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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Salvador DIAZ
Fire Controlman Chief (E-7), U.S. Navy

NMCCA 200200374 Decided 10 June 2004

Sentence adjudged 1 December 2000. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast, Naval Submarine Base New London, Groton, CT.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was tried before a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of three specifications of raping his 12-year-old daughter, and two specifications of indecent acts upon her. The appellant's crimes violated Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The adjudged and approved sentence includes a dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances, and reduction to pay grade E-1.

We have reviewed the appellant's record of trial, the eighteen assignments of error raised by the appellate defense counsel, the Government's response, the Reply Brief filed by the appellate defense counsel, as well the Appellant's Supplemental Reply Brief submitted *pro se* pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding that additional facts are necessary to resolve the assigned error asserting that a conflict of interest existed with respect to trial defense counsel, we will return the record to the Judge Advocate General for remand to the convening authority.

Statement of Facts

At the time of trial the appellant was a 47-year-old Chief Petty Officer with over 20 years in the Navy. The victim in this case is the appellant's natural daughter, who was born in October 1985. She provided the principal evidence against the appellant. She testified that the appellant's sexual abuse directed towards her began in March 1998 when the family was living in Pemberton, NJ, and continued until just before she reported the abuse in July 1999. At that time the family had moved to government quarters aboard Naval Weapons Station (NWS), Earle, NJ. The appellant had been married to the victim's mother, but they were divorced after the mother abandoned the family. This occurred prior to the commission of the crimes that are now before this court.

The abuse began in the family's two-story home in Pemberton. Prior to the abuse, the victim had been sharing a room with one of her older sisters. When another sister moved out of the house, the victim moved into a bedroom downstairs and across from the appellant's bedroom. The victim would frequently sleep in the same bed with her father. The first incident occurred on one such evening. The victim testified that she believed that the appellant thought she was sleeping when he put his arm around her and was feeling her body above her clothes. He then put his hand inside her clothes and rubbed her vagina for about 10 minutes. They did not discuss what had happened. She also testified that after this incident the appellant repeated the same sort of conduct just about every other night. She began to spend more nights in her own room. Although the appellant kept his clothes on during these touchings, the victim could tell that he was aroused because she could feel his penis on her leg. This activity continued until the victim told her aunt, the appellant's sister, that the appellant had been touching her inappropriately. The aunt let her niece go home with her father on the same evening that her niece had reported the abuse to her. At that time, the appellant told the victim that if she wanted him to stop all she needed to do was to tell him. The victim responded, telling her Dad to stop, and the touching ceased until after the family moved to NWS, Earle.

The appellant, the victim, and one other sibling moved to NWS Earle in March 1999, and the appellant began to touch his daughter again. The appellant would rub her breasts. At one point the appellant told the victim that he was doing this to keep her away from boys. He explained that if he took care of her at home she would not go looking for boys at school or on the streets. She also testified that the touching escalated to rape at Earle. She testified that the appellant had sexual intercourse with her three times in the quarters at Earle, twice in the appellant's bedroom and once in the living room. The victim was scared, confused, and embarrassed. They did not talk about what happened. All sexual activity between the two of them

stopped after the victim walked to the medical clinic on base and reported the appellant's actions.

The appellant testified on his own behalf. During his testimony he admitted that he had fondled his daughter's breasts and had digitally penetrated her vagina. He also acknowledged that the touching could have occurred twice a week. He further testified that he did not do this to satisfy his sexual desires. He believed that the victim was becoming sexually promiscuous. The appellant denied having had sexual intercourse with his daughter. On questioning by the courtmembers, the appellant testified, "I felt, if my daughter learned the right approach to sex with me, it was much more efficient than learning it from some kid on the street, that I knew, . . . just wanted to have another benchmark on his bedpost or something." Record at 747. He also testified that he did not explain to his daughter why he was touching her, but he also testified that he told her that, "[w]hat I am doing is wrong. It's against the law, but I want you to understand that this is being done, so you don't get involved with other children of your age." *Id*. at 751.

At the first Article 39a, UCMJ session of the appellant's court-martial, the trial defense counsel informed the military judge of a potential conflict of interest in the case. During pretrial discovery the Government provided to the appellant information suggesting that the appellant assaulted a female petty officer (PO F). The trial defense counsel informed the military judge that he had represented PO F at her own court-martial, and he was concerned that the Government might attempt to offer evidence of the alleged assault during the appellant's court-martial. The concern was that the Government would use the evidence if the appellant were to introduce evidence of good military character. The trial defense counsel also informed the military judge that if the Government was unwilling to agree not to use that evidence his client would "in all likelihood" dismiss the detailed defense counsel as well as the assistant defense counsel, who also was involved with PO F's court-martial. No ruling was made concerning the issue during that session of the trial.

