UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant WILLIAM BLAKE JR.
United States Air Force

ACM 34482

3 December 2002

Sentence adjudged 22 December 2000 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Mary Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-2.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Lieutenant Colonel Timothy W. Murphy.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

EDWARDS, Judge:

The appellant was convicted by military judge sitting alone, consistent with his plea, of one specification of wrongful use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 6 months, and reduction to E-2. The appellant now avers that his counsel provided ineffective assistance in the sentencing and post-trial phases of his court-martial and that the sentence as adjudged and approved is inappropriately severe. Finding no error that materially prejudices the appellant's substantial rights, we affirm. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Facts

The appellant used cocaine on 17 July 2000 by smoking it in a glass pipe. On 8 September 2000, he again used cocaine, this time by inhaling powdered cocaine up his nostrils. It is these two uses of cocaine to which he pled, and was found, guilty.[1] At the time of trial, the appellant had over 19 years and 8 months of active service in the United States Air Force. Prior to March 2000, the appellant served in the grade of senior master sergeant (E-8). In March 2000, he was reduced to the grade of E-7 pursuant to nonjudicial punishment proceedings under Article 15, UCMJ, 10 U.S.C. § 815. On 8 August 2000, the appellant was again reduced in rank (this time to the grade of E-6) pursuant to nonjudicial punishment proceedings. The appellant was an E-6 at the time of trial.

The appellant alleges that his trial defense counsel was ineffective during the sentencing and post-trial phases of his court-martial. Three of the four allegations involve trial defense counsel's performance during the sentencing phase of the trial. The appellant alleges that his trial defense counsel was ineffective because: (1) He failed to introduce specific evidence regarding the loss of retirement benefits as a result of a punitive discharge; (2) He elicited testimony from a sentencing witness that "opened the door" for the admission of evidence on a charge that had been dismissed pursuant to a pretrial agreement; (3) He failed to properly review the appellant's unsworn statement; and (4) He failed to provide specific information to the convening authority in the post-trial clemency submissions regarding the impact of a punitive discharge on the appellant's retirement benefits. The appellant also alleges that a bad-conduct discharge is inappropriately severe for the offenses to which he pled and was found guilty.

Law

We review claims of ineffective assistance of counsel de novo. *United States v. Burt*, 56 M.J. 261 (2002); *United States v. Lee*, 52 M.J. 51 (1999). The Supreme Court established the following two-part test when there is a claim of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

[1] The appellant initially plead not guilty to the charges and specifications against him. Subsequently, the appellant changed his plea pursuant to a pretrial agreement (PTA). In accordance with the PTA, the convening authority agreed to dismiss Charge I and its Specification, alleging battery in violation of Article 128, UCMJ, 10 U.S.C. § 928, and the appellant agreed to plead guilty to the Charge and its Specification alleging divers use of cocaine. There was no sentence limitation in the PTA.

> errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).[2] Our superior court adopted this standard of review for claims of ineffective assistance of counsel in courts-martial. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987).[3] *See United States v. Sales*, 56 M.J. 255, 258 (2002); *United States v. Grigoruk*, 52 M.J. 312, 315 (2000).

In *Boone*, the Court again pointed out:

> When faced with an allegation that counsel has been ineffective, the applicable standard of adjudication is the now familiar two-step inquiry of *Strickland*. This standard requires that the accused must demonstrate that his counsel was deficient and that the deficient performance prejudiced the defense so as to deprive him of a fair trial. As the Court of Criminal Appeals noted in this case, an accused is deprived of a fair trial when the court-martial proceeding produces a result that is not reliable.

Boone, 49 M.J. at 196 (citations omitted).

Analysis

The appellant argues that the failure of his trial defense counsel to provide specific evidence as to the exact amount of monetary loss as a result of a punitive discharge to the trial judge during sentencing and to the convening authority post-trial[4] amounted to ineffective assistance of counsel. We disagree.

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[2] *Strickland* involved the issue of ineffective assistance of counsel during the sentencing phase of a murder trial. Therein, the Court held that "We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial." *Id.* at 686-87 (citations omitted).

[3] *Scott* involved the claim of ineffective assistance of counsel in the findings phase of the court-martial. However, the Court adopted the *Strickland* standard without distinguishing whether the standard would apply to the sentencing phase. Subsequently, in *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988), the (then) Court of Military Appeals cited the standard in *Strickland* and that was set out in *Scott* in their discussion of a claim of ineffective assistance of counsel in the sentencing phase of the appellant's court-martial. *See also United States v. Stephenson*, 33 M.J. 79 (C.M.A. 1991) and *United States v. Boone*, 49 M.J. 187 (1998). It is clear that the tests articulated in *Strickland* and *Scott* apply to both the findings and the sentencing phases of a court-martial.

