UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SMAWLEY, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Master Sergeant ANDREW D. STEELE
United States Army, Appellant

ARMY 20170303

Headquarters, 7th Infantry Division
Sean Mangan and Lanny J. Acosta, Jr., Military Judges (trial)
J. Harper Cook and Matthew S. Fitzgerald, Military Judges (rehearing)
Lieutenant Colonel James W. Nelson, Acting Staff Judge Advocate (trial)
Lieutenant Colonel Robert A. Rodrigues, Staff Judge Advocate (rehearing)

For Appellant: Captain Lauren M. Teel, JA (argued);[1] Major Rachel P. Gordienko, JA; Captain Lauren M. Teel, JA (on brief); Colonel Michael C. Freiss, JA; Jonathan F. Potter, Esquire; Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel (brief on specified issues).

For Appellee: Captain Jennifer A. Sundook, JA (argued); Major Mark T. Robinson, JA (on brief); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Jennifer A. Sundook, JA (brief on specified issues).

9 June 2022

OPINION OF THE COURT ON FURTHER REVIEW

EWING, Judge:

This is appellant's second appeal to this court, following a remand and a sentencing rehearing. Appellant asserts no claim of error related to his rehearing, but rather contends for the first time that one of his original convictions is

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[1] The court heard oral argument on 30 March 2022 at George Washington University Law School as part of the court's outreach program.

constitutionally infirm. Appellant did not raise this constitutional challenge in his first appeal. Because appellant has shown neither good cause for his failure to raise his new claim in his first appeal, nor that he would suffer actual prejudice or manifest injustice based on his new claim, we reject his claim and affirm.

BACKGROUND

At appellant's original trial, a military judge sitting as a general court-martial convicted him, pursuant to his pleas, of one specification of violating a general order and one specification of fraternization in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934 (2012) [UCMJ]. Contrary to appellant's pleas, the military judge also convicted him of one specification of indecent exposure and one specification of disorderly conduct in violation of Articles 120c and 134, UCMJ, 10 U.S.C. §§ 920c and 934 (2012). The military judge sentenced appellant to a bad-conduct discharge and reduction to the grade of E-3. Appellant's convictions stemmed from two events he hosted at his former apartment's pool complex, where multiple junior enlisted soldiers from his unit were present, and where appellant and others were nude and took part in sexual acts. We provided additional facts about appellant's underlying court-martial in our initial opinion in this case. *See United States v. Steele*, ARMY 20170303, 2019 CCA LEXIS 95 (Army Ct. Crim. App. 5 Mar. 2019) (mem. op.) ("*Steele I*").

In *Steele I*, we held that a twenty-seven-minute gap in the audio recording of appellant's presentencing case resulted in an insubstantially verbatim transcript as described by our superior court in *United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2014). *See Steele I*, 2019 CCA LEXIS 95, at *5-6 (citing *Davenport*, 73 M.J. at 377). Appellant's only other assignment of error in *Steele I* was a claim that the government's evidence on the indecent exposure charge was legally and factually insufficient. We addressed and rejected this claim in a footnote, and affirmed the guilty findings. *Id.* at *3 n.4. Because of the *Davenport* error we set aside appellant's sentence and remanded appellant's case to the convening authority for "action consistent with R.C.M. 1103(f)," which, at that time, meant the convening authority could either order a sentencing rehearing or approve a sentence without a punitive discharge. *Id.* at *10.

The convening authority ordered a sentencing rehearing, where a panel with enlisted representation resentenced appellant to be reduced to the grade of E-5. Appellant's case is now back before us for a second time. In the instant appeal, appellant, for the first time, challenges his indecent exposure conviction on constitutional grounds. Specifically, appellant argues that we should find that the UCMJ's 2012 deletion of the "public view" element of indecent exposure rendered the resulting offense unconstitutionally vague and/or overbroad. Appellant did not present this claim to the military judge at his original court-martial, to our court in his first appeal, or to the military judge at his sentencing rehearing.

LAW AND DISCUSSION

A. "Cause and Prejudice"

In the normal course of appellate review under Article 66(b), UCMJ, this court automatically reviews the findings and sentence in general and special courts-martial where the sentence includes, as relevant in this case, a punitive discharge.[2] *See* Article 66, UCMJ, 10 U.S.C. § 866 (2012). Our mandate in such cases is to affirm only guilty findings and sentences that we find are "(1) correct in law; (2) correct in fact; and (3) should be approved." *United States v. Conley*, 78 M.J. 747, 751 (Army Ct. Crim. App. 2019).[3]

