UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Misc. Dkt. No. 2017-10

Leon A. BROWN IV
Captain (O-3), U.S. Air Force, *Petitioner*

v.

UNITED STATES
Respondent

Petition for New Trial Pursuant to Article 73, UCMJ

Decided 23 May 2018

Military Judge: Natalie D. Richardson.

Approved sentence: Dismissal, confinement for 25 years, and forfeiture of all pay and allowances. Sentence adjudged 8 December 2014 by GCM convened at Minot Air Force Base, North Dakota.

For Petitioner: Major Mark C. Bruegger, USAF; Major Jeffrey A. Davis, USAF; Captain Dustin J. Weisman; USAF; Frank J. Spinner, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Tyler B. Musselman, USAF.

Before MAYBERRY, JOHNSON, and SPERANZA, *Appellate Military Judges*.

Judge SPERANZA delivered the opinion of the court, in which Chief Judge MAYBERRY and Senior Judge JOHNSON joined.

SPERANZA, Judge:

A military judge, sitting as a general court-martial, convicted Petitioner, contrary to his pleas, of providing alcohol to minors on divers occasions; wrongfully distributing marijuana on divers occasions; wrongfully distributing psilocybin (mushrooms) on divers occasions; wrongfully using mushrooms on divers occasions; sexually assaulting a child, GB;[1] behaving in a disgraceful and dishonorable manner that seriously compromised his standing as an officer by wrongfully and dishonorably organizing individuals into a violent gang; wrongfully communicating a threat to AL on divers occasions; wrongfully communicating to MH a threat to injure ME by paying someone to assault ME; receiving consideration for arranging for KW, PW, WK, and other unnamed persons to engage in sexual intercourse with others; unlawfully entering ML's house; sexually assaulting a child, FT;[2] wrongfully threatening to hurt, injure, or kill Captain (Capt) CM; wrongfully threatening to hurt, injure, or kill Special Agent (SA) JG; and wrongfully threatening to hurt, injure, or kill Airman Basic (AB) JS, in violation of Articles 92, 112a, 120b, 133, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a, 920b, 933, 934.[3] The military judge sentenced Petitioner to a dismissal, confinement for 25 years, and forfeiture of all pay and allowances. The military

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[1] The military judge found Petitioner not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917 of raping GB in violation of Article 120b, UCMJ, 10 U.S.C. § 920b, but convicted Petitioner of the lesser-included offense of sexual assault, also in violation of Article 120b, UCMJ.

[2] The military judge found Petitioner not guilty pursuant to R.C.M. 917 of raping FT in violation of Article 120b, UCMJ, but convicted Petitioner of the lesser-included offense of sexual assault, also in violation of Article 120b, UCMJ.

[3] The military judge acquitted Petitioner of conspiracy to pander; distribution of methamphetamine; distribution of heroin; distribution of Vicodin; distribution of ecstasy; distribution of lysergic acid diethylamide (LSD); sexual assault of KW by administering KW a drug or intoxicant; sexual assault of KW by encouraging an unknown individual to commit a sexual act upon KW by administering KW a drug or intoxicant; conduct unbecoming an officer for organizing individuals under the age of 18 years to have sex for hire; obstruction of justice by requesting AB JS have others give AL marijuana or cash if she refused to testify or "have others beat her up or kill her if she refused the offer"; obstruction of justice by requesting AB ET have others give AL marijuana or cash if she refused to testify or "have others beat her up or kill her if she refused the offer"; and communicating a threat to hurt, injure, or kill AB JS. The military judge granted the Defense's motion for a finding of not guilty pursuant to R.C.M. 917 and found Petitioner not guilty of raping FT. Petitioner was also found guilty by several exceptions and substitutions.

judge credited Petitioner with 60 days of pretrial confinement credit. The convening authority approved the adjudged sentence.

