UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, DENNEY,[1] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist ZACHARY D. MINER
United States Army, Appellant

ARMY 20200063

Headquarters, Joint Readiness Training Center and Fort Polk (trial)
Headquarters, Fort Leavenworth (*DuBay* hearing)
Lanny J. Acosta, Military Judge (trial)
Timothy P. Hayes, Jr., Military Judge (*DuBay* hearing)
Colonel Tiffany M. Chapman, Staff Judge Advocate (trial)
Colonel Robert L. Manley III, Staff Judge Advocate (*DuBay* hearing)

For Appellant: Captain Andrew R. Britt, JA; Michael B. Hanzel, Esquire (on brief and reply brief); Captain Andrew R. Britt, JA (on brief on specified issue); Captain Andrew R. Britt, JA; Michael B. Hanzel, Esquire (on reply brief on specified issue).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Major Anthony A. Contrada, JA (on brief); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain R. Tristan De Vega, JA; Captain Melissa A. Eisenberg, JA (on brief on specified issue).

26 August 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Senior Judge:

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[1] Judge Denney decided this case while on active duty.

In this case, we find appellant's trial defense counsel were ineffective, their lack of performance prejudiced their client, and we are required to set aside appellant's conviction and sentence.[2]

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, one year of confinement for each specification (to be served concurrently) and reduction to the grade of E-1. The convening authority elected to take no action on the findings or sentence and the military judge entered judgment. This case is now before us for review under Article 66, UCMJ.

Defense appellate counsel filed a brief with this Court, alleging appellant was denied his Sixth Amendment right to effective assistance of counsel. This Court ordered affidavits from trial defense counsel, which the government submitted. This Court then ordered a post-trial hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

After a *DuBay* hearing, that military judge concluded appellant's trial defense counsel "were deficient without reasonable explanation in two distinct areas, case investigation and sentencing witness preparation."[3] This Court accepts the findings

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[2] We have given full and fair consideration to appellant's other assigned errors and find them to be without merit.

[3] As we hold appellant's trial defense counsel were deficient in case investigation prejudicing the merits portion of appellant's trial, we do not fully address counsel's numerous failures articulated by the *DuBay* military judge in the presentencing phase. Defense counsel made no effort to prepare appellant prior to his conviction "and only perfunctory preparations were made thereafter." Even upon announcement of the guilty findings, they did little more than scramble to cobble together a presentation. As an example of one of their failures, the defense failed to call in-person Mr. MB (formerly CPT MB), a decorated officer and current Harvard law student, who was appellant's company commander at the time of the allegations. The *DuBay* military judge held Mr. MB "specifically and emphatically denied [defense counsel's] assertions that he was reluctant to testify in person. He repeatedly offered to testify for [appellant], and made arrangements to return to Fort Polk for trial even when he believed he would have to pay for his travel, since the defense counsel never contacted him to tell him he was on their witness list until the night before trial." Defense counsel's interactions with Mr. MB were, unfortunately, typical of their interactions with several witness.

of the *DuBay* judge, unless such findings are clearly erroneous. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (citing *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016)) The *DuBay* military judge deferred ruling to our Court to determine if counsel's deficiencies prejudiced appellant. They did.

After careful consideration of the entire record, to include the extensive *DuBay* proceedings, and the briefs and arguments of appellate counsel, we find, as discussed in-depth below, that appellant was wholly deprived of his constitutional right to the effective assistance of counsel.[4]

BACKGROUND

In late January 2019, appellant invited Private E-2 (PV2) JC to his barracks' bedroom, where she spent the night. Previously, appellant and PV2 JC had engaged in consensual sexual intercourse. Private E-2 JC testified, however, as to that evening, after engaging in some consensual sexual conduct, appellant attempted to perform oral sex on her but she protested loudly and appellant stopped after she kicked him.

According to PV2 JC, appellant then left his bedroom to drink alcohol with his roommate, Private First Class (PFC) TL. Private E-2 JC described appellant's bedroom as being separated "with only one door" from the "common room" which was PFC TL's living space and where PFC TL's bed was located.

