).

Petitions for a new trial "are generally disfavored." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). They should be granted "only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *Id*. The decision of whether to grant a petition is within this Court's sound discretion. *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998) (quoting *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982)). In considering a petition for a new trial, we "have the 'prerogative' of weighing '[the evidence] at trial against the' post-trial evidence 'to determine which is credible'" and we may exercise broad discretion in finding facts. *Id*. (quoting *Bacon*, 12 M.J. at 492).

R.C.M. 1210(f)(2) provides that

> [a] new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
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> (A) The evidence was discovered after the trial;
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> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Although the SJA states that the statement of TS falls within the parameters of R.C.M. 1210, this Court is not convinced that this evidence would not have been discovered by the trial defense counsel in the exercise of due diligence. However, whether that prong of R.C.M. 1210 is met is not material to our finding that the appellant has failed to meet the third prong. Weighing the evidence presented at trial (including but not limited to statements by TB, JH, and MSgt RF; the 911 tape; the neighbor's testimony; the phone records; and the witnesses for the untruthful character of TB) and considering that TS provided an unsworn and uncorroborated statement, we are not convinced that this evidence would probably have resulted in "a substantially more favorable result for the accused." *Brooks*, 49 M.J. at 69.

Further, we find that the SJA did not err by advising the CA about the evidence and the CA did not err by not disapproving the findings and not granting the appellant's request for a new trial.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[10] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

[10] The Court notes that the court-martial order (CMO), dated 11 June 2009, incorrectly lists the appellant's plea to Charge III as not guilty. We order the promulgation of a corrected CMO.

Further, the appellant's Petition for New Trial is

DENIED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court