

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Staff Sergeant JOHN A. ANDERSON JR.
United States Air Force**

ACM 33456 (f rev)

28 January 2003

Sentence adjudged 26 August 1998 by GCM convened at McChord Air Force Base, Washington. Military Judge: Michael J. Rollinger.

Approved sentence: Dishonorable discharge, confinement for 9 years, and reduction to E-1.

Appellate Counsel for Appellant: Marcus J. Williams (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, Major Patricia A. McHugh, and Major Karen L. Hecker.

Appellate Counsel for the United States: Major Linette I. Romer (argued), Colonel LeEllen Coacher, and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

SCHLEGEL, Senior Judge:

This case is before us for the second time after a hearing ordered by our superior court.¹ *United States v. Anderson*, 55 M.J. 198, 203 (2001).

¹ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

The Court directed that the hearing address:

(1) the factual conflicts between the affidavits of Dr. Ebert and those of trial defense counsel; (2) the adequacy of trial defense counsel's pretrial investigation of the circumstances of BJA's accusations against appellant, including the delay in interviewing BJA's brother until the eve of trial; (3) the reasons for not presenting the testimony of SFC [Sergeant First Class] Boylan; and (4) the circumstances under which Dr. Ebert could have evaluated BJA and the potential results of such an evaluation.

Id.

We were tasked to reconsider the appellant's claims of ineffective representation, including his claim that defense counsel conceded his guilt. The military judge who conducted the hearing made specific findings of fact in each area identified by our superior court. We adopt those findings as our own. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conflicts Between the Affidavits of Dr. Ebert and Trial Defense Counsel

In his first affidavit after the appellant's court-martial, Dr. Ebert identified what he believed were "several disturbing aspects" of the case. First, he believed more time was needed to investigate the victim's church and the exact circumstances of her disclosure about the appellant while on a camping trip. Dr. Ebert felt there was not enough time to pursue these aspects of the case because the judge rushed the case to trial. Second, Dr. Ebert wrote that he was not given the opportunity to interview the victim. Finally, he opined that a psychological examination of the victim might have been helpful in order to eliminate the possibility that a church counselor influenced the victim. Both defense counsel provided affidavits indicating that they consulted with Dr. Ebert in preparation for trial and that he never complained to them about any of these concerns. In his second affidavit, Dr. Ebert contended that he did not consult extensively with counsel before trial and insisted that he asked to interview the victim.

At the *DuBay* hearing, Dr. Ebert testified that prior to trial he never informed defense counsel that he wanted to interview the victim. He also said that he never asked for the opportunity to conduct a psychological evaluation of the victim. Prior to trial, Dr. Ebert said that he never voiced any concern about the charismatic nature of the victim's church or its role, if any, in the victim's disclosures about her father, the appellant. Furthermore, prior to trial, he never advised counsel that he needed additional time, or asked them to move for a delay. Dr. Ebert insisted that after his arrival for the trial, he did ask to interview the victim and mentioned his concerns about the church. By contrast, one of the defense counsel recalled Dr. Ebert saying, while the court members were deliberating on findings, that it would have been nice to know more about the

victim's church and for him to have interviewed the victim. Dr. Ebert admitted that during a recess after the victim's direct testimony, he told both defense counsel that the victim appeared credible but suggested they pursue specific areas during cross-examination of the victim. Dr. Ebert also acknowledged that after the prosecution rested, he advised counsel that he should not testify because his testimony would not help the appellant's case. He also said that he was partly at fault for not interviewing the victim prior to trial.

Dr. Ebert's memory of the events leading up to the appellant's court-martial was poor and his affidavits were misleading. By his own admission, Dr. Ebert made no request for additional information about the case or for additional preparation time. He acknowledged that he made no request to interview or to evaluate the victim before trial. Moreover, his statement during the trial that the victim was credible contradicts his post-trial assertion that he needed to interview the victim.

The Pretrial Investigation of BJA's Accusations and Delay in Interviewing Her Brother

In April 1998, while traveling to Mexico on a trip sponsored by her church, the appellant's daughter, BJA, told a friend that beginning in 1995 the appellant began to touch her breasts and vagina. She said over time the touching became more frequent and the appellant began to have her touch his penis. Eventually, the appellant touched her vagina with his penis and placed his penis inside her vagina. After this disclosure, she also talked with an adult church member who was a trained counselor. The victim's mother was informed about the allegations when they returned. Later, agents from the Air Force Office of Special Investigations interviewed the victim. Charges were preferred on 18 June 1998, and the investigation pursuant to Article 32, UCMJ, 10 U.S.C. § 832 was held on 25 June 1998. Charges were referred on 10 July 1998 and trial began on 24 August 1998.

