

CORRECTED COPY
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MARCHAND, MERCK, and CURRIE
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant SEAN G. GRIGORUK
United States Army, Appellant

ARMY 9600949

101st Airborne Division (Air Assault) and Fort Campbell
R. F. Holland, Military Judge

For Appellant: David P. Sheldon, Esq.; Captain Steven P. Haight, JA (on briefs).

For Appellee: Colonel David L. Hayden, JA; Lieutenant Colonel Edith M. Rob, JA;
Major Anthony P. Nicastro, JA; Captain Karen J. Borgerding, JA (on brief).

28 March 2001

MEMORANDUM OPINION ON REMAND

MERCK, Senior Judge:

On 13 February 1998, in an unpublished decision, this court affirmed appellant's general court-martial conviction of two specifications each of rape, forcible sodomy, and indecent acts with a child under the age of sixteen. We affirmed the sentence of a dishonorable discharge, confinement for twenty years, forfeiture of all pay and allowances, and reduction to Private E1. Subsequently, appellant sought review by the United States Court of Appeals for the Armed Forces.

On 13 March 2000, our superior court set aside our decision, remanded the case, and ordered this court to do the following: (1) request an affidavit from defense counsel explaining why Dr. Underwager or any other expert in child psychology was not called to challenge DW's credibility; (2) obtain additional evidence if necessary; (3) conduct any fact-finding consistent with *United States v. Ginn*, 47 M.J. 236 (1997); and (4) reconsider appellant's claim of ineffective representation.

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The facts of this case are summarized in the opinion of the Court of Appeals for the Armed Forces dated 13 March 2000 as follows:

The charges in this case were based on accusations by appellant's stepdaughter, DW. She was 4 years old at the time of the first alleged incidents, between 5 and 8 years old at the time of the second alleged incidents, and 9 years old at the time of trial.

Appellant and his ex-wife, an Army sergeant, were married for about 5 years and divorced about 1 year before the court-martial. DW was the natural daughter of appellant's wife and was about 2 years old when appellant married her mother. The subsequent divorce was the result of frequent separations and deployments, and appellant's extramarital affair. In a pretrial statement to agents of the U.S. Army Criminal Investigation Command (CID), appellant characterized the divorce as "coupled with animosity."

Anticipating a credibility battle between appellant and DW, defense counsel requested the convening authority to employ Dr. Ralph Underwager, a child psychologist, as an expert witness for the defense. After the convening authority denied the request, defense counsel asked the military judge for relief. Defense counsel represented that Dr. Underwager would support the defense theory that the accusations were fabricated by explaining the factors that cause a child to make false accusations. Specifically, the defense proffered that Dr. Underwager would provide expert testimony on four points relevant to the defense theory of the case:

(1) A conflicted family environment, particularly divorce and separation from parents, may influence a child to fabricate stories of abuse;

(2) Because children are more suggestible than adults, repeated questioning can teach or reinforce a false accusation;

(3) The initial assumptions of a child interviewer are a powerful determinant of what the child reports; and

(4) Consistent repetition is more indicative of learned behavior than actual memory.

The military judge ruled that the first three points were permissible areas of expert testimony. He ordered the Government to produce Dr. Underwager or a suitable substitute. He conditioned his ruling on the defense's ability to produce evidence of the underlying hypothetical facts on which Dr. Underwager would base his expert opinion.

DW testified at trial, describing the conduct on which the charges were based in graphic detail. She testified that appellant told her not to tell anyone about his conduct with her, but that she told a babysitter "[c]ause I had to tell somebody."

The prosecution presented the stipulated testimony of a medical doctor who had conducted a genital-rectal examination of DW and found her condition "normal." The doctor also stated that a "normal" diagnosis is not inconsistent with an allegation of sexual abuse.

The prosecution also presented the stipulated testimony of a CID agent who questioned appellant twice. The first time appellant categorically denied DW's accusations. Responding to questions about the source of DW's sexual knowledge, he told the CID that DW had entered his bedroom while he and his wife were engaged in sexual intercourse. He further stated that DW had entered the bedroom while appellant and his current girl friend were having sexual intercourse and that he had caught DW looking through the crack of the bedroom door when appellant thought she was asleep.

According to the CID agent, appellant was later confronted with the evidence and said, "I know something happened but not all that." After being advised that it would be in his best interest to cooperate with the investigation, appellant said, "I guess all I can do is try to plea bargain." Appellant's second statement was not reduced to writing. Appellant's ex-wife testified that she learned of appellant's conduct from the babysitter. She testified that she initially "could not believe that

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something of that nature had taken place." She admitted that employees of the Tennessee Department of Human Services had mentioned the possibility that DW would be placed in a foster home if she did not support her daughter. She testified that DW had "told lies in the past." She testified that when DW had lied in the past, she and appellant "would usually confront her and drill her and, you know, question her over and over until she told the truth."

