

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class JEROME J. FORREST
United States Army, Appellant

ARMY 20200715

ORDER

WHEREAS:

On 16 December 2020, a military judge sitting as a general court-martial, convicted appellant, contrary to his plea, of one specification unpremeditated murder in violation of Article 118, Uniform Code of Military Justice [UCMJ]. The military judge sentenced appellant to a dishonorable discharge and confinement for life. The convening authority approved the findings and adjudged sentence and the military judge entered judgment. This case is now before us for review under Article 66, UCMJ.

On 20 January 2022, appellant filed a brief before this Court asserting that his trial defense counsel were ineffective in investigating and preparing for trial. Specifically, appellant asserted that his defense counsel were: (1) ineffective for failing to adequately prepare appellant's pre-sentencing case; and (2) ineffective when they failed to sufficiently investigate appellant's head injury and provide a sufficient factual basis to request or compel an expert in the area of neuropsychology. In support of his claims of ineffective assistance of counsel, appellant filed a motion to attach Defense Appellate Exhibits (DAE) A through K, which was granted in part for DAE A through F, and denied in part for DAE G through K on 18 January 2022. After filing a motion for reconsideration, appellant's motion to attach Defense Appellate Exhibits G through K was granted on 21 January 2022. Defense Appellate Exhibit A is a signed declaration from Dr. Paul Montalbano, a forensic psychologist, that challenges the Rule for Courts-Martial [R.C.M.] 706 results in appellant's case, explains what further testing and expert assistance could have been provided to appellant's mitigation case, and provides analysis on the possibility appellant experienced an altered mental state, and is relevant to the claim of ineffective assistance of counsel pertaining to both the merits and pre-sentencing portion of appellant's trial. Defense Appellate Exhibit B is a declaration by Lieutenant Commander (LCDR) Johnathan Heller, a forensic psychiatrist and the Chief of the Center for Forensic Behavioral Sciences at Walter

Reed National Military Medical Center, where he asserts there are errors and inconsistencies in the R.C.M. 706 results that appellant could have used to challenge the findings at trial and provides data regarding the number of mitigation experts assigned to non-capital cases. Defense Appellate Exhibits C through K are signed declarations from appellant's family and friends relevant to appellant's claim of ineffective assistance of counsel during pre-sentencing, which claim defense counsel either failed to adequately prepare them to testify or failed to contact them at all.

On 27 June 2022, this Court ordered affidavits from appellant's trial defense team. On 19 and 20 July 2022, this Court granted appellee's motion to attach the affidavits from appellant's detailed defense counsel at trial as Government Appellate Exhibits (GAE) 1, 2, and 3. Government Appellate Exhibit 1 is an affidavit from Mr. Lawrence Willard II, (formerly Captain Lawrence Willard II); GAE 2 is an affidavit from Major Mark Jensen, and; GAE 3 is an affidavit from Major Daniel Hill.

Concerning the investigation into appellant's head injury, Major Jensen's affidavit states he requested a neuropsychologist to examine appellant, and then filed a motion to compel that neuropsychologist when the convening authority denied the request. However, Major Jensen was released from representation before there was a hearing to argue the motion. The affidavits of Mr. Willard and Major Hill assert they reviewed appellant's medical records which they believed did not indicate appellant suffered from a traumatic brain injury (TBI). According to Major Hill's affidavit, he thought Major Jensen "may have mistakenly thought this was a viable line of defense and did not catch the prior TBI testing." According to Mr. Willard's affidavit, he and MAJ Hill came to the same conclusion that they had no evidence appellant suffered from a head injury and "that any indication that [appellant] may have suffered a head injury was, at best, speculative." Major Hill and Mr. Willard assert in their affidavits that further TBI screening was declined because appellant refused to participate.