At the *DuBay* hearing, the victim's mother said that the last day of school was between 18 and 21 June 1998. The day school ended, the victim's brothers were taken to Portland, Oregon. Next, they traveled to San Diego, California. From San Diego, they were moved to Portland, Maine, where they remained until shortly before trial. Immediately after her verbatim testimony at the Art. 32, UCMJ investigation, the victim was driven to San Diego and remained there until seven to ten days before trial. Both counsel testified that they repeatedly requested to interview the victim and two of her siblings but were rebuffed by the appellant's wife who they described as "uncooperative." She finally permitted defense counsel to interview the victim and the victim's brothers a few days before trial.

The base area defense counsel and a circuit defense counsel from Travis Air Force Base, California, represented the appellant. As is normally the case, the area defense counsel performed the majority of the pretrial preparation work in consultation with the

circuit defense counsel. In the appellant's case, this included drafting the request for the appointment of Dr. Ebert and providing him with materials. Both counsel interviewed the victim and her brother before trial. They also interviewed the victim's friend, whom she first told about the abuse, other church members, including the counselor, and a number of other individuals.

The appellant reported to his counsel that after the victim made her allegations, one of her brothers told him at a soccer game that the victim said she was going to get back at him because he would not let her date an older boy and that she was lying about the abuse. When interviewed before trial, the victim's brother denied making this statement and said that his sister never said anything like that to him. The appellant contended the child altered his story as a result of coercion or punishment by his wife. She denied this accusation.

We find nothing to support the appellant's theory that pressure of any kind was placed on his son to change his story. There is also no indication that the boy simply forgot because of the passage of time. Defense counsel questioned the boy after he was made available to them before trial. We find that the investigation of the victim's allegations was adequate and that the failure to interview the victim and the victim's brothers until shortly before trial was because the appellant's wife moved them out of the state and around the country.

The Reasons for Not Presenting the Testimony of Mr. Boylan

At the *DuBay* hearing, Mr. Martin Boylan (United States Army retired) testified that he and his wife attended church with the appellant's family and that they were friends. He also said that they were helping the appellant and his wife with marital problems. He testified that after the victim made her allegations, the appellant's wife said she did not know whether to believe her daughter or the appellant. Mr. Boylan also said Mrs. Anderson told them that before the allegations surfaced, one of her sons said the victim told him that she was angry with their father and was going to get back at him (the father). The appellant's wife denied ever making this statement to the Boylans.

Prior to trial, Mr. Boylan was interviewed over the telephone by both defense counsel. During this interview, they said Mr. Boylan had to ask his wife about the conversation. After talking with Mr. Boylan, they believed his testimony was hearsay within hearsay and only admissible to impeach the appellant's wife. After her testimony, they decided not to call him because they believed her testimony was helpful to the appellant and because they did not want the appellant's marital problems disclosed to the court members.

No two lawyers present a defense in the same way. We must only decide if the explanations offered by counsel for not calling Mr. Boylan were reasonable. In our

opinion, they were. We also note that it would have been easy for the prosecution to call the victim's brother as a rebuttal witness to testify that he never heard his sister utter those words.

Whether Dr. Ebert Could Have Evaluated the Victim and the Potential Results

As previously noted, the victim made her allegations in April 1998 and the Art. 32, UCMJ investigation was held on 25 June 1998. After her testimony, the victim left the state of Washington and did not return until approximately seven to ten days before trial. Dr. Ebert was approved by the convening authority as a defense consultant on 29 July 1998. Due to prior commitments and a scheduling problem with his travel arrangements, Dr. Ebert arrived at the base after the court-martial began but before the victim testified.

At the *DuBay* hearing, Dr. Ebert testified that he was concerned about three areas with regard to the victim. The first was credibility, which is a standard issue in any case where the accused pleads not guilty. The second area involved the circumstances surrounding the victim's disclosure about the abuse because it occurred within a charismatic church environment with the possibility of "hypnotic influences." Finally, during the victim's Art. 32, UCMJ testimony, she said that she recalled some of the abuse in dreams. Dr. Ebert felt that during an interview of the victim he would have been able to probe the circumstances of her initial disclosure, her reference to dreams, and identify inconsistencies in her statements. However, he made it clear that he could not predict if his interview would have provided any helpful information for the defense. He also acknowledged that the victim's testimony, which lasted over two hours, was about the same time period he would use for an interview.

