

IN THE FIRST JUDICIAL CIRCUIT, US ARMY
FORT CAMPBELL, KENTUCKY

UNITED STATES)

v.)

1LT BEHENNA, Michael C.)
Headquarters and Headquarters Company)
1st Brigade Combat Team)
101st Airborne Division (AASLT))
Fort Campbell, Kentucky 42223)

ESSENTIAL FINDINGS OF
FACT AND CONCLUSIONS
OF LAW

20 March 2009

The Court makes the following essential findings of fact:

1. On 28 August 2008, the Defense requested in writing that the Government provide to the Defense all exculpatory evidence.
2. Prior to trial, the Government gave notice to the Defense that it had retained Dr. Herbert MacDonell as an expert consultant, and that he was a potential witness.
3. The Defense was aware of Dr. MacDonell's education and experience and his professional reputation and standing in the area of his expertise.
4. On Wednesday, 25 February 2009, the Government rested its case without calling Dr. MacDonell as a witness. The evidence presented by the Government supported a finding that 1LT Behenna shot and killed Ali Mansur while Ali Mansur was sitting naked on a rock. The Government's theory was that the evidence supported a finding that two shots were fired several seconds apart and that the first shot was to Ali Mansur's head and the second to Ali Mansur's upper torso, in an execution-style killing.
5. Also on Wednesday, the Defense presented testimony of two Defense experts, Dr. Paul Radelat and Mr. Tom Bevel. Both witnesses testified that, in their opinions, the forensic evidence supported a conclusion that Ali Mansur had been shot while standing, with the first shot being to the chest and the second shot being to the head.
6. The Government's cross-examination of Dr. Radelat and Mr. Bevel focused on the possibility that there were many logical explanations of the shooting scenario in this case based on the forensic evidence.
7. Dr. MacDonell sat in the courtroom gallery, with consent of the parties, during the testimony of Dr. Radelat and Mr. Bevel.

8. Mr. Bevel testified after Dr. Radelat. After Mr. Bevel testified, the Defense had an opportunity to speak with Dr. MacDonell concerning the potential of his being called as a rebuttal witness.

9. The Government never informed Dr. MacDonell that he could not speak to the Defense about the substance of his potential testimony.

10. As of the end of the presentation of evidence on Wednesday, Dr. MacDonell's opinion, notwithstanding the testimony of Dr. Radelat and Mr. Bevel, was that the forensic evidence did not contradict the Government's theory of the case and, presumably based on the other evidence known to him (e.g., "Harry's" testimony and SSG Warner's testimony), he disagreed with Mr. Bevel's conclusion that Ali Mansur was standing when he was shot.

11. 1LT Behenna provided no pretrial statements asserting that the shooting of Ali Mansur was in self-defense and, until he testified on Thursday, neither the counsel for the Government nor Dr. MacDonell were aware of the substance of his potential testimony.

12. At a meeting Wednesday evening with all three trial counsel, another Government consultant (Dr. Berg), and several other administrative support personnel, Dr. MacDonell theorized and demonstrated that an unlikely but possible scenario, that was not inconsistent with the forensic evidence and the only logical explanation consistent with the testimony of Dr. Radelat and Mr. Bevel, was that if the first shot was to the chest, the second shot to the head could have occurred as Ali Mansur dropped in front of the muzzle of 1LT Behenna's weapon. The second shot would have had to of been fired immediately after the first shot, because Ali Mansur would have immediately dropped to the ground as a result of the first shot. This theory was not inconsistent with the forensic evidence, but was inconsistent with all other evidence known to the Government counsel and Dr. MacDonell (e.g., the testimony of "Harry" and SSG Warner that the second shot occurred between 3-5 seconds after the first shot, and "Harry's" testimony that Ali Mansur was sitting at the time of the first shot).

13. Dr. MacDonell's theory, as demonstrated at the meeting on Wednesday evening, was not discoverable pursuant to Brady v. Maryland nor UP R.C.M. 701(a)(6); it was merely Dr. MacDonell's attempt to reconcile the forensic evidence with the testimony of Dr. Redelat and Mr. Bevel. Dr. MacDonell's original opinion, based on the forensic evidence and all other evidence known to him at the time, remained unchanged as of Wednesday.