In addition to this initial plenary appellate review under Article 66, a non-trivial number of appeals return to this court following either a remand to the trial level for a rehearing on findings and/ or sentence (like this case), or following remand from the Court of Appeals for the Armed Forces [CAAF] for additional proceedings in our court. *See, e.g.*, *United States v. Sanchez*, ARMY 20140735, 2019 CCA LEXIS 164 (Army Ct. Crim. App. 10 Apr. 2019) (summ. disp). When cases come back in these ways, sometimes appellants press new claims of error that they did not raise in their first appeal. In some instances, we have reached the merits of the new claim or claims. *See, e.g., United States v. Hemmingsen*, ARMY 20180611, 2021 CCA LEXIS 180, at *3 (Army Ct. Crim. App. 15 Apr. 2021) (mem. op.) (concluding that considering the new issues was within the scope of the CAAF's remand order). In other appeals we have held that the newly-raised claim is not properly before us. *See, e.g., United States v. Navarette,* ARMY 20160786, 2022 CCA LEXIS 255, at *11 (Army Ct. Crim. App. 29 Apr. 2022) (citing *United States v. Smith*, 41 M.J. 385, 386 (C.A.A.F. 1995), for the proposition that "[w]hile [an] appellant is entitled to plenary review under Article 66 . . . he is only entitled to one such review.").

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[2] Because appellant received a punitive discharge at his original court-martial, we retain jurisdiction in this appeal despite appellant's otherwise sub-jurisdictional sentence of reduction to E-5 following his rehearing. *See United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006).

[3] Article 66 has changed twice since appellant's original court-martial, with the most recent change going into effect for all offenses committed on or after 1 January 2021. *See* Article 66, UCMJ, 10 U.S.C. § 866 (2021). While we note potentially significant changes in the 2021 version of Article 66, the 2012 version of Article 66 applies to this appeal, and thus we leave for another day a discussion of the import of those changes to our review authority.

Successive appeals from the same appellant are not unique to our court. In the federal system, all the federal circuit courts of appeal, as well as the United States Supreme Court, employ the so-called "cause and prejudice" standard when determining whether to provide relief for a new claim not raised during an earlier appeal from the same appellant.[4] This standard asks first whether there was some "good reason" (e.g., "cause") for appellant's failure to raise the claim in the prior appeal. *United States v. Kovic*, 830 F.2d 680, 684 (7th Cir. 1987). Appellants can establish "cause" in a number of ways, to include showing that: 1) their prior counsel rendered constitutionally ineffective assistance; 2) the "factual or legal basis for [the new] claim was not reasonably available" to the prior counsel, or; 3) there was some official interference with the appellant's ability to raise the new claim in the prior proceeding. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In addition to cause, appellants must show that they suffered "actual prejudice" because of the newly-raised claim, meaning that there was a "substantial likelihood" that, but for the arguendo error presented anew, the result of their trial would have been different. *See, e.g., Granda v. United States*, 990 F.3d 1272, 1288 (11th Cir. 2021) (citing *United States v. Frady*, 456 U.S. 152, 172 (1982)).

Where an appellant cannot show both cause and prejudice, appellate courts consider the newly-raised claim procedurally defaulted. *See, e.g., Bousley v. United States*, 523 U.S. 614, 622 (1998). A narrow exception includes instances where, despite a failure to show cause and prejudice, an appellant can show that his new claim of error resulted in a "fundamental miscarriage of justice," amounting to a

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[4] *See, e.g., Frady*, 456 U.S. at 166-72 (applying cause and prejudice test to allegation of instructional error not raised either at trial or on direct appeal); *Flores-Rivera v. United States*, 16 F.4th 963, 967-68 (1st Cir. 2021) (applying cause and prejudice to discovery claim not raised on direct appeal); *Gupta v. United States*, 913 F.3d 81, 84-85 (2d Cir. 2019) (same as to new claim of instructional error); *United States v. Jenkins*, 333 F.3d 151, 154-55 (3d Cir. 2003) (same as to new *Apprendi* claim); *United States v. Fugit*, 703 F.3d 248, 253-54 (4th Cir. 2012) (same as to new claim of error in the acceptance of guilty plea); *United States v. Bernard*, 762 F.3d 467, 476-77 (5th Cir. 2014) (same as to new conflict-of-interest claim); *Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013) (same as to new search-and-seizure claim); *White v. United States*, 8 F.4th 547, 554-55 (7th Cir. 2021) (same as to new sentencing error claim); *Roundtree v. United States*, 885 F.3d 1095, 1097-98 (8th Cir. 2018) (same as to new claim of instructional error); *United States v. Pollard*, 20 F.4th 1252, 1255-56 (9th Cir. 2021) (same as to new claim of error related to guilty plea); *United States v. Lewis*, 904 F.3d 867, 870 (10th Cir. 2018) (same as to new sentencing error claim); *Granda*, 990 F.3d at 1285-86 (same as to new constitutional "void for vagueness" challenge); *United States v. Hicks*, 911 F.3d 623, 627 (D.C. Cir. 2018) (same as to new claim of sentencing error).

showing of "actual innocence." *White*, 8 F.4th at 557; *see also Bousley*, 523 U.S. at 622.

