UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
D.E. O'TOOLE, E.E. GEISER, R.G. KELLY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KENNETH L. HORSLEY
CHIEF HOSPITAL CORPSMAN (E-7), U.S. NAVY

NMCCA 200401412
SPECIAL COURT-MARTIAL

Sentence Adjudged: 21 November 2003.
Military Judge: CAPT John W. Rolph, JAGC, USN.
Convening Authority: Commander, Naval Medical Center, Portsmouth, VA.
Staff Judge Advocate's Recommendation: LCDR C. Darden, JAGC, USN.
For Appellant: Maj Brian Jackson, USMC; Maj Jeffrey Stephens, USMC; LT J. Lokey, JAGC, USN.
For Appellee: Maj Brian Keller, USMC.

29 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A special court-martial composed of members with enlisted representation, convicted the appellant, contrary to his pleas, of three specifications of failure to obey a lawful general order and two specifications of committing indecent acts, in violation of Articles 92 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced

to a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

This case is with us for a second time. On 25 October 2006, this court affirmed the findings but set aside the sentence due to ineffective assistance of counsel during the presentencing portion of the trial.[1] On 10 November 2006, the Government filed a motion for *en banc* reconsideration. On 25 January 2007, we denied *en banc* reconsideration but granted panel reconsideration.[2] We returned the record of trial to the Judge Advocate General for remand to an appropriate CA who was authorized to order a *Dubay* hearing on the issue of ineffective assistance of counsel during sentencing.[3] A *Dubay* hearing was held on 18 and 24 April 2007 and the record was returned to this court on 12 June 2007. On 1 August 2007, the appellant declined to submit additional matters beyond those contained in his 27 October 2005 brief.[4]

We have reconsidered the record of trial, the appellant's various pleadings and documents, the Government's response, and the April 2007 *Dubay* hearing. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66 (c), UCMJ.

Background

On 4 February 2002, the appellant was an independent duty corpsman (IDC) stationed at Naval Medical Center, San Diego. While seeing Hospitalman Third Class (HM3) V in his official capacity, the appellant asked inappropriate questions about the female HM3 V's marriage and made inappropriate comments concerning his own marriage and sexual proclivities.

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[1] *United States v. Horsley*, No, 200401412, 2006 CCA LEXIS 253, unpublished op. (N.M.Ct.Crim.App. 25 Oct 2006).

[2] N.M.Ct.Crim.App. Order of 25 Jan 2007.

[3] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

[4] The appellant submitted the following assignments of error: I. The military judge erred when he failed to *sua sponte* excuse RPC Grayson for actual and implied bias. Alternatively, the civilian defense counsel rendered ineffective assistance by failing to challenge RPC Grayson for cause: II. Legal and factual sufficiency to all charges and specifications; III. The appellant was denied his 6th Amendment right to effective assistance of counsel; IV. The military judge erred by not immediately giving a curative instruction after trial counsel's improper argument soliciting spillover by the members; V. Sentence severity.

Subsequently, on 9 October 2002, while stationed as an IDC at the Branch Medical Clinic, Naval Weapons Station, Yorktown, Virginia, the appellant made inappropriate comments to two additional active duty female patients, Hospitalman (HN) J and HN F. He also committed indecent acts with the two HNs by touching them inappropriately.

Challenge for Cause

The appellant first asserts that the military judge erred by not *sua sponte* excusing Senior Chief Religious Program Specialist (RPCS) Grayson for cause based upon actual and implied bias. In the alternative, the appellant asserts that his counsel was ineffective for failing to challenge RPCS Grayson for cause.[5]

RPCS Grayson was assigned to a chaplain's office and during individual *voir* dire acknowledged that "part of a lot of [her] duties is dealing with sexual assault victims . . . ." Record at 267. RPCS Grayson also stated that she had no role in determining the truth or falsehood of various victim allegations brought to the Chaplain's office, but served merely as a referral to appropriate counselors. *Id.* at 267-68. She further stated that she was not "more protective" of victims and reiterated that her sole responsibility was to refer individuals to the proper counselors. *Id*. at 272. In sum, RPCS Grayson stated that she could be objective and fair and consider all the evidence. *Id.* at 268.