Analysis

Mindful of the guidance and standards cited by our superior court in their opinion, *Anderson*, 55 M.J. at 201-02, we find that the appellant was not denied the effective assistance of counsel at his court-martial. First, the record of trial and the hearing demonstrates that the pretrial investigation by defense counsel was reasonable. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

The victim's brother was interviewed before trial and denied hearing his sister make any statement that she was going to get even with the appellant or that she lied. He also denied telling anyone that his sister made any statements along these lines. There was no evidence that he was coerced to lie about this matter or that he forgot. We also find that the timing of the interview was controlled by the victim's mother who removed her son from the local area as soon as school was over and eventually sent him to Maine until shortly before trial. In any event, nothing suggests an earlier interview of the brother would have yielded evidence favorable to the appellant.

In addition, the circumstances surrounding the victim's initial accusations against the appellant were appropriately investigated. The victim and all the individuals who were associated with her allegations, including her initial disclosure, were interviewed by the defense prior to trial. While the victim's interview occurred shortly before trial, it was extensive and nothing suggests that an earlier interview would have benefited the appellant's defense. Once again we note that the appellant's wife removed all the children from the state as soon as she could and kept them far away until she had to bring them back. The evidence is clear that she rebuffed earlier attempts by the area defense counsel to interview the victim. In addition, defense counsel recognized the need for expert assistance and convinced the convening authority to approve the appointment of Dr. Ebert in a relatively short period of time. The evidence establishes that defense counsel took reasonable steps to investigate the case against the appellant.

By Dr. Ebert's own admission, he never informed counsel prior to trial that he needed to interview, evaluate, or test the victim. This is also consistent with his admission that he never told counsel he needed additional pretrial preparation time or that they should request a delay in order for him to arrive at the base prior to trial. Instead, it appears that he scheduled himself to arrive the day before trial was to begin. Unfortunately, due to a transportation problem that he blamed on the base legal office, Dr. Ebert did not arrive until after preliminary sessions of the court-martial had taken place. However, he was present for the victim's testimony and assisted counsel in formulating questions for cross-examination of her during a recess after the victim's direct examination. Dr. Ebert could have requested permission to interview the victim during this break. However, Dr. Ebert also admitted during the hearing that he told counsel the victim appeared credible and later advised them not to call him as a witness because his testimony would not be helpful. We find that defense counsel did not ignore Dr. Ebert's expert advice because he never insisted on interviewing the victim. Defense counsel obviously sought and followed his advice with regard to cross-examination of the victim and not calling him to the witness stand. It is unlikely that counsel would follow those recommendations by Dr. Ebert and then completely ignore a request to interview the victim.

Defense counsel's decision not to call Mr. Boylan as a witness was a tactical decision that we will not second-guess. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Other attorneys may have elected to call Mr. Boylan to the witness stand and risk the possibility that the appellant's marital problems would be exposed. However, we cannot say as a matter of law their decision was unreasonable. *Strickland*, 466 U.S. 688-90. This is especially true since the appellant's wife and her son could have contradicted Mr. Boylan's testimony.

Finally, we have reviewed the closing arguments on findings and sentence presented by defense counsel and considered his testimony from the *DuBay* hearing.

While we realize that different individuals can look at a statement and draw different conclusions about its meaning, we cannot understand how anyone could interpret defense counsel's arguments as conceding the guilt of the appellant. The findings argument is geared to an acquittal on all the charges. The quotation from Sophocles that, "there is a point beyond when even justice becomes unjust, and to find Staff Sergeant John A. Anderson, Jr., guilty under the facts and circumstances of this case would amount to just such a point", does not concede the appellant's guilt. Moreover, the sentencing argument is directed toward minimizing the impact on the appellant. Arguing during sentencing that the appellant can be rehabilitated, even though he pled not guilty, is not ineffective representation by counsel. Rather, it is effective representation because counsel was trying to minimize confinement and avoid a punitive separation.

When we examine the record of trial and the testimony from the *DuBay* hearing, we find that both counsel effectively represented the appellant. The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Art. 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED

Senior Judge SCHLEGEL participated in this decision prior to his retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator