UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant WILLIAM BLAKE JR.
United States Air Force

ACM 34482 (f rev)

1 October 2003

Sentence adjudged 22 December 2000 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Mary M. 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, Major Terry L. McElyea, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

BRESLIN, Senior Judge:

The appellant pled guilty to wrongfully using cocaine on two occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge sitting alone as a general court-martial accepted the appellant's pleas and sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-2. The convening authority approved the sentence as adjudged, but also granted a waiver of automatic (also referred to as mandatory) forfeitures for the benefit of the appellant's family.

In our initial review of this case, the appellant alleged that his trial defense counsel provided ineffective assistance of counsel during the sentencing portion of the trial, and that the sentence was inappropriately severe. This Court found no prejudicial error and affirmed the findings and sentence. *United States v. Blake*, ACM 34482 (A.F. Ct. Crim. App. 3 Dec 2002) (unpub. op.). On 30 May 2003, the Court of Appeals for the Armed Forces granted the appellant's petition for review on the following issue:

> WHETHER APPELLANT'S TRIAL DEFENSE COUNSEL WAS INEFFECTIVE BECAUSE OF (A) HIS FAILURE TO INTRODUCE SPECIFIC EVIDENCE REGARDING THE RETIREMENT BENEFITS THAT APPELLANT WOULD FORFEIT AS A RESULT OF A PUNITIVE DISCHARGE; (B) HIS INSISTENCE ON INTRODUCING EVIDENCE THAT ULTIMATELY LED TO THE ADMISSION OF EVIDENCE OF THE CHARGE THAT HAD BEEN DISMISSED BY THE CONVENING AUTHORITY; (C) HIS FAILURE TO EFFECTIVELY REVIEW APPELLANT'S UNSWORN STATEMENT; AND (D) HIS FAILURE TO INTRODUCE SPECIFIC INFORMATION TO THE CONVENING AUTHORITY REGARDING THE IMPACT A PUNITIVE DISCHARGE WOULD HAVE ON APPELLANT'S RETIREMENT BENEFITS.

United States v. Blake, 58 M.J. 292 (2003) (summary disposition). The Court of Appeals for the Armed Forces set aside our decision, and ordered this Court to obtain an affidavit from the trial defense counsel responding to the allegations of ineffective assistance of counsel and to review the case anew. *Id.* We did so. We again find no error and affirm.

I. Background

In order to properly consider the trial defense counsel's performance during the sentencing proceedings, it is helpful to review all the circumstances surrounding the case. We consider these matters for the limited purpose of examining trial defense counsel's conduct.

The appellant entered active duty in the United States Air Force on 30 April 1981. He had an impressive career in the intelligence field and, through 19 years of service, rose to the rank of Senior Master Sergeant (E-8).

In 1999, he was assigned to the 31st Intelligence Squadron at Fort Gordon, Georgia. Soon thereafter, his career began a precipitous decline. He was formally reprimanded on two separate occasions for unprofessional conduct toward two junior enlisted females. He was also formally censured on several occasions for failing to go to his place of duty on time or wrongfully leaving work without permission. He was also reprimanded for writing over $1,000.00 in worthless checks during a two-week period.

On 24 March 2000, the appellant was punished under Article 15, UCMJ, 10 U.S.C. § 815, for wrongfully going from or failing to go to his place of duty five times in six days. His commander reduced him in rank to Master Sergeant (E-7) and reprimanded him.

Shortly thereafter, the appellant was arrested for trespassing by the county police. They found in his possession a "crack" pipe, used to smoke cocaine. The appellant claimed that he just found it, and the county authorities took no action. However, a report of the incident reached the appellant's commander who ordered the appellant to provide a urine sample for testing on 31 May 2000. The sample tested positive for the presence of cocaine.

Air Force authorities ordered the appellant into the 90-day outpatient drug abuse treatment program. As part of the program, the appellant was required to submit urine samples regularly for testing. About two weeks later, he submitted a urine sample that again tested positive for cocaine.

On 17 July 2000, the appellant was required to provide another urine sample for testing. He claimed that he reported in the morning but was told to return at a later time. The appellant did not provide a urine sample that day.

Later that same night, the appellant's neighbor called the military police (MP) to respond to a domestic disturbance at the appellant's quarters on Fort Gordon. The patrolmen arrived within a few minutes, and found the appellant's wife bruised and visibly upset. Mrs. Blake told the MPs that the appellant had come home acting nervous and paranoid, and that he had pinned her to the bed and ripped her panties. When he heard the children going to call the MPs he stopped, retrieved a plastic baggie, and flushed something down the toilet. He then took the car keys, stuffed something in his shorts, and went out to the car. Mrs. Blake followed and struggled with him, trying to get him to stay. He grabbed her arms, resulting in visible bruises. She retrieved the car keys, and the appellant ran off. Mrs. Blake informed the patrolmen that the appellant acted that way when he was on drugs.

The appellant returned to the quarters while the MPs were still there. They transported him to the police station and took a blood sample for testing. Unfortunately, the Army laboratory tested the blood for alcohol only. Finding none, they destroyed the sample. When Air Force authorities learned that the blood sample was unavailable for testing, they obtained a warrant based upon probable cause and seized a sample of the appellant's urine for testing. The laboratory for the Armed Forces Institute of Pathology tested the sample, which was positive for cocaine.

The appellant received his second nonjudicial punishment, in accordance with Article 15, UCMJ, on 4 August 2000 for failing to go to the urinalysis test on 17 July

2000 and for going to the gymnasium instead of work on 21 July 2000. He was reduced to the rank of Technical Sergeant (E-6).

The appellant then entered the drug treatment program as an in-patient. However, he left the hospital without authority on several occasions, and had a fourth urinalysis test positive for cocaine during this time. He was subsequently disqualified from the treatment program.

On 8 September 2000, the appellant was ordered into pretrial confinement. The confinement facility took another urine sample for medical purposes as part of his in-processing. It was also positive for cocaine.

The appellant's commander preferred court-martial charges against the appellant on 3 October 2000, charging him with using cocaine and assaulting his wife on 17 July 2000. At the formal investigation required by Article 32, UCMJ, 10 U.S.C. § 832, the government persuaded the investigating officer to include the evidence from the medical urinalysis incident to pretrial confinement as part of the offenses investigated. Thereafter, the government amended the specification alleging the wrongful use of cocaine to include "divers occasions" between 17 July and 8 September 2000. The allegation of the new offense was not sworn.

Trial began on 19 December 2000. After arraignment, trial defense counsel submitted a barrage of motions attacking the prosecution's case procedurally and substantively. Trial defense counsel's motions included: (1) requesting a new pretrial advice; (2) asking for a new Article 32, UCMJ, investigation; (3) moving to sever the charges; (4) moving to suppress the evidence obtained from the 20 July 2000 urinalysis sample for lack of probable cause; (5) moving to suppress the urinalysis results because of improper advice to the issuing magistrate; (6) moving to suppress the results of the 8 September 2000 urinalysis as the result of unlawful pretrial confinement; (7) requesting release from pretrial confinement during trial; and (8) excluding testimony about the appellant's wife's statements as a privileged communication. After a lengthy hearing, the military judge denied the defense motions.

The defense team then requested a recess. During the break, the defense negotiated a pretrial agreement with the convening authority, wherein the appellant agreed to plead guilty to using cocaine on two occasions and the government agreed to drop the assault charge. When trial resumed, the appellant pled guilty as required by the terms of the agreement, and stipulated to the surrounding events. The appellant affirmatively waived any claim of error arising from the military judge's ruling on each motion except the lawfulness of the pretrial confinement.

The defense then presented their case in sentencing. The appellant made an unsworn statement and commented on his change in tactics.

> 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.

The appellant now contends that his trial defense counsel provided ineffective assistance of counsel in several ways during the sentencing proceedings and post-trial processes. We considered each allegation in detail.

II. Law

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set out a two-pronged test for claims of ineffective assistance of counsel. Our superior court adopted this two-part test for claims of ineffective assistance of counsel in courts-martial. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). *See also United States v. Boone*, 49 M.J. 187, 196 (1998) ("the applicable standard of adjudication is the now familiar two-step inquiry of *Strickland*").

The first prong of the test requires the appellant to show that his 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." *Strickland*, 466 U.S. at 687. In evaluating counsel's performance, we do not scrutinize only a single act in isolation, rather "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690. "In considering the adequacy of counsel's performance, we view the totality of the attorney's actions and omissions and determine whether, under the circumstances, any other objectively reasonable lawyer might have taken the approach he actually took." *Crawford v. Head*, 311 F.3d 1288, 1318 (11th Cir. 2002). Indeed, we begin with a presumption that defense counsel provided competent assistance. *United States v. Cronic*, 466 U.S. 648, 658 (1984); *United States v. Lee*, 52 M.J. 51, 52 (1999). We "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The second prong of the test for ineffective assistance of counsel requires a showing of prejudice. An appellant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The right to effective assistance of counsel includes the sentencing portion of the trial (*United States v. Bono*, 26 M.J. 240 (C.M.A. 1988)) and post-trial proceedings (*United States v. Cornett*, 47 M.J. 128, 133 (1997)). This Court reviews claims of ineffective assistance of counsel de novo. *Lee*, 52 M.J. at 52; *United States v. Wiley*, 47 M.J. 158, 159 (1997).

An appellate court's examination of claims of ineffective assistance of counsel may require exploration into matters otherwise covered by the attorney-client privilege. Of course, the appellant's assertion that his counsel was ineffective waives the attorney - client privilege "as to matters reasonably related to that" assertion. *United States v. Lewis*, 42 M.J. 1, 5 (1995) (citing *United States v. Dupas*, 14 M.J. 28, 30 (C.M.A. 1982)). In light of the presumption of competence accorded trial defense counsel under *Strickland*, and no doubt concerned about the "scrambling of relationships" which results when a trial defense counsel is required to give evidence against a former client, our superior court has directed that an appellate court must review the allegations and the entire record, and first determine whether the appellant has overcome the presumption of

competence. *United States v. Ingham*, 42 M.J. 218, 224 (1995); *Lewis*, 42 M.J. at 6. If the appellant's allegations meet the threshold, a court may order further inquiry into the factual circumstances, either through affidavits or a post-trial evidentiary hearing. *United States v. Grigoruk*, 52 M.J. 312, 315 (2000).

III. Analysis

A. Specific Evidence of Financial Impact

The appellant contends trial defense counsel provided ineffective assistance of counsel during the sentencing proceedings by failing to introduce specific evidence of the financial impact a punitive discharge would have on his retirement benefits both at trial and in clemency matters submitted to the convening authority. We find no merit to this contention.

We first consider whether this constituted deficient performance. As indicated above, we review the defense counsel's conduct in light of all the attorney's acts and omissions. In order to be "deficient" under *Strickland*, the defense counsel's performance must be so incompetent that the appellant was effectively denied his Sixth Amendment right to counsel. *See Boone*, 49 M.J. at 190 (civilian defense counsel's failure to present any matters in extenuation or mitigation, other than the appellant's unsworn statement, constituted ineffective assistance of counsel); *United States v. Murray*, 42 M.J. 174, 178 (1995) (defense counsel's failures constituted a "total breakdown of the adversarial process").

We first note all the trial defense counsel's efforts during the sentencing hearing. Clearly the defense counsel's strategy to win the dismissal of some of the specifications on motion was intended to put the sentencing case in a better posture. The strongest evidence weighing in favor of the appellant in sentencing was his record of excellent duty performance for over 19 years, and trial defense counsel made this the focus of the defense sentencing case. Trial defense counsel presented evidence of the appellant's many significant accomplishments and the statements of co-workers attesting to the appellant's good military character. Trial defense counsel also presented evidence of the appellant's personal qualities and the impact of the court-martial upon the appellant's family, notwithstanding the government's attempt to present additional evidence of uncharged misconduct in rebuttal. Finally, trial defense counsel raised the issue of the impact of the appellant's loss of retirement benefits through an unsworn statement, and later argued to the military judge about the severe impact of a punitive discharge, including the adverse effect upon the appellant's ability to provide for his family.

