UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JULIAN LATORRE
United States Air Force

ACM 34670 (f rev)

1 October 2003

Sentence adjudged 16 May 2001 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: David P. Sheldon, Karen L. Hecker, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Captain Stacey J. Vetter, and Spencer F. Fisher (legal intern).

Before

VAN ORSDOL, PRATT, and MALLOY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

PRATT, Senior Judge:

On 10 July 2003, the United States Court of Appeals For the Armed Forces (CAAF) granted the appellant's petition for grant of review of the following assigned issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY REFUSING TO ACCEPT APPELLANT'S TIMELY-FILED REQUEST FOR RECONSIDERATION WHICH ALLEGED

IN PART THAT HIS PRIOR APPELLATE DEFENSE COUNSEL HAD BEEN INEFFECTIVE BY FAILING TO GIVE HIM THE OPPORTUNITY TO SUBMIT ISSUES UNDER *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982).

Apparently having determined that this Court did so err, our superior court has remanded the case to us for consideration of the appellant's underlying claim that his prior appellate counsel had been ineffective. In doing so, CAAF directed that we seek affidavits and, if necessary, direct further inquiry pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) in order to evaluate whether the appellant was afforded the opportunity to submit issues under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). As discussed below, having obtained affidavits as directed, we find that further inquiry will be necessary.

Background

In May 2001 at McGuire Air Force Base, the appellant was convicted at a general court-martial, in accordance with his pleas, of wrongful appropriation, divers rapes, forcible sodomies and other indecent acts with a child under the age of 12, traveling in interstate commerce for the purpose of engaging in a sexual act with a minor, transporting child pornography in interstate commerce by computer, sending lewd and lascivious pictures in interstate commerce by email, and creating and possessing images depicting child pornography, in violation of Articles 121, 120, 125, and 134, 10 U.S.C. §§ 921, 920, 925, 934. His approved sentence consists of a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to airman basic.

On initial appeal, the appellant raised two issues challenging the providency of his plea to wrongful appropriation and asserting that his sentence was inappropriately severe. A different panel of this Court affirmed the approved findings and sentence in an unpublished opinion. *United States v. Latorre*, ACM 34670 (A.F. Ct. Crim. App. 3 Apr 2002)(unpub. op.).

On 3 May 2002, the appellant filed a motion for reconsideration, citing three issues for reconsideration: 1) Whether the appellant's guilty plea to transporting child pornography must be set aside in view of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); 2) Whether the appellant received ineffective assistance of counsel when his appellate counsel did not afford him the opportunity to submit allegations of error pursuant to *Grostefon*; and 3) Whether the trial judge erred in determining that the maximum allowable punishment for appellant's offenses included life without parole. In conjunction with this motion, the appellant submitted a 1 May 2002 declaration asserting, in essence, that he had not been afforded an adequate opportunity to submit *Grostefon* issues. Attached to his declaration was a

narrative description and discussion of seven issues that he asserted he would have submitted if he had been given the opportunity to do so. On 20 June 2002, this Court granted the appellant's request for reconsideration as to the first issue cited, but denied his request as to the other two issues since they did not meet any of the prerequisite conditions established in this Court's rules governing reconsideration. *See* United States Air Force Court of Criminal Appeals, Rules of Practice and Procedure, Rule 19.1(b) (1 Sep 2000). Subsequently, this Court issued a per curiam opinion upon reconsideration of the *Free Speech Coalition* issue, once again affirming the appellant's conviction and sentence. *Latorre*, ACM 34670 (recon) (A.F. Ct. Crim. App. 16 Aug 2002)(unpub. op.).

On 3 January 2003, in an appeal to our superior court, the appellant asserted 11 assignments of error, including, among others, the error delineated at the outset above (and, notably, 6 *Grostefon* issues closely representing those which the appellant attached to his 1 May 2002 declaration referenced above).

As noted previously, upon consideration of the appellant's petition, CAAF granted the petition as to the issue concerning the appellant's opportunity to submit issues under *Grostefon*, setting aside the earlier decision of this Court. In so doing, CAAF directed that this Court review the issue of ineffective assistance of appellate counsel, obtaining necessary factual information through affidavits from initially assigned appellate defense counsel and, if necessary, a *DuBay* hearing.

Accordingly, on 29 July 2003, this Court ordered that initially assigned appellate defense counsel provide affidavits responding to the appellant's allegation that he was denied an opportunity to raise *Grostefon* issues. Although affidavits were ordered and received from all three initially assigned appellate defense counsel of record, as expected the affidavits of the two supervisory counsel indicate that neither had communications with the appellant or with the primary appellate defense counsel relative to this issue. Only the affidavit of the primary appellate defense counsel, Major (Maj) J, substantively addresses the matter raised by the appellant.

On 4 September 2003, the appellant filed a motion to submit documents, consisting of a 3 September 2003 declaration responding to the factual assertions made by Maj J in his affidavit along with several attached letters intended to support his declaration. The government opposed the motion, arguing that the appellant's declaration and supporting documents are beyond the scope of the remand by CAAF and are cumulative to information already before the Court. We disagree on both counts. In it's brief on this issue, the government acknowledges this Court's discretion "to determine how additional evidence, when required, will be obtained." *United States v. Lewis*, 42 M.J. 1, 6 (1995). In keeping with *Lewis*, although we did not solicit the appellant's latest declaration, we could have; and we certainly have the discretion now, having been proffered the document, to accept it. We find this latest declaration by the appellant to be well within the scope of CAAF's remand order, which calls upon this

Court to examine the issue it squarely addresses. It is hardly cumulative inasmuch as it serves to explain an apparent ambiguity in the appellant's 1 May 2002 declaration and responds directly to assertions made by Maj J in his affidavit. The appellant's motion to submit these documents is hereby granted.