Private E-2 JC did not leave appellant's room or consume alcohol with appellant or PFC TL; but instead remained in appellant's bedroom and fell asleep. She awoke when appellant returned to bed after an hour or two of drinking with PFC TL. Private E-2 JC testified that appellant again made multiple physical advances. Private E-2 JC testified she repeatedly said no, escalating in volume, "loud enough that somebody could hear" her. She testified she was forced to have both oral and vaginal intercourse. Upon completion of the sexual acts, PV2 JC spent the remainder of the evening with appellant and slept in his room. No one other than PV2 JC and appellant were present in his bedroom at the time of the incident.

Appellant was represented by two captains assigned to Trial Defense Service (TDS) at Fort Polk, Louisiana. The Senior Defense Counsel, Captain (CPT) Justin Ervin, detailed himself to the case but subsequently detailed a subordinate junior defense counsel as appellant's first chair attorney. This was the first trial the

[4] To emphasize the expansive nature of the *DuBay* hearing, we note the transcript for that hearing was over six hundred and thirty pages while appellant's court-martial only comprised a little over two hundred and fifty pages.

subordinate defense counsel had served as a first chair attorney and only the second trial in which the subordinate attorney had any responsibilities. Leading up to the trial, the attorneys worked as a team, although CPT Ervin took a greater role in preparing for the pre-sentencing proceedings, while the subordinate defense counsel focused on the merits phase of appellant's court-martial, under CPT Ervin's guidance and supervision.

At appellant's court-martial, the government called three witnesses: PV2 JC, her roommate who testified that PV2 JC was upset the next morning and to viewing a text where appellant "apologized" the next morning, and another witness who testified that PV2 JC was annoyed and to overhearing some of a phone conversation between PV2 JC and appellant and him "apologizing" the next day.[5] The defense also called three witnesses: appellant's roommate, PFC TL, and two witnesses who saw either PV2 JC or appellant the morning after the incident. On the advice of counsel, appellant did not testify in his own defense and they did not call character witnesses during the merits phase of the court-martial.[6]

LAW AND DISCUSSION

We review claims of ineffective assistance of counsel de novo. *United States v. Furth,* 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *United States v. Carter,* 79 M.J. 478, 480 (C.A.A.F. 2020)). "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Military courts evaluate ineffective assistance claims using the Supreme Court's framework established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Furth*, 81 M.J. at 117. "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial. *Id.* (citing *Strickland*, 466 U.S. at 687).

In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

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[5] Although the government attempted to make much of appellant's apologies, he did not apologize for anything specific and the defense theory regarding the issuance of any apology was that it was in response for angering PV2 JC for his drinking as opposed to any unwanted sexual contact.

[6] There is evidence of repeated discussions regarding whether appellant would testify and appellant did engage in the standard colloquy regarding his decision not to testify with the military trial judge. There is no evidence to indicate defense counsel were prepared for appellant's testimony, should he have changed his mind and exercised his rights to testify in his own defense.

Strickland, 466 U.S. at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (Citing *United States v. Cronic*, 466 U.S 648 (1984)). With regard to defining what constitutes deficiency in a claim of ineffective assistance of counsel, the Supreme Court has stated that a "defendant must show that counsels' representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

As to prejudice, appellant must "show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In other words, the likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693, 697). In short, appellant must show that his "counsel made errors so serious that counsel was not functioning as 'the counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

On appeal, appellant raised a litany of unprofessional errors by his trial defense counsel. He specifically alleged his attorneys failed to meaningfully investigate or prepare for his trial and, as a result, his counsel did not call potentially exculpatory witnesses to testify in his defense. We, as did the *DuBay* military judge, find counsel's performance was "inexplicably deficient" in this area.

Although we do not possess the ultimate reason behind defense counsel's "inexplicable deficiency," nor are we required to, we glean insight from the *DuBay* military judge's finding below:

> As further evidence to consider in determining overall competence in representation, witnesses repeatedly referred to CPT Ervin's casual, overconfident demeanor,[7] which disturbingly was on display during his *DuBay* testimony as well. His testimony was often flippant and sometimes dismissive. For example, when it was suggested that he could have visited the unit or used the global email list to try finding [a

[7] Captain Ervin's overconfidence was further documented via a voicemail, attached as an appellate exhibit at the *DuBay* hearing, that was left for a presentencing witness, Mr. MB (current Harvard law student and appellant's former company commander) the night before the contested trial that the case was a "slam dunk" and Mr. MB would probably not be needed to testify.