We previously reviewed Petitioner's appeal under Article 66, UCMJ, 10 U.S.C. § 866. *United States v. Brown*, No. ACM 38864, 2017 CCA LEXIS 454 (A.F. Ct. Crim. App. 6 Jul. 2017) (unpub. op.). Petitioner sought reconsideration of our opinion and filed his petition for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873, the next day. We subsequently denied Petitioner's motion for reconsideration. While his petition remained before this court, Petitioner sought review at the Court of Appeals for the Armed Forces (CAAF). Accordingly, we determined we no longer had jurisdiction to review Petitioner's petition for a new trial. However, the CAAF summarily found this determination to be in error, set aside our reconsideration decision, and required us to decide the petition for a new trial. *See United States v. Brown*, ___ M.J. ___, No. 17-0609/AF, 2018 CAAF LEXIS 66 (C.A.A.F 10 Jan. 2018) (mem.).

I. BACKGROUND

Petitioner and at least one other local civilian criminal decided to form a "Crips" gang in Minot, North Dakota. Petitioner—referred to by the gang members and their associates as "Captain"—became the self-proclaimed leader, or "OG," of the gang, whose criminal enterprise tended to revolve around local teenage girls, violence, drugs, and prostitution.

II. DISCUSSION

In the charges brought against Petitioner, the Government named WK as Petitioner's co-conspirator and prostitute. At trial, WK's statements describing her prostitution and participation in Petitioner's gang were admitted against Petitioner as non-hearsay statements of a co-conspirator. Witnesses also identified WK as being a member of Petitioner's gang. Indeed, Petitioner, in statements made to other Airmen in confinement, identified and described WK as a member of his gang and part of his prostitution ring.

WK did not testify at Petitioner's trial. In July 2017, over two and a half years after the trial, WK provided Petitioner's counsel with a declaration in which she states she lived with Petitioner for nearly five months and has personal knowledge of Petitioner's "daily life during these months." WK denies being a prostitute; denies ever being part of a gang; denies Petitioner was ever involved in drugs during the time she lived with Petitioner; blames "[a]ny small amount of drugs" found in the house on herself and others; denies the existence of the prostitution ring; and denies any sexual activity occurred with FT and KW. She calls the allegations of involvement in the gang and prostitution "all lies that [she] demand[s] [her] name to be cleared away

from." She also labels the drug and prostitution allegations against Petitioner as "lies." In her declaration, WK claims that "[i]t was very easy for [Petitioner] and his sister . . . to get ahold of [WK] during 2016, even with [Petitioner] being incarcerated." WK further explains how easily Petitioner's sister was able to locate her and how "[i]t was easy for [WK] to respond back and establish contact." WK concludes the declaration by expressing her frustration in not understanding "why nobody tried to [contact her] before [Petitioner's] [c]ourt[-m]artial back in 2014."

Petitioner now maintains this "newly discovered evidence and frauds perpetrated on the court" require us to authorize a new trial for Petitioner. Petitioner argues that "WK's statement does not appear to be an attempt to exculpate herself from criminal activity, as she actually incriminates herself by taking responsibility for the drugs found in [Petitioner's] home." Petitioner cites WK's statement as "evidence" making "it . . . clear that KW and [GB's 'best friend,'] KH[,] perpetrated frauds upon the court." Petitioner concludes "[i]n this case, KW and KH perjured themselves when they discussed WK's role as a prostitute and/or member of [Petitioner's] supposed gang." Armed with WK's declaration, Petitioner then launches the same attacks on KW's and KH's credibility and the sufficiency of the evidence that failed at trial and on appeal. Accordingly, Petitioner demands a new trial due to KW's and KH's purported fraud on the court. We disagree with Petitioner's accusations and deny his petition for a new trial.

A petitioner may request a new trial "on the grounds of newly discovered evidence or fraud on the court." Article 73, UCMJ. "'[R]equests for a new trial . . . are generally disfavored,' and are 'granted only if a manifest injustice would result absent a new trial . . . .'" *United States v. Hull*, 70 M.J. 145, 152 (C.A.A.F. 2011) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)).