In addition to the federal appellate courts, our sister Air Force and Navy-Marine Corps appellate courts have likewise employed the cause and prejudice standard when evaluating second or successive appeals. *See United States v. Shavrnoch*, 47 M.J. 564, 566-69 (A.F. Ct. Crim. App. 1997) (affirmed in part and set aside in part on other grounds by *United States v. Shavrnoch*, 49 M.J. 334 (C.A.A.F. 1998)); *United States v. Chaffin*, NMCCA 200500513, 2008 CCA LEXIS 94 (N.M. Ct. Crim. App. 20 Mar. 2008) (unpublished). In adopting this standard, the Air Force court explained that it was attempting to avoid "'[p]iecemeal appellate litigation'" which was "'counterproductive to the fair, orderly judicial process created by Congress.'" *Shavrnoch*, 47 M.J. at 566 (quoting *Murphy v. The Judges of the United States Army Court of Military Review*, 34 M.J. 310, 311 (C.M.A. 1992)). The Air Force court explained the rationale undergirding the cause and prejudice standard as follows:

> What our holding does is to establish a disciplined, objective framework structuring our treatment of issues brought before us on remand which were not brought in the first instance. It gives counsel for both parties an opportunity to measure their arguments against a known standard, and to aim those arguments against a fixed target. It restores a measure of predictability to the appellate process, reinforces observance of appellate practice and procedure, and supplies counsel a legal context in which to advance their arguments.

Shavrnoch, 47 M.J. at 569.[5] Following the same logic, the Navy-Marine Corps court likewise explained in *Chaffin* that

> The avoidance of piecemeal litigation and our Article 66 mandate are easily reconciled by adopting, as the standard

[5] On further review in *Shavrnoch*, the CAAF noted that its remand orders to CCAs were "not permissive." *Shavrnoch*, 49 M.J. at 338 n.3. We understand and acknowledge this constraint on our discretion, which we believe goes without saying. Our cause and prejudice analysis here pertains to instances where either an appellant raises a new claim on a second or successive appeal that falls outside of *our own* remand order to the trial level court, or where an appellant raises a new claim on a second or successive appeal that falls outside of the CAAF's remand order to our court.

> for determining when not to apply forfeiture, the "cause and prejudice" standard used by the United States Supreme Court in its procedural default and habeas corpus jurisprudence.

Chaffin, 2008 CCA LEXIS 94, at *6. (citing, inter alia, *Murray*, 477 U.S. at 488); *see also United States v. Arnold*, No. ACM 39479, 2021 CCA LEXIS 119, at *4-5 (A.F. Ct. Crim. App. 18 Mar. 2021) (unpublished) (Posch, S.J., concurring in the result) ("Because Appellant has failed to demonstrate either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider it, I adopt the reasoning of . . . *Chaffin* . . . and find Appellant has waived this issue.").

As shown by its virtually unanimous use in appellate courts across the country, including two of our sister courts of criminal appeals, the cause and prejudice standard strikes the right balance between acknowledging that in some cases appellants will be able to bring new meritorious claims on second and successive appeals, while at the same time incentivizing parties to raise claims at the earliest possible time. *See United States v. Sanchez*, 81 M.J. 501, 506 (Army Ct. Crim. App. 2021) ("We remind practitioners of the importance of raising and litigating claims—particularly purely legal claims—early in the court-martial process."). We therefore hold that in second and successive appeals (like this one), we will provide relief for a new claim only where the appellant has shown both 1) good cause for his failure to raise the claim in the prior appeal, and 2) actual prejudice resulting from the newly-raised assignment of error; or 3) that manifest injustice amounting to actual innocence would result if we do not address the new claim. *See supra* authorities cited at footnote four and accompanying text.

B. Appellant's New Claim

Appellant's new constitutional challenge to his indecent exposure conviction is a purely legal claim that could have been, but was not, raised in appellant's first appeal to this court. Appellant claims that when Congress deleted the "public view" element from the indecent exposure offense in 2012, this made the resulting offense both unconstitutionally vague and overbroad, in that it swept in otherwise lawful behavior. In a footnote in his reply brief to this court's specified issues, and at oral argument, appellant suggested, without elaboration, that his prior appellate counsel was ineffective for failing to raise the constitutional issue. These undeveloped references to an ineffective assistance claim do not meet appellant's burden under *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Miller*, 63 M.J. 452, 455 (C.A.A.F. 2006) (*Strickland* standard applies to claims of ineffective assistance of appellate counsel). Moreover, as to *Strickland's* "deficient performance" prong, we note that in the decade since the 2012 change to the indecent exposure law there has not been a single case from any military court

supporting appellant's current constitutional claim. *See, e.g., United States v. Palacios*, 982 F.3d 920, 924 (4th Cir. 2020) (counsel "does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent") (cleaned up).

Because we find no "good cause" for appellant's failure to raise his new claim in this appeal, we need not reach the question of whether he has suffered "actual prejudice." *See, e.g., United States v. Hisey*, 12 F.4th 1231, 1242 (10th Cir. 2021) (noting that where district court found appellant failed to show cause, it "could have skipped" the question of prejudice, because *Frady* holds that appellant "must show both cause and prejudice") (cleaned up). However, without deciding the merits, the lack of any supporting authority for appellant's constitutional claim from any military court is pertinent not only to "cause," but also to prejudice and the issue of whether appellant would suffer a manifest injustice were we to refuse to reach his new claim. Finally, we note that, even giving appellant the benefit of every doubt and wholly setting aside his indecent exposure conviction, he would still stand convicted of three other offenses, and he received only a reduction to E-5 at his resentencing. Appellant has thus failed to show either cause, prejudice, or manifest injustice related to his new claim.[6]

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

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[6] Appellant originally raised his new constitutional claim in this iteration of his appeal pursuant to a lengthy and learned filing in this court under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Following our further specification of issues and requests for briefing, appellant's counsel fully briefed and argued the merits of appellant's new constitutional claim. Based on the specific facts of this case, we find that (other than the potential for irony vis a vis current counsel's claim that prior appellate counsel rendered ineffective assistance) the fact that appellant originally raised his new claim here pursuant to *Grostefon* is not legally meaningful to our cause and prejudice analysis, which applies to all newly-raised claims in second or successive appeals. Moreover, nothing in this opinion should be taken as casting doubt on the ability of appellants to raise *Grostefon* claims in this court. Finally, we note that under the version of Article 66 applicable in this case, we could reach the merits of appellant's new claim under our "should be approved" power, notwithstanding waiver or procedural default. *See Conley*, 78 M.J. at 750. We refuse to do so. For the reasons explained in this opinion, like *Conley* "this case does not call out for relief." *Id.* at 753.

Judge PARKER concurs.

SMAWLEY, Chief Judge, concurring:

I wholly agree with this court's opinion. I write separately in order to address appellant's substantive claim that Article 120c, UCMJ, is unconstitutionally vague. I find that even if appellant could show good cause for this court to consider his newly raised claim it would be without merit for the reasons stated below.

Context matters.[7] Our superior courts have firmly established that the military is a "specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). It is, furthermore, long established that members of the military are "'governed by a separate discipline from that of the civilian.'" *Id.* at 744 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). In this case, appellant was a First Sergeant when he stripped nude and engaged in sexual acts with the sole female junior enlisted soldier in the presence of other male junior subordinate enlisted soldiers. These actions took place in the hot tub and pool area of an apartment complex where appellant previously resided, after normal operating hours, and to which at least one-hundred complex residents had access—a quasi-public location at best.[8] Although the pool area was enclosed, it was in view and adjacent to apartment residential buildings and public roads.

Considering the location, context of appellant's conduct, and the military senior-subordinate relationships of the participants, appellant's assertion that the statute is unconstitutionally vague as applied to him must fail. Appellant's exposure at this location was clearly performed in an "indecent manner" and "a form of immorality, relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120c(d)(6), UCMJ. In fact, after appellant completed his sexual acts he then encouraged his other subordinate junior enlisted soldiers to engage in sexual acts with this same female soldier in his presence. Just as the military judge in this case found that appellant's exposure was indecent in this context, so too could any reasonable trier of fact applying the current definition of "indecent manner" to appellant's actions. Therefore, the facts of this case clearly support a finding that appellant committed the offense of indecent exposure under Article 120c, UCMJ.

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[7] *See Steele I*, 2019 CCA LEXIS 95, at *3 n.4.

[8] In fact, the term "quasi-public" originated from appellant. Appellant conceded the hot tub and pool area was not a private location both in his brief and during oral argument.

Appellant further asserts the current version of Article 120c, UCMJ, is unconstitutionally void for vagueness because it has the potential to criminalize large swaths of private sexual behavior among consenting adults. Appellant also states that the definition of "indecent manner" is vague, failing to provide sufficient notice that a service member can reasonably understand that his or her conduct is proscribed, and subject to indiscriminate enforcement by prosecutors and law enforcement. In addition to being unpersuasive, appellant's facial arguments are inapplicable in this case, because "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Levy*, 417 U.S. at 756. Accordingly, appellant's facial vagueness challenge to the statute also fails. Therefore, even if appellant could establish good cause, he would be unable to show actual prejudice because his constitutional challenges to Article 120c, UCMJ, are without merit.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court