> PV2 witness], [CPT Ervin] indicated that 'PV2s don't really answer or have working emails' and strongly intimated it would be beneath him to go 'rooting around looking for a Private.'

The hard question before this Court is not whether appellant's counsel were ineffective in several areas (they were); but rather to access the level to which their failures prejudiced their client. In order to analyze what, if any, prejudice occurred in this case, we will first discuss the three witnesses the defense presented and we will next turn to the possible exculpatory defense witnesses that were not presented as contrasted against the government evidence.

Defense Case-In-Chief

Appellant's roommate, PFC TL, testified appellant spent about an hour in PFC TL's bedroom, drinking alcohol, before returning to appellant's bedroom. Private First Class TL testified the distance between his bed and appellant's room was "probably 15 to 20 feet" and the level of privacy was "very limited to almost none." Private First Class TL testified he would "almost always" hear stuff from appellant's room such as appellant's TV, his phone call conversations, and "just about everything" [and] if appellant was "talking to somebody in his room," PFC TL could hear it.

Private First Class TL testified that he did not hear PV2 JC say "no," but when appellant returned to his room, PFC TL initially heard moaning so he put on his headphones in an attempt to drown out the noise. The military judge, as the finder-of-fact, appeared particularly interested in the evidentiary value of PFC TL's ability to hear something in appellant's bedroom as the judge sua sponte asked PFC TL several questions regarding the nature of his headphones.

Private First Class AM testified as appellant's fellow platoon member. He stated that he and PFC DP saw PV2 JC leaving appellant's barracks in the early morning hours and she seemed fine. During cross-examination, however, PFC AM readily admitted that he did not know PV2 JC, that PFC DP told PFC AM who she was, that he viewed PV2 JC from a distance, and it was only PFC DP who told PFC AM that she was smiling.

Sergeant GB testified as appellant's fellow team leader. He noticed appellant seemed "off his game" that morning and appellant said that he'd been in a fight with his girlfriend, where he apologized for the evening. Appellant showed SGT GB texts between himself and PV2 JC wherein appellant made general apologies to his girlfriend, although the government argued those texts to infer appellant's adverse admissions of guilt.

Defense's Failure to Investigate or Present Other Exculpatory Witnesses

Defense's entire theory of the case focused on PV2 JC's credibility. Along those lines, defense specifically proffered that PV2 JC alleged that she continually said "no" to appellant and continued to get louder, but no one heard her. During cross-examination, PV2 JC testified that she was not screaming but she was loud enough that appellant's roommate could have heard it. As previously discussed, PFC TL testified that he never heard PV2 JC say "no," but the probative value of his testimony was undermined by the government because of his headphone usage. We now turn to discuss an additional, but undiscovered (at least by appellant's trial defense counsel), defense auditory witness.

Specialist DW

Appellant testified at the *DuBay* hearing that he provided his counsel with the name and information of his next door neighbor, Specialist (SPC) DW.[8] At the *DuBay* hearing, SPC DW testified his room was adjacent to appellant's bedroom and the walls in the barracks rooms were thin.[9] Specialist DW described the layout and acoustics of the rooms, stating he could generally hear "everything" in appellant's space, to include appellant brushing his teeth and cooking meals. Specialist DW was present in his room on the night of the alleged assault and was awake until approximately 0400 because he suffered from untreated insomnia. On the night of the incident he did not hear loud voices, nor did he hear PV2 JC yelling or even saying "no."

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[8] Even assuming arguendo that appellant did not provide his counsel with SPC DW's information, that should have been easily discerned in the most rudimentary investigation. The *DuBay* military judge found "their failure to identify the next-door neighbor as a potential witness, with or without their client's assistance, was a deficient investigation of their case." Specialist DW's room was adjacent to the alleged crime scene, the witness was an active duty solider, his duty assignment and location readily available, and he would have been subject to any defense requests for an interview.

[9] Further, an additional defense auditory witness, Sergeant (SGT) NP, who lived directly across the hall from appellant testified at the *DuBay* hearing that it "was pretty easy to hear in the barracks" and if "someone was yelling or screaming or talking very loudly" that he could have heard it. Sergeant NP's *DuBay* testimony corroborated PFC TL and SP DW's testimony and he could have served as a third defense witness to testify regarding the auditory conditions near appellant's barracks room.