Petitioner's argument generally involves evidence discovered after trial. A new trial shall not be granted on the grounds of newly discovered evidence unless the petitioner shows that:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2); *see United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011); *United States v. Johnson*, 61 M.J. 195, 198–99 (C.A.A.F. 2005).

Petitioner's request for a new trial specifically alleges fraud against the court; however, "[n]o fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged." R.C.M. 1210(f)(3). Neither Article 73 nor R.C.M. 1210 define "fraud on the court." The non-binding discussion section of R.C.M. 1210 states that a new trial may be granted if there is "confessed or proved perjury . . . which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense . . . ."

"[T]he determination of sufficient grounds for granting a petition for new trial in the military rests 'within the [sound] discretion of the authority considering . . . [that] petition.'" *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) (alteration in original) (citations omitted). Accordingly, it is this court's prerogative to weigh the testimony at trial against the post-trial evidence to determine which is credible. *Id.* We are also free to exercise our fact-finding powers. *See id.* The only limit on our fact-finding powers is that our "broad discretion must not be abused." *Id.* (citing *United States v. Thomas*, 11 C.M.R. 161 (C.M.A. 1953)).

"Finally, 'post-trial attempts by co-actors to exonerate one or the other should be viewed with extreme suspicion . . . . Petitions for new trial should be denied where post-trial attempts to exculpate the petitioner appear 'contrived.' In these situations, such attempts should simply be deemed unworthy of belief and rejected." *United States v. Brooks*, 49 M.J. 64, 68–69 (C.A.A.F. 1998) (quoting *Bacon*, 12 M.J. at 492).

The record of Petitioner's trial confirms the suspicion that WK's declaration is a post-trial attempt to exonerate Petitioner. Petitioner, in addition to KW and KH, identified WK as a member of his gang and a prostitute. WK denies ever being "involved with any gang" and ever being "sold to anybody for sex." Petitioner bragged about his extensive, notorious drug activities, which were established by overwhelming independent evidence. WK denies Petitioner was "involved with drugs during the months that we lived together." Petitioner also bragged about having sex with FT. WK denies any "sex [was] going on that night with [FT]." After becoming "aware of [Petitioner's] trial from [Petitioner's] sister in late 2016," WK essentially decries the allegations against Petitioner as "lies," even though Petitioner himself boasted about committing the offenses. Consequently, we cannot ignore the appearance that WK's declaration is a contrived effort to exonerate Petitioner. In this situation, we deem such an attempt unworthy of belief. This determination alone warrants rejection of the petition.

Although we find WK's declaration incredible, we nonetheless reviewed Petitioner's claims under the heavy burden he bears to demonstrate his entitlement to a new trial. We first conclude that Petitioner knew of, or reasonably should have known of, each assertion made by WK in her declaration and Petitioner furthers no real argument to suggest otherwise. Petitioner also fails to establish any fraud against the court. Petitioner produced no evidence of confessed perjury. Petitioner also failed to prove KW and KH perjured themselves when they testified about WK's participation in Petitioner's gang and her role as a prostitute. KW and KH's testimony regarding these matters was corroborated by Petitioner's description of WK's membership in his gang as a prostitute. Moreover, WK's non-hearsay co-conspirator statements regarding her involvement in prostitution would remain admissible against Petitioner. Petitioner basically uses WK's declaration to renew his issues with KW's and KH's credibility and again questions the weight of the evidence supporting the related convictions. However, we are convinced that the issue of credibility would not be resolved in favor of WK. Any perceived fraud or purported newly discovered evidence would not probably produce a substantially more favorable result for Petitioner. No manifest injustice will occur absent a new trial for Petitioner.

III. CONCLUSION

Petitioner's request for a new trial is **DENIED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court