UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DOUGLAS E. SMITH
United States Air Force

ACM 37863
(Misc. Dkt. No. 2012-07)

08 November 2012

Sentence adjudged 20 January 2011 by GCM convened at Royal Air Force Mildenhall, United Kingdom. Military Judge: Mark L. Allred and Jefferson B. Brown (sitting alone).[1]

Approved sentence: Dishonorable discharge, confinement for 27 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn and Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant contrary to his pleas of multiple sexual offenses involving his minor daughter, TDS.[2] The court

[1] Judge Brown arraigned the appellant and Judge Allred presided over the subsequent trial.
[2] At trial, the military judge convicted the appellant of the following charges and specifications:

sentenced the appellant to a dishonorable discharge, confinement for 27 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence adjudged but suspended the adjudged forfeitures and waived mandatory forfeitures for six months, to be paid to the mother of TDS for her benefit. The appellant assigns as error that the evidence is legally and factually insufficient to support the findings of guilt of the violations of Article 134, UCMJ, 10 U.S.C. § 934, under Charge III and Additional Charge II. In a separate petition, he seeks a new trial based on an affidavit from the victim recanting her testimony at trial. Finally, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), he argues that his trial defense counsel were ineffective.

Legal and Factual Sufficiency

The appellant argues that the evidence is legally and factually insufficient to support the convictions under Article 134, UCMJ, because, he claims, the evidence fails to prove that the misconduct was either prejudicial to good order and discipline or service discrediting. The court convicted the appellant of one specification each of possession, manufacture, and distribution of child pornography, two specifications of indecent acts on a child under the age of 16 years, and one specification of providing alcohol to a child under the age of 16 years, all in violation of Article 134, UCMJ. Each specification alleges that the appellant's conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, the required terminal elements under Article 134, UCMJ. The appellant argues that the convictions rest on an "unconstitutional presumption" because the Government did not elicit any direct

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Charge I: Violation of Article 120, UCMJ, 10 U.S.C. § 920

Specification 2: Aggravated sexual abuse of TDS, a child under the age of 16, on divers occasions by placing his hands on and kissing her vagina and breasts.

Specification 3: Indecent liberties with TDS, a child under the age of 16, by masturbating in her presence.

Charge II: Violation of Article 125, UCMJ, 10 U.S.C. § 925

Specification: Sodomy with TDS, a child under the age of 16, on divers occasions by force and without consent.

Charge III: Violation of Article 134, UCMJ, 10 U.S.C. § 934

Specification 1: Possess child pornography.

Specification 2: Indecent acts on TDS, a child under the age of 16, on divers occasions by placing his hands on and kissing her vagina and breasts.

Specification 3: Provide alcohol to TDS, a child under the age of 16, on divers occasions.

Additional Charge I: Violation of Article 120, UCMJ

Specification 2: Aggravated sexual abuse of TDS, a child under the age of 16, on divers occasions by having her place her hands and lips on his penis

Specification 3: Indecent liberties on TDS, a child under the age of 16, on divers occasions by recording images of her exposed breasts.

Additional Charge II: Violation of Article 134, UCMJ

Specification 1: Manufacture child pornography of TDS, a child under the age of 16, on divers occasions.

Specification 2: Distribute child pornography of TDS, a child under the age of 16, on divers occasions.

Specification 3: Indecent acts on TDS, a child under the age of 16, not the wife of the accused, on divers occasions by having her place her hands on his penis. (In his findings the military judge excepted the words "and mouth or lips" from the specification.).

testimony that the appellant's molestation of his daughter, his providing her alcohol, or his possession, manufacture, and distribution of child pornography would negatively impact good order and discipline or tend to bring discredit to the armed forces. We find the argument meritless.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is "limited to the evidence produced at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). "The test for factual sufficiency 'is whether, after weighing the evidence [. . .] and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

Turning to the specific charges at issue in this case, Clause 2 of Article 134, UCMJ, does not require testimony regarding either public opinion or even public knowledge of the misconduct for it to be service discrediting; rather, the evidence must be sufficient to show that the misconduct is "of a 'nature' to bring discredit upon the armed forces." *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). This is for the trier of fact to decide based on all the facts and circumstances. Contrary to the appellant's argument of an unconstitutional presumption, the facts and circumstances "do not mandate a particular result unless *no rational trier of fact* could conclude that the conduct was of a 'nature' to bring discredit upon the armed forces." *Id.* (emphasis added). We presume that a military judge sitting as trier of fact "knows the law and applies it correctly." *Id.* (citing *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000)).