The defense team affidavits concerning pre-sentencing conflict with the affidavits of appellant's family and friends. Specifically, appellant's sister, Ms. Janeille Forrest, states in her affidavit that she did not speak to appellant's attorneys about her testimony until the day before she testified and that the preparation was only ten to fifteen minutes. Appellant's sister also states she was never asked about other potential witnesses that may have been able to testify on appellant's behalf. Appellant's mother, Ms. Jacqueline Forrest, stated in her affidavit that the family had "very little communication over the course of the months dealing with [appellant's] trial" and that the family was never prepared to testify until appellant's trial had already begun. Appellant's father, Mr. Mickey Forrest, asserts in his affidavit that appellant's attorneys did not spend enough time with the family or appellant and that they "always asked specific questions" instead of getting "the positive and great life [appellant] had in him." Appellant's father states they had

minimal contact with appellant's attorneys over the two years leading up to trial and were "left in the dark" throughout the two week trial. Six affidavits from individuals stating they were friends of appellant, Staff Sergeant (SSG) Abrien Bouie, Mr. Alexander Junior, Sergeant (SGT) John Russino, Technical Sergeant (TSgt) Adrian Inniss, Ms. Andrea Inniss, and Ms. Neena Kavanaugh, all assert they were never contacted by appellant's defense attorneys.

On 23 August 2022, this Court granted appellant's motion to attach DAE L, an affidavit from Dr. Louis French, the Deputy Director of the National Intrepid Center of Excellence (NICoE) at the Walter Reed National Military Medical Center and a doctor with over twenty years of experience evaluating and treating TBI. In DAE L, Dr. French states "[i]t is apparent from the medical reports" that appellant "suffered a traumatic brain injury on 09 December 2018" based on the medical records alone. Further, Dr. French asserts "any trained medical professional would have looked at the medical report and come to the same conclusion." Dr. French's affidavit conflicts with two of the trial defense team affidavits, which assert that those same medical reports reviewed by Dr. French fail to show appellant suffered a TBI.

After identifying inconsistencies in the affidavits submitted by the trial defense team, Dr. French, and appellant's family and friends, and applying the factors set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we now order a post-trial hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to resolve material inconsistencies in the post-trial affidavits and develop the facts necessary to resolve appellant's claim that his defense counsel were ineffective in investigating and preparing for trial.

NOW THEREFORE, IT IS ORDERED:

1. That the record of trial is returned to The Judge Advocate General for such action as is required to conduct a limited hearing pursuant to *DuBay* by an appropriate convening authority.

2. At a minimum, the *DuBay* military judge will resolve the inconsistencies between the affidavits filed in this case by addressing the following questions:

a. What, if any, steps did appellant's defense team take to investigate appellant's head injury that occurred one week before the charged offense of murder?

b. Did appellant's defense team attempt to have the medical reports reviewed by a medical professional/expert to rule out the possibility of TBI? If not, what was the rationale/basis for failing consult with and have a medical professional/expert review appellant's medical reports related to the accident in which he suffered a head injury?

c. What were the specific facts and circumstances that led MAJ Hill and Mr. Willard to conclude there was insufficient evidence to show appellant suffered a TBI?

d. Did defense counsel consult/speak with Dr. Janine Galusha, the requested defense expert in neuropsychology, about the type of assistance she could provide the defense team? If so, did defense counsel discuss with Dr. Galusha general testimony she could provide in support of the defense request for an expert? What, if any, were the legal or strategic reasons for not presenting testimony from Dr. Janine Galusha, in support of the Defense Motion to Compel Expert Consultants?

e. What, if any, were the legal or strategic reasons for declining the government's offer to have appellant undergo additional TBI screening? *See* App. Ex. XV. Did appellant refuse to be examined for further TBI screening as asserted by his defense team? If so, what are the facts and circumstances surrounding this refusal to participate in TBI screening to include (1) what were the substance of the discussions with appellant about his participating, or not, in TBI screening; and, (2) what was appellant's stated reason for refusing to participate in TBI screening? *See* Gov. App. Ex. 1 and 3.

f. Mr. Lawrence Willard states in his affidavit that he emailed himself and MAJ Hill a memorandum for record (MFR) that detailed the discussions and advice he and MAJ Hill had given appellant concerning additional TBI testing, but that he could not locate it. Does MAJ Hill have a copy of this MFR? If so, attach a copy of the MFR as an appellate exhibit. If not, what does MAJ Hill recall about this MFR, if anything? If MAJ Hill remembers or has a copy of this MFR, does he agree with it or have any additional facts to add regarding the discussion with appellant?