Analysis

As noted above, in his 1 May 2002 declaration, the appellant created a certain ambiguity. He acknowledged that he spoke with his appellate counsel, Maj J, "at least twice to raise issues regarding my appeals and/or *Grostefon*." Yet he goes on to say: "Before I could raise those issues, I received a copy of the brief filed on my behalf without my knowledge, so I never had an opportunity to submit any issues." In support of this latter assertion, the appellant attached a lengthy description of seven issues he would have raised. In contrast, the recently solicited affidavit of Maj J indicates that, while preparing an appellate brief for the appellant's case, he telephoned and spoke with the appellant in confinement, discussing issues to be raised in the appeal. Maj J relates that he asked the appellant "if he had questions or any other issues he wanted me to raise." In response, according to Maj J's affidavit, the appellant expressed concern for the length of his adjudged confinement and Maj J agreed to raise that issue. Maj J's affidavit further states:

> This is the only issue that SSgt Latorre asked me to raise. He told me he knew what he did was wrong and he admitted to that at trial, so he wasn't trying to escape punishment. He only felt that his actions did not justify the amount of punishment he received.

In his responsive 3 September 2003 declaration, the appellant describes a significantly different progression of events. He asserts that, each of the two times he spoke with Maj J, he was not given a chance to fully discuss potential issues because Maj J told him that he had not yet read the record of trial and wanted to do so before further discussion. According to the appellant, Maj J told him he would call him after he had read the record of trial, but never did. Instead, the appellant was reportedly surprised when he next received a copy of the appellate brief that had been filed on his behalf. Referring to Maj J's assertion that he had called the appellant and discussed the contents of the brief he was preparing, the appellant's latest declaration states: "That is untrue. We never had that conversation and I had no idea what he intended to raise until I received the filed brief." As to sentence severity being the only issue he wanted to raise, the appellant asserts:

> That is misleading. I did tell [Maj J] that I wanted my sentence reduced. However, I never told him that this was the only issue I wanted raised --it is simply the only issue that I was able to discuss with him before he interrupted me and told me that he could not talk to me about the

particulars of my case until he read the record of trial. I had other issues that I was concerned about and was intending to discuss them with him when he had read the record, but was never given the opportunity.

While we recognize the considerable burden of directing a *DuBay* hearing in this matter, the divergent versions of events and intents represented in the appellant's declarations and the appellate counsel's affidavit convince us that lesser means of establishing a necessary factual predicate in this matter (e.g., ordering further clarifying affidavits) would inevitably prove inadequate and fail to establish undisputed facts. Thus, and in view of the limitations placed upon our fact-finding powers by *United States v. Ginn*, 47 M.J. 236 (1997), we have no choice but to direct a hearing to fully explore this matter in a forum suitable for further fact finding.

The record of trial is returned to The Judge Advocate General for referral to a convening authority for purposes of directing a *DuBay* hearing. The ultimate issue, again, is whether the appellant was duly afforded an opportunity to submit issues for consideration on appeal pursuant to *Grostefon*. Thus, the *DuBay* hearing should focus on establishing all facts pertinent to that issue, including but not limited to, the following:

(1) Precisely what communications, verbal or otherwise, occurred between Maj J and the appellant as regards the raising of appellate issues, with dates specified or estimated to the best recollection of the parties;

(2) Whether Maj J specifically discussed with the appellant his right to identify issues to be raised on appeal (with or without specific reference to *Grostefon*) and, if so, when, in what manner, and with what content;

(3) Whether the appellant understood that right;

(4) Whether an understanding was established between Maj J and the appellant concerning when the appellate brief would be finalized;

(5) Whether, in the telephone conversation related by Maj J in his affidavit, during which the appellant is alleged to have raised the issue of sentence severity, or in any other communications that may have occurred, the appellant gave any indication that he (a) had further issues to raise, (b) had no further issues to raise, or (c) desired further time to consider whether he had any further issues to raise; and whether, in that conversation, or in any other communication, Maj J informed the appellant that he could raise further issues and, if so, whether a "deadline" was established for the appellant to notify Maj J of any further issues;

(6) Whether, at the time of each acknowledged communication with the appellant, Maj J (a) had read the record of trial, (b) informed the appellant that he had or had not read the record of trial, (c) indicated to the appellant that he would contact him again before finalizing the appellate brief, and (d) did or did not, in fact, do so; and

(7) Whether any regularly established process and/or written documentation exists which supports or memorializes any of these communications, explanation of rights, "deadline" for submitting *Grostefon* issues, or any other pertinent facet of this matter.

The government will return the record of trial, together with the record of the *DuBay* hearing and any additional matters, to this Court for further review within 90 days from issuance of this opinion, unless an enlargement of time has been granted. Thereafter, Article 66(c), UCMJ, 10 U.S.C. 866(c), shall apply.

OFFICIAL

HEATHER D. LABE
Clerk of Court