Applying the above standards, we find the evidence legally sufficient to support the appellant's conviction. The appellant's minor daughter, TDS, testified that he sexually abused her on multiple occasions when she was between 10 and 14 years of age and that he also provided alcohol to her which sometimes facilitated the sexual abuse. She testified that when her father provided the alcohol to her she was afraid to become

intoxicated because that is when the "touching" happened. [3] A Department of Defense Computer Forensic Laboratory expert testified that he found multiple files of suspected child pornography on computer media under user names belonging to the appellant – files in which the appellant's daughter is often the subject and files which he transmitted to others. Considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, including that the alleged misconduct was of a nature to bring discredit to the armed forces. *See Phillips*.

Turning to factual sufficiency, we note that in *Phillips* the Court remanded the case to the lower court to ensure that the court did not conclusively presume that certain conduct was service discrediting as part of its factual sufficiency analysis. We engage in no such presumption. After weighing the evidence and making allowances for not having observed the witnesses, we are convinced beyond a reasonable doubt that the misconduct alleged under Article 134, UCMJ, of which the appellant was convicted is of a nature to bring discredit to the armed forces.

The Petition for New Trial

In November 2011, about ten months after trial and a couple of months after payments under a waiver of automatic forfeitures would have ceased, the appellant's daughter, TDS, signed a brief affidavit in which she recanted her in court testimony. She states that "none" of her in court testimony was true and that she was pressured by her mother and others to proceed. Based on the victim's post-trial recantation, the appellant seeks a new trial.

The petition for new trial essentially alleges that TDS committed a fraud on the court; however, "[n]o 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." Rule for Courts-Martial (R.C.M.) 1210(f)(3). "Petitions for a new trial based on a witness's recantation 'are not viewed favorably in the law.'" *United States v. Rios*, 48 M.J. 261, 268 (C.A.A.F. 1998) (quoting *United States v. Giambra*, 33 M.J. 331, 335 (C.M.A. 1991)). Such petitions "should not be granted unless '[t]he court is reasonably well satisfied that the testimony given by a material witness is false." *Id*. (citations omitted). We review petitions for a new trial by "weighing 'testimony at trial against the' post-trial evidence 'to determine which is credible.'" *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) (quoting *United States v. Brozauskis*, 46 C.M.R. 743 (N.C.M.R. 1972)), *cited in Rios*, 48 M.J. at 267-68. Looking to federal civilian court practice, which provides guidance for military practice on petitions for new trial, a motion for new trial may be decided on affidavits without an evidentiary hearing. *Rios*, 48 M.J. at 268

[3] The appellant argues that the laws of the United Kingdom do not prohibit providing alcohol to minors in the home. Regardless of the drinking age in the United Kingdom, we find the appellant's conduct under these circumstances sufficient to be of a nature to bring discredit to the armed forces.

(citations omitted).

Applying these standards to evaluate the petition in this case, we compare the victim's summary denial in the affidavit with the extensive testimony at trial.[4] The appellant's daughter testified that the appellant sexually abused her on multiple occasions when she was between 10 and 14 years of age. When TDS was about 10 years of age and the family was stationed in Guam, the appellant began taking photographs of TDS in "model like poses." He also began inappropriately touching her breasts and vagina "a few times a month," had her touch and kiss his penis, and masturbated in her presence "maybe once a month." During one incident, the appellant grabbed at his daughter as she was stepping out of the shower, causing her to fall and injure her eye to the extent that treatment at the local emergency room was required. Medical records corroborate her description of the injury.

When TDS was 11, the appellant was reassigned to the United Kingdom. Her mother and brother did not receive the necessary medical clearances to accompany the appellant to the United Kingdom, and TDS eventually went to reside with him alone. The appellant's adult girlfriend moved into the residence with the appellant and TDS.

