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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Calvin K. DAVIS
Ensign (O-1), U.S. Navy

NMCCA 200301256 Decided 31 October 2005

Sentence adjudged 11 October 2002. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of larceny of several items of Government property, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. A military judge sitting as a general court-martial sentenced him to confinement for 18 months and dismissal from the naval service. The convening authority approved the sentence, but waived automatic forfeitures.

We have considered the record of trial, the assignments of error[1], the Government's response, and the appellant's reply.

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[1] I. THE MILITARY JUDGE'S GUILTY VERDICT THROUGH EXCEPTIONS AND SUBSTITUTIONS WAS VAGUE AND AMBIGUOUS AND FAILED TO REFLECT WHICH FACTS CONSTITUTED THE OFFENSE FOR WHICH ENS DAVIS WAS CONVICTED, THEREBY DEPRIVING ENS DAVIS OF A FULL AND FAIR REVIEW OF HIS CONVICTION UNDER ARTICLE 66(C), UCMJ.

II. ENS DAVIS' DUE PROCESS RIGHTS WERE VIOLATED WHEN THE MILITARY JUDGE RETURNED A FINDING OF GUILTY TO THE SOLE CHARGE AND SPECIFICATION BY EXCEPTIONS AND SUBSTITUTIONS THAT SUBSTANTIALLY CHANGED THE NATURE OF THE OFFENSE, THEREBY CREATING A FATAL MATERIAL VARIANCE.

III. THE PROSECUTION FAILED TO PRESENT FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT ENSIGN DAVIS HAD STOLEN MILITARY PROPERTY BOUGHT BY SK1 CHARLES L. SHIRD.

The appellant's motion for oral argument is denied. Except for insufficient evidence as to some of the items of property, there is no reason to grant relief. As modified, the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was charged with stealing military property, without further description of the property in the specification. In entering a finding of guilty, the military judge excepted the words, "military property," and substituted the following specific list of items: "hand tools, power tools, a Honda portable generator, a Northstar power washer, knives, jackets, gloves, shirts, sunglasses, wristwatches, backpacks, duffle bags, medical equipment, camping equipment and a combination television/VCR." Record at 426-27.

The property named in the specification was found in the appellant's house, mostly in the basement. Various documents showed that many of the items were purchased through use of the appellant's Government credit card.

Sufficiency of Evidence

The appellant contends that the evidence is insufficient to show that he stole military property bought by a co-worker, Storekeeper First Class (SK1) Charles L. Shird, a Northstar power washer, a Honda portable generator, and a combination television/VCR. We agree in part.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). We conclude that the evidence was legally sufficient to support the conviction.

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not

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IV. THE PROSECUTION FAILED TO PRESENT FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT ENSIGN DAVIS HAD STOLEN A NORTHSTAR POWER WASHER, A HONDA PORTABLE GENERATOR AND A COMBINATION TELEVISION/VCR.

V. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL DEFENSE COUNSEL FAILED TO PRESENT RELEVANT AND MATERIAL EVIDENCE ON THE MERITS.

VI. THE CONVENING AUTHORITY ABUSED HIS DISCRETION BY FAILING TO SPECIFY THE REASONS FOR DENIAL OF ENS DAVIS' REQUEST FOR DEFERMENT OF CONFINEMENT.

having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So, too, may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

We first note that the Government concedes that the evidence is insufficient as to the Northstar power washer, shirts, and duffle bags. Based on our scrutiny of the record, we agree with the Government and accept that concession. However, we conclude that the evidence is factually sufficient as to all other items.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense team was deficient in their representation on the merits in the following particulars:

1. They presented no opening statement.

2. They offered no evidence in the defense case-in chief other than documentation of his good military character.

3. They convinced the appellant not to testify. “On numerous occasions I wanted to testify on my behalf, only to be told . . . that the prosecution had the burden of proof.” Appellant’s Affidavit of 25 Nov 2003 at 2.

4. They failed to cross-examine witnesses or produce other evidence to explain why the property was found in his home.

5. They failed to properly obtain and evaluate the appellant’s supply records and Missing, Lost, or Stolen property reports.

6. They failed to cross-examine his ex-wife regarding her motive to wrongfully accuse him.

7. They expressed confidence that the Government’s evidence was not enough to prove him guilty.

Having carefully considered the appellant’s assertions, the responsive affidavits of his two trial defense counsel, and the

entire record of trial, we conclude that the appellant has failed to show that his defense team was constitutionally ineffective.

In its recent decision of *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court set forth a comprehensive explanation of the legal concept of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint that he was deprived of the effective assistance of counsel, the appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

To determine whether the presumption of competence is overcome, we follow a three-part test:

> 1. Are the appellant's allegations true, and if so, is there a reasonable explanation for the lawyer's actions?
>
> 2. If the allegations are true, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers?
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> 3. If so, we test for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Id. at 474. We will apply this test to the appellant's complaints.

1. No opening statement. "While it is unusual to forgo an opening statement, it is not ineffective assistance to do so in certain circumstances." *United States v. McConnell,* 55 M.J. 479, 486 (C.A.A.F. 2001). Here, the defense strategy was to reserve opening statement pending presentation of the Government's evidence, vigorously attack that evidence, then reassess the status of the case before deciding whether to make an opening statement or not. Having done so, the defense team concluded that it had presented most of the available exculpatory evidence through cross-examination and that, other than documentary evidence of good military character, presenting additional evidence was too risky or useless. Specifically, the appellant elected not to testify. We also note that this was a trial before military judge alone, who "could understand the evidence," without the need for an opening statement. Affidavit of Mr. Otis K. Forbes, III of 5 Oct 2005 at 2. Under these circumstances, we conclude that the defense team was not remiss in opting to waive

opening statement. *See United States v. Lorenzon*, 47 M.J. 8, 12 (C.A.A.F. 1997).