Both appellant and SPC DW testified that, after hearing of the alleged assault, SPC DW approached appellant and told him what he knew and that he was willing to testify. Both testified that SPC DW was present and dressed to testify at the court-martial - at appellant's request - but his attorneys never met with SPC DW. Although we easily find appellant's defense counsel were ineffective for failing to interview or present SPC DW, we are fully cognizant that our analysis does not cease at that conclusion and we must now consider whether appellant was prejudiced.

As to our prejudice analysis, we first recognize that the *DuBay* military judge found "[t]he most percipient witness in this case other than the complaining victim likely would have been SPC [DW], who the court finds was identified by the appellant and delivered to court prepared to testify." In essence, the defense failed to call their best witness who was physically present at the courthouse and willing to testify.

Contrary to the government's assertions, SPC DW's evidence was of substantial probative value and not cumulative as this was a second auditory witness very close to the alleged crime scene that contradicted PV2 JC's credibility. Further, SPC DW's testimony was more probative than PFC TL's testimony, because PFC TL testified he put on headphones when he heard moaning coming from appellant's bedroom the night of the incident and his ability to hear what was happening, from the moment the alleged assault occurred, was therefore compromised.

Beyond failing to call SPC DW, the defense counsel failed to identify or call PFC DP, who was a more probative witness than PFC AM, regarding PV2 JC's demeanor.

Private First Class DP

The *DuBay* military judge found appellant provided PFC DP's name and correct contact information to his defense counsel. Captain Ervin testified he repeatedly attempted to contact PFC DP with no success. Despite not interviewing PFC DP, defense counsel did request PFC DP's production, which the government granted, although someone at TDS provided an erroneous phone number in the request. When the trial counsel called and discussed the inability to reach PFC DP with appellant's trial defense counsel, they simply withdrew the request for production.

The *DuBay* military judge noted CPT Ervin seemingly acknowledged this failure and, "strongly intimated it would be beneath him to go 'rooting around looking for a Private.'" Of particular interest at the time of the *DuBay* hearing, PFC DP still had the same phone number, was easily reached by appellant's civilian

appellate counsel, and the number was used to secure his testimony at the *Dubay* hearing. Again, having found CPT Ervin ineffective, we must consider what, if any, prejudice resulted from his acts.

Private First Class DP saw PV2 JC leaving appellant's barracks the morning after the assault and could attest to her demeanor. The *DuBay* military judge held PFC DP's "testimony could have *salvaged* [PFC AM's] testimony." (emphasis added). We agree with the *DuBay* military judge that PFC AM's testimony needed "salvaging" because after the government's cross-examination, the distinct impression was created that PFC AM was a mere substitute, and a poor substitute at that, for the testimony of PFC DP who possessed the actual knowledge regarding PV2 JC and her actual demeanor. PFC AM's testimony served to mostly reiterate hearsay statements from PFC DP and created a distinct impression that PFC AM had no relevant knowledge beyond that provided to him by PFC DP whose lack of testimony at the trial was a gaping hole for the defense.

In a she said/he said case with no other visual witnesses, an additional (and the best) auditory defense witness and an additional (and the best) defense witness regarding the victim's demeanor were not presented to attack PV2 JC's credibility. From all accounts, CPT Ervin was delusional in his assurance that an acquittal was a "slam dunk" and that bravado and flippant attitude continued through into the *Dubay* hearing. Defense counsel appeared to have relied on their own misguided impressions of the complaining witnesses and thus all but abdicated their responsibilities to investigate, challenge the government's evidence, and advocate for their client.

We find that each noted error, standing alone, was deficient and likely prejudicial. The cumulative effect of defense counsel's errors, however, reached a level, in our eyes after a complete review of appellant's contested court-martial and the *DuBay* hearing, that is "sufficient to undermine [our] confidence in the outcome" of appellant's trial. We do not make this finding lightly but are unable to find otherwise when multiple probative defense merits' witnesses were not presented on his behalf.

CONCLUSION

As such, the findings of guilty and the sentence are SET ASIDE. A rehearing may be ordered by the same or different convening authority.

Judges DENNEY and PARKER concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court