[4] Article 60(b)(1), UCMJ, 10 U.S.C. § 860(b)(1) provides that "[t]he accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence."

The appellant entered active service in the United States Air Force on 30 April 1981. As of the date of his trial, the appellant had almost 19 years and 8 months on active duty. It is clear that a punitive discharge would deprive him of retirement benefits (specifically retired pay). The loss of retirement benefits would be significant if the trial judge sentenced the appellant to a punitive discharge, the convening authority approved the discharge, and such discharge was ultimately executed. It is well established that "once a bad-conduct discharge is adjudged and executed, it terminates a servicemember's military status and any concomitant right to receive military retirement benefits." *United States v. Greaves*, 46 M.J. 133, 137 (1997).

Evidence of appellant's estimated retirement benefits would have been admissible if the appellant had offered such evidence at trial. *United States v. Becker*, 46 M.J. 141, 144 (1997) (such evidence is admissible where the appellant is "literally knocking at retirement's door at the time of his court-martial" and requests to present such evidence); *United States v. Luster*, 55 M.J. 67 (2001) (per se rule that appellant had to be essentially guaranteed a right to retirement before such evidence is admissible was rejected). Furthermore, if offered, exclusion of such evidence by the trial judge is generally viewed as prejudicial error. *See Becker*, 46 M.J. at 142; *See also Luster*, 55 M.J. at 72.

However, the trial defense counsel never requested that the trial judge admit or consider evidence of the specific value of the appellant's retirement benefits, nor the specific financial consequences of a punitive discharge. Notwithstanding this, it is clear that this issue was on the appellant's mind and that of his counsel. In his unsworn statement, the appellant told the judge that the "fear of losing my retirement benefits and the medical care for my wife" drove his fear of initially accepting responsibility for his actions. He asked the military judge to "consider all other alternatives to a punitive discharge." During his unsworn statement, the following exchange occurred between the appellant and his trial defense counsel:

> Q. Now, you indicated earlier in your statement to the judge that you've always wanted to tell the truth about this drug business, right?
>
> A. [nods his head in the affirmative]
>
> Q. And the only thing, as you indicated earlier, that held you back was your unwillingness to sacrifice your retirement benefits and the medical benefits that come along with that, that are - -
>
> A. That is correct, Sir.
>
> Q. - - critical to your wife right now?

A. That's correct, Sir. I made the biggest mistake of my life, and I recognized that. I wanted to do something about it, but I was really afraid of having to throw away my career after over 19 years for that.

Q. In fact, when you and I conversed about this well in advance of trial, you said you were willing to plead guilty to the drug offense subject to any punishment other than sacrificing your retirement benefits and the medical things that went along with that, correct?

A. Yes. We discussed that.

Q. And we were unable to reach that kind of an agreement with the Government, right?

A. [nods his head in the affirmative]

....

Q. And you told me at 7:30 yesterday morning, you said, "Captain Martin, if these last few motions don't go our way, I'm pleading guilty," didn't you?

A. I did.

Q. Okay. And when you expressed your preference to me about going in front of the judge alone, I shared with you my personal opinion that your best opportunity to avoid punitive discharge was to take a trial by members for sentencing, didn't I?

A. Yes, Sir, you did. You advised me every step along the way, and I want to take this opportunity to thank you, Sir, for helping me out, for fighting hard for me. But, that is true, you did advise me that my best bet, as far as you were concerned, would be with members.

Q. And even understanding that your best opportunity to avoid a punitive discharge was in front of members, why did you still choose to go judge alone?

A. A couple of reasons. One, like I said, I felt that I was wasting the court's time, because I knew what I had done, and it wasn't necessary to go forward the way we were. I just wanted to let everybody get on with what they were doing. It's Christmas time, let everybody go

> home, or do what they have to do, and just whoever needed to be - - unfortunately, needed to be here, that's all it required.

In his closing argument, the trial defense counsel specifically called the judge's attention to the price that a punitive discharge would extract from the appellant – referring to such a punishment as "an amputation." The trial defense counsel argued that "in recognition of those kinds of commitments, those kinds of lifetime commitments, that sacrifice, that a punitive discharge should be avoided here." The trial defense counsel then closed his rebuttal sentencing argument with the following plea:

> We only ask Your Honor to forego imposing a punitive discharge in this case so that Sergeant Blake might get some recompense from the Government for the 19 really outstanding years that he had, that led up to this year. And if you reduced him significantly, his retirement benefit would be commensurately reduced.