We recognize that the defense counsel was limited in his ability to present matters on behalf of the appellant by the risk of opening the door to evidence of additional misconduct by the appellant, including uncharged instances of drug abuse and his failure

of the drug rehabilitation program. Any time a member faces the possibility of a punitive discharge, the member's rehabilitative potential is at issue. However, the trial defense counsel could not have offered opinion evidence of such a trait (if, indeed, such a witness existed), without running the risk that the witness would be cross-examined with "Did you know, would it change your opinion" type questions relating to the appellant's other uses of cocaine while in the drug rehabilitation programs. *See Michelson v. United States,* 335 U.S. 469 (1948); *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988). Moreover, the prosecution might have also countered with further opinion evidence about the appellant's lack of rehabilitative potential.

Presenting specific evidence of the financial value of the loss of potential retirement income was equally problematic, because the appellant's current enlistment would not take him past the 20 years of service required to be eligible to apply for retirement. The appellant entered active duty on 30 April 1981, a fact the military judge specifically noted at the conclusion of the providence inquiry. (R. at 529). The charge sheet reveals that the appellant's current enlistment began on 26 January 1995 for a term of 6 years. The appellant's enlistment would then expire on 26 January 2001, several months short of the 20-year mark. Thus, the appellant would have had to extend or reenlist to become eligible to apply for retirement. Moreover, the time the appellant spent in pretrial confinement (8 September 2000 to 21 December 2000, or 105 days) was "lost time" not creditable toward retirement, requiring an even longer extension to meet retirement eligibility requirements.

However, Air Force regulations barred the appellant from reenlisting or extending while court-martial charges were pending, court-martial action was under appellate review, or he was serving a sentence of a court-martial. Air Force Instruction (AFI) 36-2606, *Reenlistment in the United States Air Force*, Table 3.2, Items 12, 13, and ¶ 4.5 (21 Sep 1998). Furthermore, there was no real possibility of a waiver or exception under the appellant's circumstances. Paragraph 5.54, AFI 36-3208, *Administrative Separation of Airmen*, (10 Mar 2000), set out Air Force administrative policy: "Drug abuse is incompatible with military service and airmen who abuse drugs one or more times are subject to discharge for misconduct." Paragraph 5.55.2.1 of that regulation provided, "A member found to have abused drugs will be discharged," unless the member met all seven criteria for retention. The appellant did not. Additionally, the appellant's failure of the drug rehabilitation program provided a further basis for his administrative separation from the Air Force, regardless of the outcome of the court-martial. *See* AFI 36-3208, ¶ 5.31; AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, ¶ 3.16.2 (22 Jan 1999).

Reviewing the record, we conclude that a reasonable defense counsel in the same or similar situation could determine that presenting specific detailed information about potential lost retirement benefits would not be helpful. To the contrary, eliciting specific, detailed testimony on this issue would likely invite rebuttal emphasizing that a punitive

discharge would not cause the loss of the appellant's retirement benefits because the appellant was ineligible to apply for retirement in any case. In these unique circumstances, raising the issue of the loss of retirement benefits in a general way through the appellant's unsworn statement and counsel's argument was the best way to bring the issue to the military judge's attention without inviting rebuttal. For the same reasons, a reasonable defense counsel would not have presented specific data on lost retirement benefits to the convening authority.

Turning to the trial defense counsel's affidavit, it appears he was acutely aware of the appellant's ineligibility for retirement. Indeed, trial defense counsel indicated that when the appellant's "legal troubles began unfolding in the summer of 2000," he advised the appellant to reenlist or extend to get himself past the 20-year point. However, the appellant was unable to do so. Trial defense counsel knew that the appellant would not become eligible to apply for retirement, and so detailed data on the loss of retirement benefits would be speculative. Trial defense counsel was also aware that the trial judge had refused to admit similar evidence in other cases. For similar reasons, trial defense counsel knew that such information would be unhelpful in the clemency matters submitted to the convening authority. Finally, trial defense counsel knew that the military judge was a colonel in the Air Force and very experienced on the bench, and that she would know what was at stake for the appellant in this case. We find these trial and post-trial tactics reasonable, and we will not second-guess counsel on such matters. *Morgan*, 37 M.J. at 410.

