IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

James C. NOCE
Airman Apprentice (E-2), U.S. Navy

NMCCA 200201126 Decided 29 April 2005

Sentence adjudged 10 August 2001. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Naval Air Station, Pensacola, FL.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CAPT MARK PEDERSEN, JAGC, USNR, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence and wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The court-martial also found the appellant guilty, contrary to his pleas, of carnal knowledge, in violation of Article 120, UCMJ. The court-martial sentenced the appellant to a bad-conduct discharge, 24 months confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 16 months pursuant to a pretrial agreement.

We have carefully reviewed the record of trial, the appellant's assignment of error alleging a due process violation based on the purported non-disclosure of exculpatory evidence, and the Government's response. 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

The victim of the carnal knowledge, "JV," a fourteen-year-old female, met the appellant through his fiancée, Amy. JV babysat for Amy's children. At their first meeting, Amy told the appellant that JV was 14 years old. Prosecution Exhibit 2 at 4. After being told of her age and watching JV dance, the appellant later commented to his fiancée that JV should be careful because someone might get the wrong idea and take advantage of her. *Id.*

The next morning, the appellant went to his fiancée's home. After Amy had gone to work, the appellant woke JV, who was sleeping in an upstairs bedroom. He invited JV to join him in the living room to talk. Shortly afterwards, he asked JV to accompany him to Amy's bedroom in the basement while the children slept upstairs. The appellant asked JV if she was a "virgin," to which she replied that she was, but that she wanted to lose it to someone she had been "seriously talking to," but that she was not planning on doing it "right away." PE 1 at 3. The appellant offered to "take care of `that'" (JV's virginity), but JV declined, saying that he was dating Amy and that she (JV) did not know him. *Id*. The appellant asked JV to give him a hug and as she did, he put his hands on her buttocks and pulled her onto his lap. *Id.* at 4-6. Thereafter, in various stages of undress, the appellant pulled JV's hips to his groin and rubbed her genitalia against his erect penis. The appellant removed JV's shorts and shirt. He then pulled JV onto his lap but was unable to initially penetrate her vagina. He then told her to roll over and entered her vagina as she laid on her side. *Id.* at 6. After about 5 minutes, the appellant got up and JV ran upstairs. JV did not know whether the appellant ejaculated inside her but stated that he "stuck his penis inside" and that it hurt. *Id*. About one hour following the incident, JV used the bathroom and noticed that she was bleeding from her vaginal area even though it was not time for her menstrual period. *Id.* at 7.

JV subsequently disclosed to a friend what had happened. JV's friend told her mother, who contacted local police and JV was taken to an emergency room for a rape examination. Standard forensic evidence was collected, and the examining physician noted that JV's vaginal area was slightly red and that her hymen was torn. PE 4 at 31.

A. Pretrial Discovery and Disclosure

In his sole assignment of error, the appellant contends that the Government violated his constitutional and statutory rights by not disclosing, before trial, a laboratory report obtained by the Naval Criminal Investigative Service (NCIS) indicating the lack of semen in the sexual assault kit swabs taken from the victim. In support of his position, the appellant cites RULE FOR

COURTS-MARTIAL 701(a)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), and the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). The appellant argues that the laboratory report qualifies as a document within the Government's possession, which "reasonably tends" to negate the appellant's guilt. R.C.M. 701(a)(6). At the same time, the appellant claims that this laboratory report was evidence "favorable to [the] accused" and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. We disagree as to both contentions.

On 18 July 2000, NCIS seized a sexual assault evidence collection kit (commonly known as a "rape kit") used on JV. On 9 May 2001, NCIS filed a Forensic Examination Request to the Serology Trace Division at the U.S. Army Criminal Investigation Laboratory (USACIL) in Georgia, requesting "urgent priority" for the testing of the sexual assault kit. Government's Answer of 24 Nov 2004 at 3.

