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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON A. BROWN IV, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 21-55727 D.C. No. 2:19-cv-08507-MRW MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Michael R. Wilner, Magistrate Judge, Presiding

Argued and Submitted August 3, 2022
Pasadena, California

Before: SILER,[**] CALLAHAN, and H. THOMAS, Circuit Judges.

While serving as a captain in the United States Air Force, Leon Brown IV helped organize and lead a violent gang in Minot, North Dakota. Military prosecutors convened a general court-martial in 2014 and charged Brown with a litany of Uniform Code of Military Justice violations. *See* 10 U.S.C. § 818. The

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

charges included pandering, "dishonorably organizing individuals into a violent gang," providing alcohol to minors, distributing controlled substances (such as heroin, marijuana, methamphetamine, and psychedelic mushrooms), using controlled substances, communicating threats to witnesses, prosecutors, and other members of the armed forces, and sex crimes against minor children. A military judge found Brown guilty on many of those charges and acquitted him on a few others, none of which is at issue here. The court imposed a sentence of 25 years' imprisonment.

Brown appealed (with limited success) to the Air Force Court of Criminal Appeals and to the United States Court of Appeals for the Armed Forces. *See United States v. Brown*, No. ACM 38864, 2017 WL 3311205 (A.F. Ct. Crim. App. 2017); *United States v. Brown*, 78 M.J. 162 (C.A.A.F. 2018). Then he petitioned for a writ of habeas corpus in federal court. 28 U.S.C. § 2241. The district court denied his petition.

I. STANDARD OF REVIEW

In habeas appeals from military courts the scope of our review is "more narrow" than in habeas appeals from civilian-court judgments. *Burns v. Wilson*, 346 U.S. 137, 139 (1953). We ask only two questions: (1) whether the court-martial had jurisdiction over Brown and (2) whether the court-martial "acted within its lawful powers." *Broussard v. Patton*, 466 F.2d 816, 818 (9th Cir. 1972) (quoting

Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962)).

II. ANALYSIS

The military courts fully and fairly considered Brown's habeas claims, and they acted well within their lawful powers. *See Burns*, 346 U.S. at 142.

1. The military trial judge found Brown guilty of sexually assaulting GB and FT, two underage girls, and Brown now argues he's actually innocent on both counts, *i.e.*, that he never had sexual relations with either girl. But even if it were appropriate for us to consider the post-trial declarations Brown submitted in support of his habeas petition, those declarations fall far short of what's required for a successful actual-innocence claim. To prevail on an actual-innocence claim, a petitioner must "affirmatively prove" it "is more likely than not that no reasonable [trier of fact] would have found [him] guilty beyond a reasonable doubt." *Jones v. Taylor*, 763 F.3d 1242, 1246–47 (9th Cir. 2014) (citations omitted).

As the Air Force Court of Criminal Appeals explained, testimony from at least four witnesses supported Brown's conviction for sexually assaulting GB. One witness testified to seeing Brown unclothed and "on top of" GB at a house party. Another witness saw Brown and GB "making out" at the same party; the next morning she saw GB "laying in" Brown's bed, wearing nothing but a sheet. Yet another witness recounted a conversation in which Brown admitted to having sex with GB. And although GB did not remember having sex with Brown, she testified

to getting "very, very, very intoxicated" at a house party with Brown. She also remembered being in Brown's bedroom, picking her bra off the bedroom floor, and spending time with Brown in his living room. The Air Force Court of Criminal Appeals considered all this testimony, considered a series of corroborating text messages sent by Brown, and then found sufficient evidence to support Brown's conviction. *Brown*, 2017 WL 3311205, at *3.

The Air Force Court of Criminal Appeals also carefully analyzed the evidence underlying Brown's conviction for sexually assaulting FT. The court considered the relevant witness testimony, including testimony from one witness who claimed she walked into Brown's bedroom and observed his having sex with FT. *Id.* at *4–6. The court also considered the series of incriminating statements made by Brown during his period of pretrial detention; it quoted, for example, one recording where Brown opined that FT "f***** like she was older" than her age (fourteen). *Id.* at *5. After weighing all this and more, the court again found sufficient evidence to support Brown's conviction. *Id.* at *6.

By any measure, the Air Force Court of Criminal Appeals' analysis amounted to a full and fair consideration of Brown's sexual-assault convictions. Brown's post-trial declarations—some of which were filed by Brown's victims—might have inspired a factual dispute at trial, true enough, but by no means would they more likely than not have precluded every reasonable factfinder from voting to convict.

Reasonable factfinders could have relied on testimony from the government's trial witnesses and credited that testimony over the post-trial declarations submitted in support of Brown's habeas petition.

2. Next, Brown says investigators violated his Sixth Amendment right to counsel as set forth in *Massiah v. United States*, 377 U.S. 201 (1964), by putting recording devices in his place of pretrial detention and by using jailhouse informants to elicit incriminating statements from him. Brown's *Massiah* claim, however, is procedurally defaulted because he raised it for the first time on collateral review; he never filed a *Massiah*-based suppression motion before the military trial judge, nor did he challenge the admissibility of his jailhouse statements on direct appeal. *See Davis v. Marsh*, 876 F.2d 1446, 1449 (9th Cir. 1989). Even if Brown's *Massiah* claim was not procedurally defaulted, and even if the Sixth Amendment right to counsel applies in general court-martial proceedings, *see generally Middendorf v. Henry*, 425 U.S. 25, 31–42 (1976); *Daigle v. Warner*, 490 F.2d 358, 364 (9th Cir. 1973), his claim fails on the merits. Sixth Amendment rights do not attach until "adversary judicial criminal proceedings" begin. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). Here, the government stopped recording Brown's pretrial statements before adversary judicial criminal proceedings began. *See United States v. Harvey*, 37 M.J. 140, 142 (C.M.A. 1993).

3. Brown's habeas petition also raises a series of claims under *Brady v. Maryland*, 373 U.S. 83 (1963). One of his claims concerns Airman Basic Derrick T. Elliott, a government witness who testified at trial. After trial, the government disclosed a 2012 incident where police arrested Elliott for shoplifting and for providing false information to police. The Air Force Court of Criminal Appeals "quickly conclude[d]" the government erred by failing to disclose Elliott's arrest but denied relief under *Brady*'s materiality element because other evidence at trial amply exposed Elliott as "a convicted drug distributor, convicted drug user, and admitted self-serving liar." *Brown*, 2017 WL 3311205, at *15–16. The Air Force Court of Criminal Appeals fully and fairly considered this claim, and its conclusion—that any evidence of Elliott's 2012 arrest "would not have affected the outcome of [Brown's] case" because cross-examination effectively displayed Elliott's proclivity for lying and criminal activity, *id.* at *16—is not a basis for habeas relief.

Brown also claims the government violated *Brady* (1) by not disclosing its cooperation agreements with Elliott, Jarrid Gable, and Ethan Telford and (2) by not disclosing that Elliott, Gable, and Telford requested clemency in exchange for their cooperation. We reject this claim because Brown has not demonstrated how any of this information could have reasonably affected the outcome of his trial. To begin, it's unclear how Elliott and Gable's cooperation and clemency requests would have affected the military judge's decision to convict Brown, especially since the

government corroborated much of its testimony by presenting recordings where Brown admitted to many of the UCMJ violations at issue. Telford's cooperation agreement and clemency request is even less relevant because he never testified at trial; Brown's attorney would therefore have had no occasion to raise his agreement or clemency request on cross-examination.

Brown's brief also mentions a scattering of other evidence allegedly withheld by the government—including a list of photographs, various statements made by witnesses and non-witnesses to military police and military prosecutors, and information about a witness's criminal history—but Brown has not shown "a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

4. Finally, Brown argues his trial counsel performed ineffectively by not moving to suppress the audio recordings made during his period of pretrial detention. We disagree. Two elements comprise a successful ineffective-assistance claim. The claimant must first show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and then he must show prejudice—in other words, he must "demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). Brown's claim

fails both elements. For the reasons explained above, it's unlikely that the military judge would have suppressed the incriminating jailhouse recordings because even if the Sixth Amendment applies in general court-martial proceedings, Brown's Sixth Amendment rights hadn't yet attached when the government recorded the incriminating statements at issue. Trial counsel's failure to file a likely-unsuccessful suppression motion did not "amount[] to incompetence under 'prevailing professional norms.'" *Id.* at 105 (citation omitted). Furthermore, Brown has not shown his counsel's failure to file a suppression motion prejudiced him.

AFFIRMED. PETITION DENIED.