Turning first to the second prong of the *Stickland* test, we hold there is no prejudice to the appellant. There is no basis to conclude that the appellant was "deprived of a fair trial" or that the proceedings would have "produce[d] a result that is not reliable." *Boone*, 49 M.J. at 196. The trial defense counsel understood that the military judge, a colonel in the United States Air Force, properly appreciated the financial impact of a punitive discharge without having to point out the specifics to her. We are confident that this experienced military judge knew the value of the retirement benefits and understood how such benefits are calculated. As our superior court has held, "a military judge is presumed to know and apply the law correctly." *United States v. Raya*, 45 M.J. 251, 253 (1996) (citing *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994); *United States v. Montgomery*, 42 C.M.R. 227, 231 (C.M.A. 1970)). The military judge is not required to leave this knowledge at the courthouse door when deliberating on sentence. In this case, the military judge had before her a noncommissioned officer who received two nonjudicial punishments under Article 15, UCMJ that resulted in two reductions in grade, and numerous administrative punishments; and who pled guilty to, and was found guilty of, two uses of cocaine. The military judge was fully informed of the appellant's military history and his family problems and concerns. She properly considered all matters submitted by the defense in extenuation and mitigation. In light of these matters, she adjudged a sentence that she viewed as appropriate for the crimes and for the accused. In *United States v. Dewrell*, 55 M.J. 131 (2001), the Court addressed a similar issue – with one major difference. In that case, the sentencing was conducted before members. Therein the Court noted:

> Appellant also claims that defense counsel did not inform the members about the precise consequences of a punitive discharge. Yet the record establishes that defense counsel informed the members a punitive discharge would "deprive him of everything that he has worked for and everything

> that he has contributed; everything that he is or thought he was." Based on the nature of appellant's felony conviction, the evidence presented during sentencing, the military judge's instructions, and argument of counsel, we are convinced that the officer members had sufficient information to understand the ramifications associated with awarding appellant a punitive discharge.

Dewrell, 55 M.J. at 134. We too are convinced that the military judge had sufficient information to understand the ramifications of punishing the appellant with a punitive discharge.

We also hold, under the first prong of the *Stickland* test, that the performance of trial defense counsel was not deficient. Trial defense counsel clearly understood the ramifications of a punitive discharge and discussed these ramifications with the appellant. Days of motions in an effort to save the appellant's retirement benefits preceded the appellant's personal decision to plead guilty and to be sentenced by a military judge sitting alone. The appellant did this in spite of counsel's advice that the appellant's best option to preclude a punitive discharge and hence preserve his retirement benefits would be to elect sentencing by court members. The appellant acknowledged this advice and yet elected to proceed with judge alone sentencing. The trial defense counsel then made a strong showing to the judge that the appellant's retirement and medical benefits were absolutely the appellant's primary concern. He made this showing through the unsworn statement of the appellant and by stressing the impact of a punitive discharge during his sentencing argument. The appellant now complains that the trial defense counsel did not do enough. We hold such complaint to be without merit.

The appellant also argues that his counsel was ineffective in that he failed to provide similar detailed information on the value of retirement benefits to the convening authority before he took action. We again hold that counsel was not ineffective in his handling of the issue of retirement benefits and the consequence of a punitive discharge.

"[T]he military accused has the right to the effective assistance of counsel during the pretrial, trial and post-trial stages. . . . As to the effectiveness of counsel, we apply a two-pronged test, the first being the competence prong, and the second being the prejudice prong." *United States v. Hicks*, 47 M.J. 90, 93 (1997). Again, we apply *Strickland* when faced with an allegation of ineffective assistance of counsel in the post-trial stage of a court-martial.

The appellant, his wife, and his counsel made impassioned pleas for clemency during the post-trial stage of his court-martial. The primary focus of their clemency plea to the convening authority was that the bad-conduct discharge not be approved. Trial defense counsel clearly tied together the appellant's concern for his family and how the loss of his retirement benefits would affect his family.

In the appellant's personal post-trial submission to the convening authority, the appellant followed the same course as did his trial defense counsel. The focus was on his family and the resulting burden that approval of the punitive discharge (and therefore the loss of retirement benefits) would cause his family. The same theme can be seen in the appellant's wife's submission to the convening authority. She asked the convening authority to "change my husband's discharge so that he can retire."