On 24 May 2001, trial defense counsel submitted to trial counsel a detailed discovery request. The request sought, *inter alia*: (1) "any exculpatory information or impeachment information in the possession of or known to the [G]overnment and/or any of its agents regarding the alleged victim in this case" and (2) "results of any forensic testing done on any evidence pertaining to this case, including but not limited to DNA analysis, blood typing, hair and fiber analysis, fingerprinting, etc." Appellant's Brief of 7 Jun 2004 at 9; Affidavit of LT Paul D. Bunge, JAGC, USNR of 10 May 2004 at 1. The request indicated it was a continuing discovery request. On 25 May 2001, trial defense counsel submitted to the Article 32, UCMJ, Investigating Officer, a discovery request seeking, *inter alia*, "production of evidence collected by any law enforcement agency following the allegations against [the appellant], including but not limited to any physical evidence at the scene of the alleged crime, and any medical records from any examination of the alleged victim." Appellant's Brief at 10; Affidavit of LT Paul D. Bunge at 2.

On 30 May 2001, in response to trial defense counsel's 24 May 2001 request, the Government produced all responsive materials, including the entire NCIS report. The NCIS report indicated seizure of a sexual assault evidence kit and that the case is pending analysis of the kit and comparison of evidence at the USACIL. The Government's 30 May 2001 response also specifically indicated "all physical evidence is currently at the [USACIL], Forest Park GA for testing." Government's Answer at 3.

B. The "Missing" Evidence

On 8 August 2001, a forensic DNA examiner drafted the initial Serology/DNA report and submitted it for technical and administrative review within the Serology/DNA division. The Serology/DNA division finalized the report on 12 August 2001 and returned the case folder to the forensic examiner. On 14 August

2001, a Deputy Records Custodian forwarded the case folder and finalized laboratory report to NCIS via registered mail. On 17 August 2001, NCIS received the results of the USACIL report and, on the same day, generated a report, informing trial counsel of the results.

C. Trial

On 10 August 2001, the appellant signed a pretrial agreement. That same day, the appellant waived his right to a five-day waiting period and proceeded to trial by general court-martial. Record at 8. Prior to trial, the appellant did not move for a continuance to await the pending laboratory results. Government's Answer at 4; *see also* Record at 8, 11. At trial, the appellant pled not guilty to violation of Article 120, UCMJ, carnal knowledge, but guilty to violation of Article 134, UCMJ, the lesser included offense of indecent acts or liberties with a child. The pretrial agreement allowed the Government to pursue the charge of carnal knowledge, despite the appellant's plea to the lesser included offense, and to use as proof of the greater offense several stipulations of testimony. The Government's case on the merits relied on the stipulations of testimony, a medical report, and the appellant's providence inquiry.

D. Post-Trial Discovery

In his 10 May 2004 affidavit, the trial defense counsel asserted he never received the laboratory report showing the lack of semen on the sexual assault kit swabs. The trial defense counsel claimed that had he known the laboratory results before trial, he would not have negotiated a pretrial agreement allowing the Government to go forward with proof on the greater offense of carnal knowledge. Appellant's Brief at 10; Affidavit of LT Paul D. Bunge at 3. Trial defense counsel also asserted that the laboratory report would have aided in the defense's preparation of their case since it would have rebutted the victim's credibility and supported the defense's assertion that no penetration occurred between the appellant and the victim. Appellant's Brief at 10; Affidavit of LT Paul D. Bunge at 3.

Violation of Discovery Requirements

A. The Constitutional and Military Justice Standard

Trial counsel's failure to disclose favorable evidence to the appellant violates constitutional due process "where the evidence is material either to guilt or to punishment," irrespective of the good, or bad, faith of the trial counsel. *Brady*, 373 U.S. at 87. The military justice system provides the appellant broader discovery than required in federal civilian criminal trials. *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004). Article 46, UCMJ, serves as the foundation for this broader discovery, which is implemented in R.C.M. 701. *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999).

R.C.M. 701(a)(2)(B) requires the Government, upon defense request, to allow examination of any results or reports of scientific tests or experiments that "are within the possession, custody, or control of military authorities, . . . and which are material to the preparation of the defense. . . ." Regardless of a defense request, R.C.M. 701(a)(6) requires the Government "to disclose known evidence that 'reasonably tends to' negate or reduce [the appellant's] degree of guilt or reduce the punishment that [the appellant] may receive" if convicted. *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004). These provisions encompasses impeachment evidence. *Williams*, 50 M.J. at 440; *see United States v. Watson*, 31 M.J. 49, 54-55 (C.M.A. 1990).

