UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GABRIEL U. BENTLEY
United States Air Force

ACM 38097

27 August 2013

Sentence adjudged 3 November 2011 by GCM convened at Joint Base Pearl Harbor-Hickam Air Force Base, Hawaii. Military Judge: Vance H. Spath.

Approved Sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Mr. Gerald R. Bruce, Esquire.

Before

ORR, HELGET and WEBER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial comprised of officer members of two specifications of violating a lawful general order, one specification of wrongfully distributing some amount of spice, and one specification of wrongfully using spice, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. Contrary to his pleas, the members convicted the appellant of one specification of wrongfully distributing some amount of oxycodone, in violation of Article 112a, UCMJ.[1] The members sentenced the appellant to a bad-conduct discharge, confinement for

[1] The appellant was charged with and found not guilty of one specification of wrongfully distributing hydrocodone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.

12 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. The convening authority approved the adjudged sentence, except he only approved confinement for 8 months.

Before this Court, the appellant raises three assignments of error: (1) Whether the treatment the appellant received while in confinement amounted to cruel and unusual punishment; (2) Whether the trial defense counsel's failure to present evidence that the appellant was taking the medication Roxicet amounted to ineffective assistance of counsel; and (3) Whether the appellant's conviction for the wrongful distribution of oxycodone is legally and factually sufficient.[2] Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

The appellant pled guilty to wrongfully using and distributing spice on divers occasions between 18 February 2010 and 5 May 2011, in violation of a lawful General Order issued by the Commander, Pacific Air Forces. On average, he used spice anywhere from one to four times a week. He also wrongfully distributed spice on multiple occasions. On some occasions, he would buy the spice and share it with his friends, while on other occasions, he would contribute money for the purchase of a bag of spice and then would share the contents with his friends. On one specific occasion on 27 March 2011, during an Air Force Office of Special Investigations operation, the appellant purchased a bag of spice and shared it with his friends. The appellant claimed that one of the main reasons he used spice was as a replacement for his prescription medicine to alleviate the pain associated with his physical injuries.

The appellant pled not guilty to wrongfully distributing on divers occasions both oxycodone and hydrocodone, but was found guilty of wrongfully distributing oxycodone.

Cruel and Unusual Punishment

The appellant claims that the treatment he received in confinement constitutes cruel and unusual punishment.

We review claims of cruel and unusual post-trial punishment de novo. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007); *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). "In our evaluation of both constitutional and statutory allegations of cruel or unusual punishment, we apply the Supreme Court's Eighth Amendment[3] jurisprudence 'in the absence of legislative intent to create greater protections in the UCMJ.'" *Pena*, 64 M.J. at 265 (quoting *United States v. Lovett*,

[2] The second and third assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] U.S. CONST. amend. VIII.

63 M.J. 211, 215 (C.A.A.F. 2006)). "Denial of adequate medical attention can constitute an Eighth Amendment or Article 55[, UCMJ,][4] violation." *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001) (citing *United States v. Sanchez*, 53 M.J. 393, 396 (C.A.A.F. 2000)). However, medical care provided to inmates need only be reasonable, not "perfect" or "the best obtainable." *Id.* at 475 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991)). To prevail, the appellant "must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he 'has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ.'" *Lovett*, 63 M.J. at 215 (omission in original) (footnotes and citations omitted).

In February 2010, prior to his court-martial and entering confinement, the appellant was diagnosed with a left hip femoral impingement which caused an extensive tear in the cushion of his hip requiring surgery to repair the tear. He was additionally diagnosed with Avascular Necrosis bone disease, which is a deterioration of the bone. The appellant claims that his medical profile was ignored upon entering confinement at the Naval Brig Joint Base Pearl Harbor-Hickam and he was expected to function as a normal prisoner. He alleges that he suffered severe back pain due to sleeping on a thin foam pad on a metal bed and had to skip showers for over a week due to his inability to balance and hold the hot and cold buttons to keep the shower running. Additionally, he asserts that access to his pain medication was limited.