Appellant testified in his own defense and categorically denied the allegations. He described an incident of DW's destructive behavior, where, shortly after the birth of her younger brother, she went into the kitchen and destroyed everything related to the baby and his food. Appellant described a second incident when DW hit her younger brother in the back with a large toy. She initially blamed it on the babysitter, but finally admitted doing it. Appellant admitted having an extramarital affair and fathering a child by another woman. He testified that, as his marriage deteriorated, DW became hostile, and they grew distant.

The defense presented evidence of good character. A first sergeant testified that appellant was "a very good noncommissioned officer" and "a very good parent." Another first sergeant testified that appellant was a good soldier and "very honest." A friend and fellow noncommissioned officer testified that appellant was "a very good parent." A subordinate characterized him as "a great parent." Appellant's father characterized him as "a stern parent" but "a fair parent."

The defense did not present evidence from Dr. Underwager or any other expert in child psychology.

52 M.J. 312, 313-14.

Appellant filed a post-trial affidavit, dated 1 April 1997, with this court in which he asserted in pertinent part that: (1) he discussed with his lead trial defense counsel (TDC) "the need (importance) of expert testimony during child sexual abuse cases [;]" (2) "[his TDC] believed that the prosecution had some dirt on our intended expert [Dr. Underwager] which would be used in an attempt to discredit him and make him out as a hired gun going to the highest bidder [;]" and (3) the TDC told

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appellant that “he could convey the same message to the panel, bringing it up in a casual manner, as not to seem too abrasive toward the alleged child victim.”¹

Pursuant to this court’s order, dated 5 April 2000, TDC² provided an affidavit, which provided in pertinent part:

During preparation for trial I researched the utility of employing an expert in child psychology. I was referred to Dr. Underwager by another attorney. After speaking with Dr. Underwager, I asked him for additional information, which he provided, on which to base a request for expert witness. Contrary to his affidavit, I recall speaking to Dr. Underwager on more than one occasion, especially as scheduling issues developed. I became concerned about the “false claims” and the “documents” he carried to rebut them, as mentioned in his affidavit. With an innocent client facing life in prison, I was sensitive to the possibility of diverting the panel’s attention to the issue of whether we were trying to pass off a “quack” on them. The government counsel approached

¹ Appellant also filed a post-trial affidavit, dated 27 February 1997, with this court from Dr. Underwager, in which the affiant stated:

I was contacted by . . . defense counsel for SSG Grigoruk I spoke to him at length about what I could testify about to assist the defense I told him that the JAG corps is familiar with me and tries to keep me from testifying by making false claims about me and essentially intimidating a defense counsel. I informed him that we know what they do and carry the documents to falsify the erroneous claims and implications they make.

. . . .

I did not hear anything further so after a few weeks, . . . I called [defense counsel.] He was not available so I left a message asking him to call me [He] never returned my call.

² Although there was an assistant trial defense counsel (ATDC), his inability to recall any substantive facts about this case made his affidavit of little, if any, importance. (Affidavit filed with this court by ATDC, dated 4 May 2000).

me at some point after the motion was litigated and showed me a detailed format for attacking Dr. Underwager. He also indicated that the government was willing to provide him rather than any suitable substitute. As noted below, by that time I had pretty much already decided against using him. As Dr. Underwager notes in his affidavit, I quit contacting him well before the trial.

My initial decision to seek an expert was in large measure a response to the government experts, especially Mr. Pitcock. I was looking for expert assistance as much as expert testimony. The written information provided by Dr Underwager was very basic, but helpful. I used this assistance to develop witness questions, organize my argument, and generally support the theory of the case. At the motion session, the government's use of Mr. Pitcock was clarified and they later agreed to stipulate to the examining physician, Dr. Bryant. At that point, any tactical need to balance their expert's testimony at trial was gone. The potential danger of having to litigate Dr. Underwager's credibility or having another expert open the door for Mr. Pitcock's appearance far outweighed the foreseeable [sic] impact of the granted testimony, the substance of which I argued to the panel anyway.

DISCUSSION

Our superior court determined that appellant established “a factual *foundation* for a claim of ineffective representation.” 52 M.J. at 315 (emphasis added). That is, “appellant ha[d] met the *Lewis*^{3]} threshold for compelling defense counsel to explain his actions.” 52 M.J. at 315 (citing *United States v. Clark*, 49 M.J. 98 (1998)). The limited⁴ questions we are concerned with are:

³ *United States v. Lewis*, 42 M.J. 1, 6 (1995)(holding that defense counsel may be required to justify his actions when a court determines “that the allegation[s] and the record contain evidence which, if unrebutted, would overcome the presumption of competence.”); see also *United States v. Thompson*, 54 M.J. 26 (2000).

⁴ We are limited to these questions because our superior court has determined that appellant failed to meet the *Lewis* threshold in respect to his other complaints about his TDC's performance.

(1) In a classic credibility contest, where TDC had established the factual predicate for the proffered expert testimony, then inexplicably does not call the expert or any expert, was that action based on a strategic or tactical decision?

