

Denver Post

June 25, 2005

Academy Rape Trial on Hold: Judge's Action Follows Refusal of Therapist to Turn Over Notes

By Howard Pankratz, Denver Post Staff Writer

[Randolph Air Force Base, Texas] – A military judge on Friday decided to indefinitely postpone an Air Force Academy sexual assault court-martial, after a civilian rape counselor refused to turn over her notes of conversations with the alleged victim.

Col. David Brash's ruling, released Friday morning, followed a day of closed hearings during which attorneys for 1st Lt. Joseph Harding argued they could not provide an adequate defense unless they knew whether civilian therapist Jennifer Bier had information relevant to the case in her notes.

David Sheldon, Harding's attorney, said immediately after the ruling that Brash's decision "ensures Lt. Harding's right to a fair trial."

"We believe this is appropriate and lawful," Sheldon said.

Despite 56 complaints between 1993 and 2003 about sexual assaults at the academy – many of them delayed reports generated by this case involving alleged victim Jessica Brakey – court-martial prosecutions for assaults at the academy are rare. Attorneys for Bier and Brakey seized on that record in harshly criticizing Brash's ruling.

"This move may have been preordained before the proceedings even started," said Joseph Madonia, one of Brakey's attorneys. "They continue a pattern of coverup."

Harding still faces court-martial at Randolph Air Force Base near San Antonio on a second, lesser count of "indecent assault" involving another former cadet. If convicted, he could be expelled from the Air Force and sentenced to a maximum of five years in prison. The sexual assault charge carried a maximum life sentence.

Prosecutors were not available to say whether they would appeal Brash's order abating the more serious charge.

"I'm sure they are discussing it right now," said Air Force attorney Maj. Elizabeth Schuchs-Gopaul.

Bier and Brakey attorney Wendy Murphy said she hoped that was the case.

“We are vociferously urging the prosecution to appeal because it is a blatantly unlawful decision by the judge,” Murphy said. “I don’t care what the basis was.”

There was a two-year delay between the alleged rape and Brakey’s report to academy officials, so no direct physical evidence exists. As a result, Brakey’s credibility is integral to the prosecution’s case.

Brash’s decision favors Harding’s constitutional right to confront his accuser and examine all evidence that might be helpful to him above Brakey’s expectation and Bier’s pledge that their conversations would be private.

Brakey has said she was attacked by Harding, a cadet commander, in 2000. But she didn’t report the alleged assault until August 2002, after academy officials became concerned about changes in her behavior.

By then, Harding had graduated, and the academy moved to honorably discharge Brakey from the Air Force. She went public with her allegations and generated a new round of congressional and media scrutiny of the academy, and the Air Force’s treatment of sexual assault cases.

It wasn’t until May 2004 that the Air Force revealed Harding would be charged with sexual assault in the Brakey case and indecent assault in a 1999 case, also at the academy.

The defense requested and received medical and counseling reports on Brakey from Air Force doctors who had treated her, Murphy said. But Brakey also sought counseling from a civilian – Bier – and when Harding’s attorneys came for her records, she refused, and Brash threatened to jail her.

On Friday, Bier received an award from the Colorado Coalition Against Sexual Assault for her decision to protect Brakey’s confidentiality.

“I’ve said many times I would much rather have gone to jail than have them dismiss this case,” she said. “I am heartbroken that they will not prosecute.”

Bier still faces the possibility of jail for refusing to turn over her notes. Brash can certify to a U.S. district judge, probably in Denver, that Bier is in contempt.

At that point, a civilian judge could order her to turn over the notes or face a contempt charge.

Brash did not say Friday whether he would ask a civilian judge to hold Bier in contempt. Schuchs-Gopaul said “such actions are not contemplated at this time” but added that she could not speak for what the judge might do in the future.

Staff writer Felisa Cardona contributed to this report. Staff writer Howard Pankratz can be reached at 303-820-1939 or hpankratz@denverpost.com.

Copyright © 2005 The Denver Post.