At a subsequent Article 39a, UCMJ, session, the Government raised the issue seeking to have the military judge find that the detailed defense counsel did not have a conflict of interest. The Government did this through a Motion in Limine, Appellate Exhibit XII. The appellant's written response is Appellate Exhibit XIII. In support of the answer to the Government's motion the appellant filed an affidavit in which he stated:

> I am extremely concerned that my counsel feel unable to adequately represent me regarding any issues that involve the alleged assault of HM3 F[ ]. I know that I face severe punishment including life in prison if convicted. I do not want to be represented by lawyers who do not believe they can do their best

job because of a conflict of interest.

Appellate Exhibit XIV. In discussing the issue on the record, it became clear that if the appellant called witnesses to testify that he had good military character, the Government was going to ask the witnesses if they were aware that the appellant had assaulted PO F. It was also clear that the Government had a good faith basis for asking the "did you know" type question, that the Government could not offer extrinsic evidence to prove that the assault took place, and that PO F was not going to testify. And it was also clear that the Government intended to ask potential witnesses concerning the appellant's good military character if they were aware the appellant had told one of his other daughters to lie to medical authorities concerning how she had been injured when she went to the hospital seeking medical treatment for the injury.

While the military judge did not "resolve" the issue concerning a possible conflict of interest, he did inform the appellant that the Government would be able to ask the "did you know" type questions to defense character witnesses. Record at 43. With that ruling, the trial defense counsel informed the military judge that he would advise the appellant "of his right to dismiss us and request individual military counsel (IMC)." *Id*. at 45. The military judge also advised the appellant of his right to request IMC to avoid the potential conflict of counsel issue, and told the appellant that he needed to advise the military judge the next day if he wanted IMC. *Id*. at 45-47. The military judge also stated that he found the conflict "to be kind of [an] extraneous issue," *id*. at 45, and that it was "fairly minimal." *Id*. at 48. This Article 39a, UCMJ, session ended on 30 October 2000. When the court-martial reconvened on 27 November 2000, the appellant did not raise the conflict of interest issue. It did, however, come up again.

Just prior to the members being instructed on findings, the appellant addressed the military judge concerning the fact that no evidence of his good military character had been presented. A fairly lengthy discussion ensued. *Id*. at 785-800. During this dialogue the military judge explained to the appellant that his counsel had tactical reasons for the way they handled the issue of good military character. The appellant specifically stated that he did not agree with that, noting that this had been his earlier concern. The dialogue concluded with the military judge telling the appellant that he would not be allowed to represent himself, or to question witnesses on his own. The military judge then asked the defense if they wanted to either reopen their case or for the appellant to retake the stand, and the defense declined both offers. *Id*. at 801.

Sufficiency of the Evidence

In the appellant's eleventh assignment of error, he asserts that the evidence is insufficient to prove that he raped his daughter. We have carefully considered that assignment of error, as well as the sufficiency of evidence with respect to the allegations that the appellant committed indecent acts upon his daughter. 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, 325 (C.M.A. 1987). Without question, with regard to the three specifications of rape and the two specifications of indecent assault, that standard is met in this case.

The test for factual sufficiency is even 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 having personally observed the witnesses. *Turner*, 25 M.J. at 325. 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). "[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. Based on that review, we are convinced beyond a reasonable doubt of the appellant’s guilt of the charged offenses. Quite frankly, we find the testimony of the victim to be credible and consistent. While true that the victim told different versions of the appellant's culpability prior to reporting his criminal conduct to authorities, she had a reasonable explanation for her earlier "stories." Furthermore, her testimony concerning the indecent acts is generally corroborated by the appellant's own testimony. Although the appellant asserts that when he touched the victim's breasts and digitally penetrated her vagina with his fingers he had no intent to gratify his sexual desires, we find the appellant’s testimony disingenuous and unworthy of belief. We find that the evidence of record is both legally and factually sufficient to support his conviction on both charges and all specifications of which he was convicted.