Turning first to the second prong of the *Stickland* test, we hold there is no prejudice to the appellant. Trial defense counsel provided a comprehensive submission to the convening authority and clearly and succinctly argued his client's position that disapproval to the punitive discharge was the single most important request of his client. As the Court noted in *Dewrell,* we are convinced that the convening authority "had sufficient information to understand the ramifications associated with awarding appellant a punitive discharge." *Dewrell,* 55 M.J. at 134. In addition, we hold that the performance of counsel was not deficient. *See Strickland*.

We now turn to the allegation of ineffective assistance of trial defense counsel in calling Sergeant Eric Haeseker, an Army military police officer[5] during sentencing and in the allegation that the trial defense counsel did not properly review the appellant's unsworn statement after the appellant elected to plead guilty. Again finding no prejudice, we hold there is no ineffective assistance of counsel.

During sentencing, the trial defense counsel called Sergeant Eric Haeseker to testify. His tactical purpose in doing so, as set out on the record, was so that Sergeant Haeseker could "testify to the degree of cooperation and compliance Tech[nical] Sergeant Blake gave to authorities in connection with the apprehension." Trial defense counsel did not intend to "go into any of those peripheral details of what happened that evening."[6] A short summary of the apprehension of the appellant is necessary to properly address this allegation.

Sergeant Haeseker responded to a call of a domestic disturbance on the night of 17 July 2000 at the appellant's on-base residence. When he arrived at the residence, he spoke with Mrs. Blake (the appellant's wife) who advised him that the appellant had pinned her to the bed and ripped off her underwear. Mrs. Blake also advised Sergeant Haeseker that she believed that her husband was "on drugs."

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[5] The appellant lived on and was apprehended on Fort Gordon, Georgia.

[6] As already noted, the appellant was initially charged with two offenses – battery upon his wife and use of cocaine. The charge of battery was dismissed by the convening authority pursuant to a PTA. The appellant initially pled not guilty to both charges. Numerous motions by the defense were litigated after which a PTA was entered into wherein the appellant agreed to plead guilty to the alleged use of cocaine in exchange for the convening authority's agreement to dismiss the alleged battery.

During sentencing, Sergeant Haeseker testified that the appellant was cooperative and "offered us no trouble." Trial defense counsel did not ask Sergeant Haeseker any questions concerning the battery allegation and then objected when trial counsel attempted to do so during their cross examination of Sergeant Haeseker. The trial judge allowed the trial counsel to inquire into the reason for the appellant's apprehension, which was the allegation of spousal assault.

In the appellant's unsworn statement, the appellant stated that "on the 17th of July, we (the appellant and his wife) had a heated verbal altercation. She was extremely upset with me that day, one of the reasons being, that she knew the truth, that I had used cocaine that day." Based on this statement, the judge allowed rebuttal testimony concerning the "heated verbal altercation" including the spouse's initial statements that she had been assaulted on 17 July. The judge concluded that she would consider "just their [(Sgt Haeseker and Private First Class Toni Graham)][7] initial response and what they saw and what they observed within that initial ten minutes, and that's it." In rebuttal, the appellant made an oral unsworn statement wherein he said that the assault allegation as related by the military police was not correct.

Taking these two trial tactics into consideration, we hold there is no prejudice to the appellant. The trial defense counsel's tactic was clearly to show that the appellant had been cooperative with law enforcement officers once he was apprehended and that he truly cared for his spouse. The judge's decision to allow rebuttal evidence to the evidence introduced by the appellant was not "disastrous" as noted by the appellate defense counsel's brief – nor did it result in snatching "defeat from the jaws of victory."

As the Court noted in *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993), "[o]ne cannot read this record without appreciating the sustained, determined, professional effort made throughout by the trial defense [counsel]." We have carefully considered the allegations of ineffective assistance of counsel made by the appellate defense counsel but are completely satisfied that the appellant received competent representation at his trial. Our superior court has held that to show that counsel's performance was deficient "requires [a] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Dewrell*, 55 M.J. at 133 (citing *Strickland*, 466 U.S. at 687). In addition, we have repeatedly required this same standard. *See United States v. Terlep*, No. 01-0241/AF (30 Sep 2002). In the same light, we hold there were no such errors in counsel's performance in this case.

[7] PFC Graham was another military policeman who responded to the domestic disturbance call on the night in question.

Finally, we turn to the assertion that the imposition of a punitive discharge is inappropriately severe in this case. We disagree. We may affirm only such part or amount of the sentence as we find correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We are to ensure "that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In the 16 months preceding his trial, the appellant received one letter of admonishment, three letters of reprimand, and was twice reduced in grade pursuant to proceedings under Article 15, UCMJ. He also pled guilty to, and was convicted of, twice using cocaine.

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 (2001). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator