UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ACM 36110**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
WILLIAM PEREZ, JR.	)	
USAF,	)	
Appellant	)	**Panel No. 2**
	)	

On 30 March 2004 and 28 June – 2 July 2004, the appellant/petitioner was tried by a general court-martial composed of officer members at Moody Air Force Base, Georgia. Contrary to his pleas, he was found guilty of one specification of sodomy with M.R.G., a child under the age of 16, and one specification of assault with intent to commit sodomy against E.M.G., in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934. The appellant/petitioner was sentenced to a bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-3.

On 12 April 2006 the appellant/petitioner submitted a Petition for a New Trial and an Assignment of Errors to this court. The government responded to both defense submissions and oral argument was held on 20 November 2006. After considering all submissions and arguments of counsel, we determined that a post-trial fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967) was necessary to resolve the petition for new trial. A hearing was ordered and subsequently conducted. The military judge, as instructed, collected evidence and made detailed findings of fact relevant to the petition. The record was then returned to this court. Counsel for the appellant/petitioner and the government subsequently submitted further written argument in support of their positions. In its written response, the government argues the petition should be denied insofar as it relates to the appellant/petitioner's conviction for assault with intent to commit sodomy against E.M.G., but no longer seems to oppose the petition as it pertains to his conviction for sodomy with M.R.G.

Background

At trial, the primary evidence against the appellant/petitioner was derived from the testimonies of M.R.G. and E.M.G., the younger sisters of the appellant/petitioner's wife. No physical evidence of sexual abuse was presented. After the court-martial, both

victims recanted their accusations and claimed that their mother, Bridget Gaccek, invented the stories of abuse and instructed the young girls to lie to authorities.

At the *DuBay* hearing, the military judge heard testimony from M.R.G. and several other witnesses. Bridget Gaccek and E.M.G. (who is still living with her mother) exercised their right to remain silent and refused to appear or testify at the hearing. There was no evidence the government attempted to obtain immunity for either witness in order to compel their testimony. Because E.M.G. was not available, the military judge at the *DuBay* hearing considered various hearsay statements made by E.M.G. that had been obtained by the appellant/petitioner's attorney prior to the hearing. One of the statements was a verbatim transcript of an interview conducted by the appellant/petitioner's attorney after E.M.G. was sworn.

After considering evidence presented at the hearing the military judge made detailed findings of fact. He concluded:

> Based on the evidence presented, my evaluation of the credibility of the witnesses, and the totality of the circumstances, the court finds that the trial testimony of MRG was untruthful and that her subsequent recantation is true. Without being able to personally observe the witness, the court is reluctant to make the same finding regarding EMG's testimony, although circumstantial evidence strongly suggests that her recantation is true as well.

We find the military judge's findings and conclusions to be thorough and concise, and well-grounded in the evidence adduced at the post-trial hearing.

Discussion

Under Article 73, UCMJ, 10 U.S.C. § 873, and Rule for Courts-Martial (R.C.M.) 1210, an accused may petition The Judge Advocate General for a new trial at any time within two years after the convening authority approves the court-martial sentence. The proper venue for a petition for new trial depends on the stage of appellate proceedings in the case at the time the petition is filed. The appellant/petitioner's Petition for a New Trial is appropriately before us because the petitioner's appeal was pending before us at the time the petition was filed. *See* Article 73, UCMJ; R.C.M. 1210(e).

Petitions for 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 whether to grant the petition is within our sound discretion. *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). We have the prerogative of weighing evidence at trial against the

post-trial evidence to determine which is credible and we may exercise broad discretion in finding facts. *Brooks*, 49 M.J. at 68.

R.C.M. 1210(f)(2) provides that a new trial shall not be granted on the grounds of "newly discovered" evidence unless the petitioner shows that:

> (A) The evidence was discovered after the trial;
>
> (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.

R.C.M. 1210(f)(3) states "no fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged."

We review the question of whether a petition meets the Article 73, UCMJ, criteria de novo. *United States v. Denier*, 43 M.J. 693, 699 (A.F. Ct. Crim. App. 1995).

After conducting a thorough independent review of the evidence and carefully considering the military judge's findings and conclusions from the post-trial hearing, we find that grounds for a new trial exist on both grounds cited above: newly discovered evidence and fraud on the court-martial. First, we hold the petitioner has satisfied the criteria for granting a new trial under R.C.M. 1210 (f)(2). In so holding we find the following: (1) the evidence that M.R.G. and E.M.G. were committing perjury by fabricating their allegations against the appellant/petitioner was not discovered until well after completion of the trial; (2) this evidence could not have been discovered at the time of trial because the girls were still under the control and influence of their mother, who was essentially directing their actions; and (3) given that the testimony of the two girls was the primary evidence against the appellant/petitioner at trial, the newly discovered evidence showing the stories of the girls were fabricated would have probably produced a substantially more favorable result for the accused. Second, in considering R.C.M. 1210(f)(3), we hold a fraud was committed on the court-martial and that this fraud had a substantial contributing effect on the finding of guilty.

Accordingly, upon consideration of the appellant's petition, it is by the Court, this 17th day of March 2008,

ORDERED:

That the Petition for a New Trial is **GRANTED**.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court