Conflict of Interest

In his first assignment of error, the appellant asserts prejudicial error claiming that he was denied conflict-free counsel. We find that the facts are not adequately

developed in the record and will return the record to the convening authority for a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), or other action as set out in our decretal paragraph.

The question of whether the appellant's counsel labored under a conflict of interest is a mixed question of law and fact that is reviewed *de novo*. *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996). To resolve the question, four questions are involved. "Was there [successive] representation? If so, did it give rise to an actual conflict of interest? If so, did appellant knowingly and intelligently waive his right to conflict-free counsel? If not, did the conflict have no adverse effect on counsel's representation of appellant?" *Id*.

Without question, a military accused has a constitutional right to the effective assistance of counsel. Included within that right is the right to an attorney who is not encumbered by a conflict of interest with other clients. *United States v. Henry*, 50 M.J. 647, 651 (N.M.Ct.Crim.App. 1999). But even in cases where a single attorney is representing individuals charged with the same crime, that fact alone does not necessarily give rise to a conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). In such cases of "multiple representation" an appellant need not demonstrate prejudice in order to obtain relief; all the appellant need do is demonstrate that he objected at trial and that the "conflict of interest actually affected the adequacy of his representation." *Id*. at 348-50. Prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Burger v. Kemp*, 483 U.S. 776, 783 (1987)(quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Supreme Court once again, quoting from *Sullivan*, noted that a defendant is not entitled to relief until he "shows that his counsel *actively represented* conflicting interests." *Mickens* at 175. The Court also cautioned against an "unblinking" application of the *Sullivan* presumption of prejudice standard in all conflict of interest cases. *Id.* at 174.

In the case before us, we are concerned by the absence of evidence of good military character on the merits. This concern is heightened by the comments of the trial defense counsel and the appellant contained in the record of trial, and the failure of the military judge to adequately resolve the issue. Where a military judge is aware of a potential conflict of interest, "the court should seek to elicit a narrative response from [the] defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives

his Sixth Amendment protections." *United States v. Breese*, 11 M.J. 17, 22 (C.M.A. 1981)(quoting *United States v. Davis*, 3 M.J. 430, 434 (C.M.A. 1977)). The fact that the case before us does not involve multiple representation does not resolve the issue, as an attorney has a continuing duty to represent a client. *Henry*, 50 M.J. at 651. *See also Davis*, 3 M.J. at 432 n.9.

In *United States v. Smith*, 36 M.J. 455 (C.M.A. 1993), our superior court examined a record in which it determined that the facts contained therein were inadequate to determine whether there was an actual conflict of interest in the case. The court returned the record to the convening authority who was authorized to order a *DuBay* hearing. Similarly, we find the facts contained in the record before us to be inadequate to resolve the conflict of interest issue. We also conclude that a *DuBay* hearing is appropriate in this case. If one is conducted, we note that the appellant's allegation that he was denied conflict-free counsel waived his attorney-client privilege on this issue. *United States v. Devitt*, 20 M.J. 240, 245 (C.M.A. 1985).

Conclusion

Accordingly, the record of trial is returned to the Judge Advocate General of the Navy for submission to a convening authority who may order a *DuBay* hearing to resolve the question of whether an actual conflict of interest existed in this case, or order a rehearing on the findings and sentence if a *DuBay* hearing is deemed impracticable, or may dismiss the charges if a rehearing is deemed impracticable. If a *DuBay* hearing is conducted, the military judge is to make findings of fact as to: (1) whether there was an **actual** conflict of interest in the appellant's court-martial; (2) if there was an actual conflict of interest, whether it adversely affected counsel's representation of the appellant -- focusing on the question of why no evidence of the appellant's good military character was presented during the findings stage of the appellant's trial; and (3) if there was an actual conflict of interest, whether the appellant intended to waive the conflict. If the military judge finds that there was an actual conflict of interest, that the conflict adversely affected the appellant's representation at trial, and that the appellant did not intend to waive the conflict, the military judge shall set aside the findings and sentence and return the record to the convening authority for a decision whether to order a rehearing on findings and sentence. If the military judge determines that there was no actual conflict of interest, or that even if there was an actual conflict of interest, it did not adversely affect the appellant's representation at trial or the appellant intended to waive the conflict, the military judge

shall record his findings of fact and legal conclusions and return the record to the Judge Advocate General of the Navy for resubmission to this court. See *Smith*, 36 M.J. at 457-58.

Judge VILLEMEZ and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court