

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, HERRING, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant
United States Army, Appellant

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ORDER

WHEREAS:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of four specifications of indecent act with a child and one specification of communicating a threat in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2006) [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for three years, and reduction to the grade of E-1. The convening authority set aside the finding of guilty to the specification of communicating a threat, approved a reduction only to E-2, but otherwise approved the findings and sentence as adjudged.

On 11 February 2016, appellate defense counsel filed an appellate brief asserting three assignments of error. The third assignment of error alleged:

THE CUMULATIVE NATURE OF DEFENSE
COUNSEL'S [SIC] FAILURES AND ERRORS IN THIS
CASE DENIED APPELLANT EFFECTIVE ASSISTANCE
OF COUNSEL, WHICH IN TURN LEAD TO AN UNFAIR
TRIAL ON THE MERITS AND SENTENCING.

In support of this assignment of error, appellate defense counsel included a 119-page sworn declaration made by appellant. In that declaration, appellant alleged, inter alia, that his trial defense counsel, Major [redacted] and [redacted], failed to prepare him to testify at his own trial and did not contact numerous defense witnesses or call those witnesses at trial despite appellant's request to do so.

In addition to appellant's sworn declaration, appellate defense counsel included sworn declarations from numerous people, to include:

. An attorney,

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submitted three separate affidavits titled "Declaration of" a certain person wherein Mr. _____ relayed contents of phone conversations with the alleged person. Some of these sworn declarants stated they were not contacted by appellant's trial defense counsel, others were contacted but not called to testify, while other declarants stated they testified but had other relevant information to appellant's defense.

In response to the brief and declarations submitted by appellate defense counsel, both of appellant's trial defense counsel provided affidavits disputing appellant's claims of ineffective assistance of counsel. Contrary to appellant's declaration, both MAJ _____ and MAJ (then CPT) _____ maintain that they or a Trial Defense Services (TDS) paralegal contacted each witness provided by appellant, and that appellant had not provided the names of each declarant who claimed to have never been contacted. Although appellant did provide the name of Thomas Grosso two weeks before trial, a TDS paralegal contacted Mr. _____ and trial defense counsel concluded Mr. _____'s testimony would be cumulative. According to his affidavit, MAJ _____ thoroughly prepared appellant to testify at trial.

Having reviewed the pertinent material in this case, we determine that a hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), is appropriate. Based on the facts of this case, a *DuBay* hearing is required in order for this court to properly assess appellant's claim of ineffective assistance of counsel as well as conflicts between these affidavits and appellant's assertions.

NOW, THEREFORE, IT IS ORDERED:

1. That the record of trial is returned to The Judge Advocate General for such action as is required to conduct a limited hearing pursuant to *DuBay* in order to determine the facts surrounding appellant's claim that he was denied effective assistance of counsel at his trial.

2. The *DuBay* military judge shall hear the respective contentions of the parties on the issue specified above, permit the presentation of witnesses and evidence in support thereof, and within fourteen (14) days of the hearing enter findings of fact and conclusions of law based thereon. At this hearing, the following questions will, at a minimum, be addressed:

- a. What was the substance of the discussions between appellant and MAJ _____ regarding appellant testifying at trial? How often did appellant meet with his attorneys to prepare to testify? What were the contents of those meetings? Did appellant actively participate in these discussions? Who made the ultimate decision for appellant to testify?

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- b. Why was Father [redacted] not called as a telephonic witness or afforded a stipulation of expected testimony in the defense case?
- c. [redacted] submitted an affidavit that he was the ex-husband of [redacted] and she and her daughter, AF, made similar claims of abuse against Mr. [redacted] who stated those claims were investigation by Department of Social Services (DSS) and were unfounded. According to Mr. [redacted] DSS found that Ms. [redacted] was coaching AF to make false allegations. Why did the defense team not present this testimony of Mr. [redacted]

- e. In regards to Mr. [redacted] ILT [redacted] and MSG [redacted] was there any discussion as to whether they would be beneficial as the defense's theory of the case of the alleged victim's mother's motive to fabricate? Why were they not asked about the Ms. [redacted] motive to encourage AF to fabricate despite evidence of such a motive?

3. At this hearing, the military judge may call those individuals who have provided affidavits or statements in support of or in response to appellant's claim of ineffective assistance of counsel. These individuals include, at a minimum: MAJ [redacted] MAJ [redacted] ILT [redacted] and MSG [redacted]. The military judge, at his or her discretion, may call any other witness and review any evidence that may have a bearing on the questions listed above or on the overall issue of whether appellant was denied the effective assistance of counsel at trial. The appellant should be afforded the opportunity to testify.

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4. That the hearing will be concluded no later than sixty (60) days from the date of this Order.

5. That, at the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, be returned promptly to this Court for further review.

DATE: 23 November 2016

FOR THE COURT:

Acting Clerk of Court

CF:	Chief, DAD	JALS-TJ
	Chief, GAD	JALS-CCR
	JALS-CCZ	JALS-CR4