14. Government counsel, based on Dr. MacDonell's opinion that the available forensic evidence did not lend itself to very detailed interpretation, decided that they would not call Dr. MacDonell in rebuttal. Because Dr. MacDonell wanted to return home for personal reasons, arrangements were made for him to depart Fort Campbell at approximately 1700 on Thursday to return to New York.

15. On Thursday, 26 February 2009, Dr. MacDonell was once again, with consent of the parties, present for the direct testimony of 1LT Behenna. Prior to 1LT Behenna testifying to circumstances of the actual shooting, Dr. MacDonell did not find 1LT Behenna to be a credible

witness. 1LT Behenna then testified to his account of the shooting, which was consistent with Dr. MacDonell's demonstration during the meeting the evening prior.

16. After hearing 1LT Behenna's account of the shooting, Dr. MacDonell changed his opinion of 1LT Behenna's credibility and believed that he was telling the truth. While 1LT Behenna was testifying, Dr. MacDonell told Dr. Berg, who was sitting in the gallery next to Dr. MacDonell while 1LT Behenna was testifying, "That's exactly what I told you yesterday."

17. Dr. MacDonell's now "new opinion," although consistent with, was not cumulative UP M.R.E. 403 to any evidence which had been introduced during trial.

18. At approximately 1700 on Thursday, while the Court was closed to deliberate on an issue concerning M.R.E. 301, and just prior to Dr. MacDonell leaving the courtroom, Dr. MacDonell informed Mr. Zimmerman that, "I would have made a great witness for you" or words to that effect. When Mr. Zimmerman asked what his testimony might be, Dr. MacDonell informed the Defense that he could not divulge any information to the Defense, as he had been retained by the Government. Mr. Zimmerman did not pursue the matter further with Dr. MacDonell, and the Defense made no further inquiry to Government counsel on the matter until Friday morning. Defense Counsel's inquiry Friday morning was the first reasonable opportunity under the circumstances to address the matter with the Government.

19. Dr. MacDonell testified in response to counsel questions on Saturday, 28 February 2009, that, as he was leaving the courtroom, he told the prosecuting group "that was just exactly what I told you." In response to the Court's specific questions, however, Dr. MacDonell admitted that he made that statement only to Dr. Berg during 1LT Behenna's testimony. The Court finds that Dr. MacDonell made the statement only to Dr. Berg.

20. Dr. MacDonell left the courtroom to return to New York before the Government began its cross-examination of 1LT Behenna.

21. On Friday, 27 February 2009, prior to the start of court that morning, Mr. Zimmerman informed Government counsel about Dr. MacDonell statement and asked what he meant by it. Government counsel responded that they did not know, and that they were unaware of any exculpatory information. Government Counsel's response to Mr. Zimmerman was an honest, good faith representation, albeit inaccurate as it relates to whether Dr. MacDonell actually processed favorable information for the Defense.

22. Defense Counsel now asserts that it was reasonable to rely on Government counsel's response that Dr. MacDonell "did not possess" or "that they were unaware of" any exculpatory information to justify not pursuing the matter further. The Court disagrees. There is only one reasonable interpretation of Dr. MacDonell's statement, in light of his area of expertise i.e., that he would have testified that in his opinion the forensic evidence in some way favorably supported the Defense theory of the case.

The Court makes the following conclusions of law:

1. Assuming without deciding whether the Government counsel were obligated to disclose Dr. MacDonell's "new" opinion pursuant to Brady and/or R.C.M. 701, Dr. MacDonell's statement to Mr. Zimmerman was sufficient notice that he possessed favorable, if not exculpatory, information under both Brady and R.C.M. 701. See Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) and United States v. Clark, 928 F.2d 733 (6th Cir. 1991).

2. Defense Counsel's failure on Thursday to make immediate inquiries of the Government Counsel or to take other action based on Dr. MacDonell's statement was both understandable and reasonable under the circumstances. The statement was made immediately prior to cross-examination of 1LT Behenna. There is no doubt, based on the circumstances of this case that was a pivotal point in the trial for the Defense. The Court finds no error by Defense Counsel for not pursuing, with Government Counsel, clarification of Dr. MacDonell's statement prior to conclusion of 1LT Behenna's testimony, or during the late evening in the midst of complying with other Court requirements. Defense Counsel pursued the issue with Government Counsel at the first reasonable opportunity, which was Friday morning.