B. Trial Counsel's Duty of Due Diligence

"Trial counsel must exercise due diligence in discovering [favorable evidence] not only in his possession but also in the possession" of others acting on the Government's behalf. *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993). The prosecutor's relationship to the other governmental entity and the nature of the defense discovery request define the scope of the review outside his own files that the trial counsel must undertake. *Williams*, 50 M.J. at 441. If relevant files are known to be under the control of another governmental entity, the trial counsel must inform the trial defense counsel of that fact and engage in "good faith efforts" to obtain the information. *Williams*, 50 M.J. at 441 (citing Standard 11-2.1(a), Commentary, American Bar Association, Criminal Justice Discovery Standards 14 n.9 (3d ed. 1995).

C. Application to the Facts of This Case

While the "missing" information from the final lab report is certainly discoverable under *Brady* and R.C.M. 701, we are convinced that the trial counsel fulfilled his duty of due diligence to discover and disclose exculpatory evidence within his control. First, the Government exercised "good faith efforts" to obtain the laboratory results by filing a request to USACIL Serology Trace Division for "urgent priority" in processing the kit's analysis. Second, during discovery, trial counsel informed the trial defense counsel of the kit's seizure and its pending analysis at USACIL.[1] Third, the Forensic DNA

[1] The trial counsel's 30 May 2001 response indicates disclosure to trial defense counsel of the entire NCIS report, which reveals the kit's seizure and specifies that analysis of evidence was pending. The trial counsel's 30 May 2001 response also advised the trial defense counsel that analysis was pending. The trial defense counsel's affidavit of 10 May 2004, however, claims he does not remember receiving the entire NCIS report or the laboratory report. The trial defense counsel's uncertainty does not conflict with the trial counsel's 30 May 2001 discovery response; thus, we find no basis to warrant post-trial fact-finding proceedings. *See United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000)(holding that the appellant's

Examiner at the Army lab completed his initial report on the evidence only two days before the appellant's trial. And most importantly, the Serology Division reviewed and finalized the report two days **after** trial (emphasis added). Within five days thereafter, the NCIS case agent received the final results and generated his report, informing the trial counsel of the lab's analysis.

We also note that negotiations for a pretrial agreement were concluded before trial commenced and the trial defense counsel never requested a continuance pending receipt of the laboratory results. In fact, the appellant waived his statutory right to a five-day waiting period and expressed his desire to proceed to trial on 10 August 2001. Making a tactical decision based on the evidence available to him, the appellant chose to forego the laboratory results and proceed to trial with a pretrial agreement that limited his confinement to 16 months. In view of these facts, we find that the trial counsel's duty of due diligence did not extend to contacting the lab technician responsible for testing the evidence and inquiring as to the status of the analysis before beginning the appellant's trial. Thus, we conclude that the trial counsel did not erroneously withhold disclosure of the final laboratory report.

Having determined that the trial counsel met his obligations, we need not review the "materiality" of the laboratory report in terms of the impact that report would have had on the trial's results. *See United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). Assuming *arguendo* that non-disclosure of the report was error, however, we find no material prejudice to a substantial right. We reach this conclusion based on the compelling evidence of the appellant's guilt, including his own admission that he guided and rubbed JV's vagina against his erect penis, as well as the contemporaneous forensic evidence of JV's bloody vagina, torn hymen, and reddened vaginal area. We are further convinced that the absence of semen in the rape kit swabs is not significant to disprove penetration, but only to prove that ejaculation did not occur inside JV's vagina, which was not a disputed trial issue.

We find speculative the appellant's contention that having the lab results might have permitted him to obtain a more favorable pretrial agreement by foreclosing the Government from going forward on the offense of carnal knowledge. Lastly, we find it somewhat disingenuous for the appellant to argue now he was prejudiced by his decision to accept an expedited trial schedule knowing that the lab results were still pending. Had such results confirmed the presence of the appellant's semen, he certainly would have been at a far greater disadvantage in contesting the principal charges of rape and carnal knowledge and

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assertion of nondisclosure was insufficient to trigger the need for a post-trial hearing where there was a lack of conflicting assertions between trial defense counsel and trial counsel).

in negotiating a favorable pretrial agreement. The appellant's apparent tactical decision to rush to trial and "beat the test results" cannot now be used to claim error. We therefore decline to grant the requested relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court