2. No evidence in the defense case-in-chief other than good military character. A defense counsel's duty to zealously represent his client normally encompasses calling witnesses on the merits on behalf of his client. However, where the defense team has considered the appellant's suggested witnesses, interviewed them, consulted the appellant afterward, and otherwise conducted an adequate pretrial investigation, there may be times when the defense team may properly rest without presenting the appellant's desired witnesses. Such was the case here. The appellant specifically mentions SK1 Farkas and Construction Mechanic First Class (CM1) Halford in his affidavit, although he did not say whether he thought they should be called by the defense or simply interviewed to assist in pretrial preparation. We note that the defense team interviewed both petty officers and concluded that they would not be helpful as defense witnesses. SK1 Farkas was called to testify by the Government and the defense team conducted an adequate cross-examination. We conclude that the defense team was not deficient in their strategic and tactical decisions as to potential defense evidence. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)(holding appellate courts will not second-guess defense counsel's reasonable choice of strategy).

3. Appellant's Choice Not to Testify. The appellant states in his affidavit that he wanted to testify but his counsel told him that the prosecution had the burden of proof. He does not allege that the defense team prevented him from testifying or pressured him to remain silent. The affidavits submitted by the civilian defense counsel and the trial defense counsel both unequivocally state that the appellant was advised of the Government's burden of proof and that he had an absolute right to testify. Those affidavits also clearly indicate that the pros and cons of testimony were discussed and that the appellant was told it would be unwise to take the stand. The affidavits even go so far as to explain the reasoning, i.e., given the appellant's lack of credible explanations for the presence of thousands of dollars worth of military property in his house he would open himself to damaging cross-examination. After considering the advice, the appellant elected not to testify. We reject the appellant's second-guessing on this point. *See Davis*, 60 M.J. at 473.

4. No Explanation for the Presence of the Property. The appellant complains that his counsel failed to properly explore possible explanations for the presence of the property in his house. In his affidavit, the appellant lists several items of property seized by the Government and admitted in evidence, then attempts to explain how and why that property was in his house. For some items, such as a generator and table saw, the appellant contends that he purchased the items at stores for his own use, yet he could not provide receipts or other corroborating information for that contention. The appellant also claims that

someone could have brought the items into his house without his permission or knowledge and that his young son told him men were actually doing so. As stated in the affidavits of the civilian counsel and the trial defense counsel, these points were made at trial during witness examination and argument. The fact that the military judge was not persuaded by the evidence and argument does not render the defense team ineffective.

5. Failure to Obtain and Evaluate Records. The appellant next complains that the defense team failed to obtain and evaluate credit card records and files and any Missing, Lost or Stolen property reports the command may have submitted. The affidavits of the civilian and trial defense counsel do not directly dispute this complaint, but point out that in the absence of a credible explanation for the presence of the property in the appellant's house, it did not matter. We concur. Defense counsel need not traverse every possible evidentiary avenue in the course of their journey through pretrial preparation, only those that might assist in the defense. We also note that the appellant fails to explain how such records and reports would be relevant in his defense.

6. Failure to Fully Explore Bias of the Appellant's Ex-Wife. In his affidavit, the appellant accuses his ex-wife of starting the investigation and alleges that her main motivation was getting him in trouble so that she could keep the children during separation and divorce proceedings she initiated at the same time as she contacted investigators. The affidavits of the civilian and trial defense counsel correctly point out that Mrs. Davis was a Government witness at trial and underwent cross-examination on her motives and bias. Even assuming *arguendo* that the appellant is correct, we conclude that the appellant suffered no prejudice of any material right because his counsel may not have cross-examined his ex-wife as thoroughly as he wanted them to do. Given the large amount of property purchased for the Government that was found in the appellant's basement, his ex-wife's motives and bias are of little significance unless there was also some reason to believe that she alone, or with somebody else, framed the appellant. Nothing before us suggests such an evil scheme.

7. False Confidence in Deficiencies in Government's Evidence. The appellant claims that his civilian defense counsel expressed confidence that the Government had not borne its burden of proof and, therefore, declined to present any evidence in the defense case-in-chief. In his affidavit, the civilian defense counsel states that he does not believe that he advised the appellant in such a manner. In his affidavit, the trial defense counsel states that no promises or assurances were made to the appellant. While this might be construed as a factual conflict, we conclude that any such error would not result in relief under the circumstances of this case, even if the factual conflict were

resolved in the appellant's favor. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).[2]

Having applied the *Davis* test to the appellant's assertions, we conclude that he has failed to overcome the presumption of competence. This assignment of error lacks merit.

Failure to Explain Refusal to Defer Confinement

Finally, the appellant correctly asserts that the convening authority erred by summarily denying his request for deferment of six days of confinement. Citing RULE FOR COURTS-MARTIAL 1101(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.), our superior court has decreed that the convening authority's decision on a request for deferment of confinement must be in writing and must include the reasons upon which the decision is based. *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992). The Government concedes the error but argues that the appellant has failed to show prejudice other than the lack of knowledge for the reasons for the denial of the request. We are persuaded by the Government's argument. *See id.* While the convening authority erred in summarily denying the request, we decline to grant relief.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. We except the words "a Northstar power washer," "shirts," and "duffle bags" from the specification. Those words are dismissed. As excepted, the findings are affirmed. We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). As reassessed, we conclude that the approved sentence is both appropriate and is no greater than that which would have been imposed if the prejudicial error had not been committed. The sentence, as approved by the convening authority, is affirmed.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

[2] The appellant's 18 October 2005 motion for a fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) is denied.