In the appellant's brief on appeal, he asserts that RPCS Grayson stated during *voir dire* that "she may be *more likely* to believe an alleged victim with a history of lying rather than a truthful accused." Appellant's Brief at 4. We find this characterization of RPCS Grayson's *voir dire* responses to be inaccurate. In reality, RPCS Grayson disagreed with the military judge's statement that "as a general proposition ... an individual, who has a history of lying, even as an alleged victim, would be *more difficult* to believe, than somebody who maybe had a history of telling the truth." There is no indication that the RPCS would, in fact, favor a lying victim over a truthful accused. There being no evidence of actual or

[5] The appellant's civilian defense counsel did not challenge RPCS Grayson either for cause or peremptorily.

implied bias on the part of RPCS Grayson, there was no *sua sponte* duty for the military judge to excuse her. *See United States v. Elfayoumi*, 66 M.J. 354, 2008 CAAF LEXIS 723 at 5-6 (C.A.A.F. 2008). Accordingly, we also find that the civilian defense counsel was not ineffective by failing to challenge this member. *Strickland v. Washington*, 466 U.S. 668 (1984). This assignment of error is without merit.

Legal and Factual Sufficiency

The appellant's next assignment of error contends that the evidence is legally and factually insufficient to sustain his convictions. We disagree.

The tests for legal and factually sufficiency are well-known. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. Reasonable doubt does not mean evidence must be free from conflict. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature, when such conduct creates an intimidating, hostile or offensive work environment.[6] Each of the victims testified that the appellant used his position of authority as a medical provider and senior noncommissioned officer (NCO) to make unwelcome sexual comments and propositions. On appeal, the appellant does little more than reassert his unsuccessful arguments at trial.

Considering the evidence in the light most favorable to the Government, we are convinced that a rational fact finder could have found the elements of each specification and charge beyond a reasonable doubt. We are also convinced of the appellant's guilt of each specification and charge beyond a reasonable doubt. This assignment of error is without merit.

Ineffective Assistance of Counsel

In his third assignment of error, the appellant avers that he was denied effective assistance of counsel in the presentencing phase of his court-martial. Specifically, he

[6] Secretary of the Navy Instruction 5300.26C, Enclosure (1) at ¶¶ 4, 5 (17 Oct 1997).

asserts that his civilian defense counsel was ineffective when he presented, as part of a comprehensive 20-year service record, an enlisted evaluation referencing a July 1990 special court-martial and a second enlisted evaluation referencing the appellant's disenrollment from a Navy school for reasons unrelated to his grasp of the material.

In order to prevail on a claim of ineffective assistance of counsel, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland*, 466 U.S. at 689; *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland*, 466 U.S. at 687.

Ineffective assistance of counsel involves a mixed question of law and fact. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)). Whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are determined by a de novo review. *Id*. (citing *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004) and *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)).

The military judge who conducted the *Dubay* hearing entered extensive written findings of fact and conclusions of law. The appellant does not contest the findings of fact and, having carefully reviewed the record, we agree the findings are consistent with the record and we adopt them as our own.

Essentially, the defense counsel testified that their primary goal during presentencing was to save the appellant's retirement by showing his entire 20-year career, warts and all. The defense called good military character witnesses and supplied the members with the appellant's entire record of service. While the strategy did not work out as well as they hoped, their decision to pursue this strategy does not constitute deficient performance. We agree with the military judge at the *Dubay* hearing that the Government could well have introduced both evaluations as matters in aggravation. Under the circumstances, we do not characterize as below acceptable performance levels a tactical decision to reveal arguably negative information on the defense's own terms, rather than allowing the Government to do so on their terms.

Having carefully considered the record of trial and the *Dubay* hearing, we find that the appellant has not met his burden to show that the defense strategy was unreasonable under prevailing norms. *Davis*, 60 M.J. at 473. We therefore conclude that the appellant was not denied effective representation under applicable standards of review. Accordingly, we find the appellant's claim to be without merit.

Conclusion

The appellant's remaining assignments of error are without merit. We specifically find the approved sentence appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). Accordingly we affirm the findings and the approved sentence.

Chief Judge O'TOOLE and Senior Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court