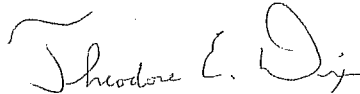
3. Assuming error occurred, however, at that point or any time prior to the sentence being announced, the Court finds not only that there is no reasonable probability, were it not for the error, of a more favorable result in the findings or the sentence of the Court (See Strickland v. Washington, 466 U.S. 668 (1984)), the Court is convinced beyond a reasonable doubt that any such error was harmless.

4. In testing for prejudice under Strickland, harmless error beyond a reasonable doubt for a violation of Brady and/or R.C.M. 701, and in the Court's evaluation of whether a mistrial is manifestly necessary in the interests of justice UP R.C.M. 915 or for a new trial UP R.C.M. 1210(f), the Court must consider the totality of the evidence presented in the case. The Court finds based on the following (both individually and collectively), that any error was harmless beyond a reasonable doubt and that a mistrial is not manifestly necessary in the interests of justice:

a. If the Defense Counsel had pursued the nature and potential evidentiary value of Dr. MacDonell's opinion and sought an order from the Court to the Government to produce Dr. MacDonell either prior to resting their case on Thursday, or coupled such a request with a request to reopen their case on Friday morning, the Court would have denied the request UP M.R.E. 403 and/or the factors enunciated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Dr. MacDonell's opinion of the value of the forensic evidence never changed. He admitted that such evidence did not lend itself to detailed interpretation. His original conclusion was that the forensic evidence was not inconsistent with the testimony of "Harry" and SSG Warner. His "revised" conclusion was not based on a reassessment of the forensic evidence, but rather his personal opinion of the credibility of 1LT Behenna's testimony. He determined that 1LT Behenna was credible, and by implication, more credible than "Harry" and SSG Warner. This is nothing more than an impermissible comment by one witness on the credibility of other witnesses in the guise of an "expert opinion."

b. The overwhelming evidence in this case supports a finding that 1LT Behenna, immediately prior to the shooting, was assaulting Ali Mansur with a loaded firearm while threatening to kill him if he did not provide the information 1LT Behenna was seeking. 1LT Behenna testified that he had no legal justification or legal excuse to interrogate Ali Mansur at all and that he did have any legal justification or legal excuse to conduct an interrogation in the manner that he did. Although there are many situations in a combat environment that would justify or excuse the pointing of a loaded firearm at someone, this was clearly not one of those situations. In applying the law to the facts of this case, the members could come to no reasonable conclusion other than 1LT Behenna did not have a right to self-defense. Accordingly, the Court is convinced beyond a reasonable doubt that any evidence as to self-defense did not have, nor would any additional evidence as to self-defense have, made a difference in the Court's determinations.

The Defense motion for a mistrial is DENIED.


THEODORE E. DIXON
COL, JA
Military Judge

The Court orders the Government to inform the General Court-Martial Convening Authority of the following:

The Court has, over the years, repeatedly cautioned counsel that any attempt to compare one case to another case is akin to the old adage of trying to compare apples to oranges. Each case is different and each accused uniquely situated. The Court understands, however, that the Appellate Courts are charged with the duty of making a “sentence appropriateness” determination in every case reviewed. The Court has noted over the years that decision is not always an easy one for my Appellate colleagues so I offer the following for consideration by the General Court-Martial Convening Authority and the Appellate Courts:

I have been a judge for 10 years and have never considered it appropriate to comment on the relative severity of a sentence adjudged by members. Moreover, I am mindful that many would consider any such comment as exceeding my responsibilities as a judge. Notwithstanding, in this case, I am convinced that I would be derelict in my duty to the fair administration of justice to not do so.

I have presided in hundreds and hundreds of courts-martial, two of which are appropriate to highlight. Those two cases, U.S. v. Clagett and U.S. v. Hunsacker, were cases tried in this jurisdiction wherein each accused was found guilty of premeditated murder of detainees in Iraq. The aggravating circumstances in those cases far exceeded the circumstances of this case. For reasons not strictly based on the merits of those cases, the then General Court-Martial Convening Authority agreed pretrial to disapprove any confinement in excess of 18 yrs. I respectfully recommend the General Court-Martial Convening Authority taking action on this case exercise similar discretion. When considering sentence appropriateness in this case, in my opinion, the interests of justice would continue to be served by approving a sentence that is no more severe than that approved in those two cases.