The appellant's photo sessions with his daughter continued after she arrived in the United Kingdom, but this time the photographs were more "of a sexual nature" and TDS was both clothed and unclothed. He sometimes had her write "D+T" on her chest before taking a photograph, but TDS did not know why. If TDS did not cooperate in posing for the photographs the appellant would withhold money and privileges from her. He often provided her alcohol at home, but she was "scared" to become intoxicated with him because "things had happened before." The record of trial notes that TDS became emotional when asked what kinds of things had happened. She described how the appellant continued to touch her breasts and "private parts" and had her touch his penis a couple of times a month, often bargaining with her by soliciting sexual favors for things she wanted to buy or do. He also again masturbated in her presence. The sexual touching escalated to oral sex in the appellant's bedroom. She testified that, on one occasion shortly before she left the United Kingdom, the appellant rubbed his penis on her vagina but did not penetrate her. TDS told her mother about the sexual abuse when she returned to the United States. She testified that neither her mother nor anyone else ever told her what to say about the abuse.

Law enforcement agents seized various computer media from the appellant's residence in the United Kingdom and forwarded them to the Department of Defense Computer Forensic Laboratory (DCFL). A DCFL expert in digital forensic examinations, Mr. SO, analyzed the computer media. He testified that he found multiple files of suspected child pornography on the media under user names belonging to the

[4] The appellant urges that we not consider the various affidavits submitted by the Government in response to his petition. We accede to his request – to resolve the issue we need look no further than the testimony at trial.

appellant. TDS is the subject in many of the images and videos. For example, under the appellant's user profile identified as "digdug6" are several photographs of a topless TDS. One photograph shows an individual pulling open the shirt of TDS to expose her breasts. Videos found on the media show TDS in various stages of undress including one of her performing a striptease while a male's voice can be heard in the background telling her to "finish what she started." Another video shows the appellant masturbating over his sleeping daughter while a woman identified as his girlfriend "Louise" speaks in the background. The examiner also found multiple images of child pornography involving other victims.

Chat logs recovered from the appellant's computer show that the appellant often chatted with his daughter between their respective laptop computers and that he watched her on webcam. In one exchange recorded on 8 June 2008, the appellant urges his daughter to let him watch while she shows herself to her boyfriend on a webcam:

> APP: Oh I see so I buy you a new cam being nice and now I cant wach you on cam hmmmm
>
> TDS: Dad
>
> [The appellant then accepts his daughter's invitation to start viewing her webcam]
>
> APP: ok so are you whaching others cam or are they just waching you?
>
> TDS: me. Ok. god privisy. I'm turning it off plz?
>
> APP: what
>
> TDS: can ii turn it off of u
>
> APP: why
>
> TDS: my bf wants to see me
>
> APP: so he is asking to see you? What did you tel him did you tell him im waching your cam???
>
> TDS: npo
>
> APP: you better not tell any one that

The chat logs show that the appellant repeatedly asked his daughter to send him images, and the logs show that the appellant used sexually explicit images of his daughter in chatting with others.

Under the appellant's username, the examiner found recorded chat conversations and images in a program called "Google hello" in which the appellant exchanged pornographic images of his daughter with other chat users. Specifically concerning the images of his daughter on which "D+T" was written, the chat logs show that "D+T" is a couple named "Don and Tamara" who exchanged sexually explicit images with the appellant. For his part of the exchange, the appellant sent sexually explicit images of his daughter. One of the images sent from "Don and Tamara" shows them having sexual intercourse while a photograph of TDS rests on Tamara's body.

We find the detailed, corroborated, and sometimes emotional trial testimony of TDS far more credible than the summary denial in the affidavit submitted in support of the appellant's petition. For example, the military judge noted for the record that TDS became quite emotional when asked about the charged sexual intercourse: "I will note for the record here that it will be shown on the record that the witness, [TDS], is in an emotional state. She seems to be on the verge of crying and is speaking only slowly." When later given the opportunity by the military judge to explain whether the appellant penetrated her, TDS was careful to describe what happened as well as what did not:

> MJ: And I just need to be a little bit detailed there, was it just a brief touching or did it press against you and press inside of you at all?
>
> TDS: No, sir; just rubbing.
>
> MJ: Just rubbing?
>
> TDS: Yes, sir.
>
> . . . .
>
> MJ: You've heard so many different definitions and explanations; okay. When I'm talking about the vagina here I'm talking about the lips of the vagina --
>
> TDS: Yes, sir, I know.
>
> MJ: -- and you got that part. Did the penis ever get inside those lips?
>
> TDS: There was no penetration.