On 28 November 2011, the appellant was flown from Hawaii to the Miramar Brig in California. According to the appellant, he was immediately placed in isolation for 10 days and was not given his prescriptive medication or other pain medication. He also experienced additional pain due to the fact that the window in his room would not close and a cold wind was present during cool nights. He states that he was also denied access to a shower as the shower facilities were located on a different floor. Additionally, he was not provided a handicap toilet seat which ultimately caused severe constipation. Further, the walker he used prior to his arrival at Miramar was broken in transit and he did not receive a replacement until 2 February 2012. He claims that he did not receive a wheelchair until 7 December 2011, and was without walking assistance from 28 November 2011 to 7 December 2011. Also, despite his medical conditions, he did not receive an Americans with Disabilities Act approved cell until 28 December 2011. Finally, the appellant claims that he was wrongfully handcuffed while twice being transported to the emergency room.

On 3 February 2012, the Commanding Officer for the Naval Consolidated Brig Miramar responded to the appellant's petition for clemency. Concerning the appellant's

[4] In addition to prohibiting "cruel or unusual punishment," Article 55, UCMJ, 10 U.S.C. § 855, prohibits "[p]unishment by flogging or by branding, marking, or tattooing" and "[t]he use of irons . . . except for the purpose of safe custody." None of the specific prohibitions are at issue here.

time at the Pearl Harbor Brig, during his first shower call on 4 November 2011, it was obvious the appellant needed assistance which the staff provided. On 7 November 2011, a shower chair was purchased and the appellant was permitted to bathe in a more convenient shower facility. On 8 November 2011 (the appellant claims this request was made on 4 November 2011), the appellant requested a special raised toilet seat which was not provided until 17 November 2011 due to the Veterans Day weekend. Upon his arrival to the Naval Consolidated Brig Miramar on 28 November 2011, the appellant was placed in medical segregation, which is customary for all prisoners who arrive with medical issues. He was visited four times a day by a Navy Medical Corpsman who delivered his medications to his cell. On 1 December 2011, a toilet seat riser and shower chair was ordered. On 2 December 2011, the contracted medical equipment company delivered the wrong sized toilet seat and a shower chair. On 5 December 2011, the correct toilet seat riser was delivered (the appellant claims the seat did not arrive until 7 December 2011). On 7 December 2011, the appellant requested and was granted a shower. On 8 December 2011, the appellant was moved from medical segregation to the general population, and on 16 December 2011, the appellant was moved to his permanent cell which is Americans with Disabilities Act compliant (the appellant claims that this did not occur until 28 December 2011). Regarding the medical treatment of the appellant, from 17 December 2011 to 2 February 2012, the appellant was seen by several medical providers for pain management and treatment of various medical conditions. Concerning the allegation that he was wrongfully restrained when transported to the emergency room, per the applicable Department of Defense and Navy regulations, all prisoners are required to be restrained when required to leave the brig and remain in the restraints throughout their absence.

Having reviewed the appellant's declaration, together with the response by the Commanding Officer for the Naval Consolidated Brig Miramar, we find that the appellant has failed to show an objectively and sufficiently serious act or omission resulting in the denial of necessities and that prison officials were deliberately indifferent to his medical conditions that might have violated the Eighth Amendment or Article 55, UCMJ. Although there are some minor inconsistencies between the appellant's assertions and the response by the Commander of the Miramar Brig, even if we assume that the appellant's post-trial treatment was as he claims, we find that he has not sustained his burden of showing deliberate indifference to his health and safety. Further, although there are factual differences between the two declarations, we need not order an evidentiary hearing pursuant to *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), since this legal issue can be resolved based on the "appellate filings and the record." *Id.* at 248. Accordingly, the appellant has failed to establish his Eighth Amendment and Article 55, UCMJ, claim.[5]

[5] We note that the appellant raised his confinement conditions with the Convening Authority who ultimately granted clemency by reducing his period of confinement by four months.

Ineffective Assistance of Counsel

In the second assignment of error, the appellant alleges that his trial defense counsel were ineffective by failing to present evidence that he was taking the medication Roxicet and dealing with pain, insomnia, depression, and other issues during the span of his spice use, and for failing to present the findings of his Physical Evaluation Board, Medical Evaluation Board, and the Veterans Affairs Disability Evaluation System Proposed rating. The appellant believes that if the members had known more about his medical conditions, they would not have convicted him of wrongfully distributing oxycodone or would have at least sentenced him to a lesser period of confinement.

We review de novo claims of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010)). To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In evaluating counsel's performance under the first *Strickland* prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688-89. The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 698.

We apply a three-part test to determine whether an appellant has overcome the presumption of competence:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions . . . ?
>
> 2. If they are true, did the level of advocacy fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?

> 3. If ineffective assistance of counsel is found to exist, is . . . there . . . a reasonable probability that, absent the errors, [there would have been a different result]?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks and citations omitted).

Concerning the appellant's claim that his trial defense counsel should have presented evidence that he was taking the medication Roxicet to deal with pain, evidence was presented concerning the appellant's hip injury and associated pain. The appellant's prescription history consisting of oxycodone (Roxicet) and hydrocodone (Vicodin) was also introduced into evidence. During closing argument, the trial defense counsel argued that because the appellant had undergone hip surgery and needed the pain medication for his own medical needs, there was no reason for him to distribute his medication. Further, in his unsworn statement, the appellant discussed his physical injuries, his recent surgery, and the need for two additional surgeries. Finally, in her sentencing argument, the trial defense counsel highlighted the appellant's injuries and the chronic pain he was continuously experiencing.

Concerning the appellant's allegation that his trial defense counsel should have presented evidence of his medical board findings and ratings, according to his trial defense counsel, the decision was made not to present this evidence after consultation with their appointed expert that spice use can cause mental health side effects. The appellant's trial defense counsel were concerned that if they would have introduced evidence of the appellant's depressive disorder, it would have opened the door for the prosecution to argue that the appellant's mental health issues were attributable to his spice use. Instead, they felt a more prudent strategy would be to introduce evidence of the appellant's physical injuries. The appellant was briefed and concurred.

Considering the particular circumstances in this case and applying the two-part *Strickland* test, the appellant has failed to show either that his trial defense counsel were deficient, or that any deficiency resulted in prejudice. Accordingly, we find the appellant's trial defense counsel were not ineffective.

Legal and Factual Sufficiency

The appellant claims that his conviction for wrongfully distributing oxycodone is legally and factually insufficient.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could

have found all the essential elements beyond a reasonable doubt.'" *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). In resolving legal-sufficiency questions, we are "bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant was charged with wrongfully distributing oxycodone on divers occasions, between on or about 14 July 2010 and on or about 4 November 2010, and for wrongfully distributing hydrocodone on divers occasions, between 1 August 2010 and on or about 4 November 2010. He pled not guilty to both specifications, but was found guilty of wrongfully distributing oxycodone. The appellant alleges that the members' finding of guilty for the wrongful distribution of oxycodone is inconsistent with their finding of not guilty for the hydrocodone distribution specification.

According to the testimony of AB SM, on approximately five occasions between 1 August 2010 and 1 October 2010, he paid the appellant $25 for the purchase of two pills each of oxycodone and hydrocodone. Additionally, the appellant's medical records reflect that he was prescribed oxycodone on 14 and 28 July 2010, but wasn't prescribed hydrocodone until 30 September 2010. Although the appellant alleges that the members did not believe the testimony of AB SM, it appears from the record that the members found him not guilty of the hydrocodone distribution specification based upon the incongruity between the testimony of AB SM and the date the appellant was prescribed hydrocodone. However, considering that the testimony of AB SM is consistent with the appellant's prescription history for oxycodone, the members found him guilty of wrongfully distributing oxycodone.

Considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we find the evidence legally

and factually sufficient to support his conviction for the wrongful distribution of oxycodone.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court