(2) If counsel's action was based on a strategic or tactical decision, was that decision "so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment and" did his decision fall "below an objective standard of reasonableness [?]" *United States v. Davis*, 52 M.J. 201, 204 (1999)(quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); and

(3) Whether these questions can be decided on the basis of "uncontroverted facts" contained in the affidavits, or whether controverted factual assertions relevant to our decision on these issues require us to order a fact-finding hearing? *See Ginn*, 47 M.J. at 248.

In accordance with the principles announced in *Ginn*, 47 M.J. at 248, we must determine whether it is necessary to conduct further factfinding to resolve the claim of ineffectiveness. *See also United States v. Stuart*, 50 M.J. 72, 73 (1999). Applying the rationale set forth in *Ginn*, considering the post-trial affidavits and statements filed with this court, and the record of trial in this case, we find that it is unnecessary to conduct further fact-finding to determine the ineffective assistance of counsel issue. The rationale of *Ginn*'s third principle is applicable to our decision.⁵

Comparing the information in appellant's affidavit and his TDC's affidavit, it is clear that they do not differ in what was discussed. Additionally, the affidavit and statement by Dr. Underwager is not in substantive conflict with TDC's affidavit. Both agree that they discussed the substance of his proposed testimony and Dr. Underwager sent TDC information regarding that testimony. Dr. Underwager only recalls one conversation, but trial defense counsel recalls more than one conversation. The issue for this court is not how many times they talked but why trial defense counsel did not call Dr. Underwager or any other expert as a witness. Thus, we find no controverted facts relevant to our determination to be decided by a fact-finding hearing. Therefore, we turn directly to the ineffective assistance issue.

⁵ *Ginn*'s third principle reads:

[I]f the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issues on the basis of those uncontroverted facts.

A determination of effective assistance of counsel is a mixed question of law and fact. The final determination of whether the representation by counsel was deficient, and, if so, whether it was prejudicial are questions of law reviewed de novo. *United States v. Wean*, 45 M.J. 461, 463 (1997)(citing *Buenoano v. Singletary*, 74 F.3d 1078, 1083 (11th Cir. 1996)). In order to determine if counsel provided ineffective assistance, the Supreme Court in *Strickland*, 466 U.S. at 687, adopted a two-pronged test:

First, the [appellant] must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [appellant] by the Sixth Amendment. Second, the [appellant] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable.

See also *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)(Court of Military Appeals adopted the two-pronged test established in *Strickland*); *Clark*, 49 M.J. at 100; *United States v. Young*, 50 M.J. 717, 724 (Army Ct. Crim. App. 1999).

In so doing, we keep in mind that appellate courts give due deference to the strategic and tactical decisions made at trial by defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)); *United States v. Walters*, 42 M.J. 760, 763 (Army Ct. Crim. App. 1995); see also 52 M.J. at 315. Further, we must eliminate the distorting effects of "hindsight" before we evaluate the performance of counsel at the time of trial. *Strickland*, 466 U.S. at 689.

In this case, TDC's affidavit presents tactical and strategic reasons to forego the testimony of Dr. Underwager or any other expert, and the record establishes that these decisions were indeed followed. The defense team, while not presenting a perfect case, executed a sound strategy in utilizing the information provided by Dr. Underwager, but not giving the government the opportunity to cross examine Dr. Underwager or any other expert, or to present rebuttal evidence from Mr. Pitcock, a licensed psychological examiner who had conducted numerous psychological tests on DW and appellant.⁶ (See Appellant's Ex. XXI-D; R. at 28-29); cf. *United States v. Ingham*, 42 M.J. 218 (1995). The TDC was acutely aware of the danger of

⁶ It is important to note that TDC had access to these psychological tests at least by the time of the Article 32, UCMJ, investigation. See Rule for Courts-Martial 405(h)(1)(B); 1103(b)(3)(A)(i).

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litigating the credibility of Dr. Underwager and opening the door to the government's expert testimony. During voir dire, the TDC questioned the members, and they agreed that children are capable of making up stories to get attention and may be intimidated by adults when questioned. The TDC conducted a detailed cross-examination of both DW and her mother, attempting to cast doubt on their credibility; he presented "good soldier" evidence; and finally, appellant denied any guilt. Counsel's performance represented a meaningful test of the prosecution's evidence. *Cf. United States v. Cronin*, 466 U.S. 648, 659(1984); *Scott*, 24 M.J. at 188. Appellant's conviction was due to the evidence against him—not counsel's performance.

Our original decision of 13 February 1998 remains in effect.*⁷

Chief Judge MARCHAND and Judge CURRIE concur:

FOR THE COURT:

MARY B. DENNIS

MARY B. DENNIS
Deputy Clerk of Court

⁷ See *Ginn*, 47 M.J. at 238 n.2, for an explanation of how our decision is affected when our superior court sets it aside and remands for further consideration.

*Corrected