MJ: Excuse me.

TDS: There was no penetration past the lips.

Thus, when given the opportunity to provide the testimony needed to convict the appellant of raping her, TDS testified that he did not – hardly the testimony of someone who was, as alleged in the post-trial affidavit, simply parroting what others told her in an effort to send her father to jail. Further, many details of her testimony are corroborated by the testimony of the forensic expert who examined the appellant's computer media. Having carefully weighed the testimony at trial against the post-trial recantation of this young victim, we are not reasonably well satisfied that the testimony given by her at trial is false; therefore, the petition for new trial is denied. R.C.M. 1210(f)(3); *Rios*, 48 M.J. at 268-69.

Ineffective Assistance

The appellant argues, pursuant to *Grostefon*, that his trial defense counsel were ineffective by (1) not filing a motion to suppress the results of a search of computer media and (2) not requesting a delay. The appellant states in a post-trial affidavit that he "believed" there were problems with the search of his computer media, but his counsel did not file a motion to suppress. He also states that he wanted to delay the trial because he was suffering "withdrawal symptoms" from prescribed medication that caused "vomiting, headaches, confusion, and disorientation" which continued throughout the trial, but his counsel refused to request a delay.

We review ineffective assistance of counsel claims de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[5] and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The deficiency prong requires that an appellant show that the performance of counsel "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. The

[5] U.S. CONST. amend. VI.

prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *See United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). The law presumes counsel to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *See Garcia*, 59 M.J. at 450 (quoting *Strickland*, 466 U.S. at 689)); *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). To prevail on a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. . . . The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (internal citation omitted). Generally, evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Applying these standards to the issue at hand, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing.

In a responsive affidavit, trial defense counsel state that they and the appellant discussed a possible motion to suppress the computer media search results. After investigating the facts surrounding the search, the defense team found no basis to file a motion to suppress. In accordance with *Morgan* and *Rivas*, we find no basis to second-guess their reasoned decision and conclude that their performance did not fall below prevailing professional norms.

Concerning the appellant's withdrawal symptoms, defense counsel state that neither they nor the psychologist who was a defense expert consultant noticed any of the symptoms described by the appellant. According to the record of trial, neither did the military judge who, as previously noted, astutely observed and recorded the behavior and demeanor of witnesses. At his arraignment on 13 December 2010, the appellant responded clearly to all of the military judge's questions, affirmatively identified who he wanted to represent him, and engaged in a discussion concerning who would represent him at the later trial. He stood when addressed and resumed his seat when directed. When the military judge asked the appellant if he had any questions concerning the arraignment process or the future trial date in January, the appellant replied that he did not.

At trial the next month, the military judge noted that the appellant again stood when addressed: "Sergeant Smith, I see that you are rising as I speak to you. That is

good courtesy that you are showing the court, good professionalism, but please have a seat there, Sergeant Smith." The appellant responded clearly to each of the judge's questions, and affirmatively elected trial by military judge alone. During a later discussion with the appellant about certain stipulations of expected testimony, the military judge noted no unusual behavior or lack of understanding by the appellant. In fact, at no point in the record did the military judge or counsel note any unusual behavior or illness of the appellant. Finally, we note that a sanity board conducted in November 2010 found the appellant competent to stand trial. In short, we find that the record and appellate pleadings compellingly demonstrate that the medication withdrawal symptoms claimed by the appellant did not seriously impact the appellant's ability to participate in his defense. *See Ginn*, 47 M.J. at 248 (If the record and appellate pleadings "'compellingly demonstrate' the improbability of [the assertions in the affidavit], the Court may discount [the] assertions and decide the legal issue.").

Conclusion

The approved findings and the sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[6] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41.

[6] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has prejudiced the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court