g. Was there a good faith basis for defense counsel to present evidence that appellant suffered a TBI? If so, what evidence supports this?

h. Did defense counsel discuss appellant's R.C.M. 706 results with the medical professional(s) who conducted the evaluation? If not, what was the reason for failing to do so? Did defense counsel have appellant's R.C.M. 706 results reviewed by their own expert? If not, what, if any, were the legal or strategic reasons for the defense team failing to do so?

i. Major Daniel Hill states in his affidavit multiple times that appellant provided varying factual accounts of what occurred the night of his wife's murder. What steps, if any, did defense counsel take in consulting a medical professional/expert regarding the potential impact of appellant's head injury just days prior to the murder, coupled with the medications he was prescribed

after the head injury, on appellant's memory given appellant's varying factual accounts of the night of the murder?

j. How did defense counsel investigate and prepare for presentencing proceedings? Other than obtaining names of friends and family from appellant, what independent investigation into appellant's background, character, and military service did defense counsel conduct? What family members, friends, and military personnel did defense counsel interview prior to trial? Did defense counsel interview SSG Abrien Bouie, Mr. Aleander Junior, SGT John A. Russino, TSgt Adrian J. Inniss, Ms. Andrea Inniss, and Ms. Neena Kavanaugh? If not, what were the circumstances or reasons why defense counsel did not interview these witnesses? What were the strategic reasons, if any, for not calling witnesses to testify that defense counsel interviewed?

k. What steps did defense counsel take to prepare the witnesses that testified for presentencing? Specifically, when did defense counsel first go over testimony with the family members that testified? Approximately how long did defense counsel spend preparing these family members to testify? *See* Def. App. Exs. C, D, E, and Gov. App. Exs. 1 and 3.

l. Mr. Willard and MAJ Hill state in their affidavits that appellant failed to provide them any names outside his family members that could testify on his behalf during presentencing. Did defense counsel ask appellant's family members about other friends or family that may have been able to testify on appellant's behalf during presentencing? Did appellant's family know any of the six individuals that provided affidavits stating they were friends with appellant? *See* Def. App. Exs F, G, H, I, J, and K.

m. What were the legal or strategic reasons for defense counsels' decision not to seek a mitigation expert in this case?

n. What, if any, were the legal or strategic reasons for not presenting evidence of appellant's military service during presentencing?

3. The *DuBay* military judge will permit the presentation of witnesses and evidence, make rulings as appropriate, enter findings of fact, and, as necessary, reach conclusions of law, concerning the questions above. The findings of the *DuBay* military judge will address the matters set forth in this order and resolve inconsistencies in the affidavits and testimony of the witnesses.

4. At this hearing those individuals with relevant information, to include but not limited to those who have provided affidavits regarding appellant's claim of ineffective assistance of counsel, shall be required to provide testimony, unless the *DuBay* military judge makes specific findings as to why particular witnesses are

deemed to be unavailable. These individuals include: Mr. Lawrence Willard II, MAJ Mark Jensen, MAJ Daniel Hill, Ms. Janeille Forrest, Ms. Jacqueline Forrest, Mr. Mickey Forrest, SSG Abrien Bouie, Mr. Alexander Junior, SGT John Russino, TSgt Adrian Inniss, Ms. Andrea Inniss, Ms. Neena Kavanaugh, Dr. Janine Galusha, Dr. Louis French, Dr. Paul Montalbano, and Dr. Johnathan Heller. The appellant should be afforded the opportunity to testify.

5. The hearing will be concluded no later than ninety (90) days from the date of this Order.

6. At the conclusion of the proceedings the record, with an authenticated verbatim transcript of the hearing, will be returned promptly to this Court for further review.

DATE: 11 October 2022

FOR THE COURT:



JAMES W. HERRING, JR.

Clerk of Court

CF: JALS-DA
JALS-GA
JALS-TJ
JALS-CCR
JALS-CR4