The appellant argues "the retention of his retirement benefits was *the* paramount concern in any adjudicated sentence." (Supl. Pet. at 12). However, the appellant's statement at trial, quoted above, belies that later assertion. To the contrary, it is obvious that he rejected the advice of his counsel that litigating the charges before members offered the best opportunity to avoid a punitive discharge, and instead voluntarily elected to be tried by a military judge sitting alone.

The appellant contends that the defense counsel was required to submit specific financial data in this case. Citing *United States v. Luster*, 55 M.J. 67, 72 (2001), the appellant argues that "[a] general understanding of the impact a punitive discharge would have on retirement benefits is an insufficient substitute for the detailed presentation of a specific financial penalty." (Supl. Pet. at 11). However, the appellant's reliance on *Luster* is misplaced. In that case, the military judge did not allow the defense to present proffered specific information about the potential loss of retirement benefits, but allowed some general information. The reviewing court found error and, in assessing prejudice, concluded that general information was an insufficient substitute to eliminate the resulting prejudice. The language from *Luster* relied upon by the appellant concerned the prejudice flowing from an erroneous ruling; it does not stand for the proposition that defense counsel must submit detailed financial impact evidence in all cases.

The appellant also cites *Luster* for the proposition that the appellant "was clearly within the time frame wherein detailed evidence of income loss as a result of a punitive discharge was *required* for admission if offered." (Supl. Pet. at 12 (emphasis in original)). That is not correct. In *Luster*, our superior court found that the military judge abused her discretion in refusing to admit evidence of the appellant's retirement pay at specific ranks where the "appellant had 18 years and 3 months of military service *and he was serving in an enlistment which would normally result in his eligibility for retirement*. *Cf. United States v. Henderson*, 29 M.J. 221, 222 (C.M.A. 1989)." *Luster*, 55 M.J. at 71 (emphasis added). The appellant was not in an enlistment which would make him eligible to retire, and therefore did not meet the second requirement set forth in *Luster*. We also note the *Luster* opinion made a point to compare the *Henderson* decision, which held that the military judge did not abuse his discretion in finding estimates of lost retirement pay too collateral for admission where the appellant would have to reenlist to become eligible to apply for retirement. *Henderson*, 29 M.J. at 222. Under the circumstances of the appellant's case, where the "prospective administrative consequences of a sentence are so uncertain and remote as to substantially risk confusing the sentencing authority," *id.* at 223, the military judge would have been within her discretion to exclude such evidence.

Of course the issue before this Court is not whether the evidence might have been admissible, but whether it was ineffective assistance of counsel not to offer such evidence at trial or in post-trial clemency submissions. We are aware of no case law or standard of practice that requires that such evidence be produced in all cases, and the appellant has cited none. Although it has been offered in some cases within recent years, in many others it has not. Thus it cannot be honestly said that normal standards of practice require it. In a similar vein, service members at trial face daily the financial penalties of reduction in rank and punitive discharge, but it is not a customary practice for defense counsel to offer detailed data about potential future financial losses resulting from these punishments. We find that the conduct of the trial defense counsel in this respect was not deficient under prevailing professional norms. *United States v. Burt*, 56 M.J. 261, 264 (2002).

B. Opening the Door to Evidence of Assault and Review of Unsworn Statement

As noted above, the appellant was originally charged with assaulting his wife on 17 July 2000 by holding her down and ripping her underwear. During extensive pretrial motions, it became apparent that the appellant's wife had changed her story about what transpired on 17 July 2000, and would not testify for the prosecution. The military judge ruled that the appellant's wife's initial statements to the responding MPs, Staff Sergeant (SSgt) Eric Haeseker and Private First Class Toni Graham, were admissible as excited utterances. Subsequently, the assault charge was withdrawn as part of the pretrial agreement, and the appellant pled guilty to using cocaine on two occasions.

During the sentencing proceedings, trial defense counsel called SSgt Haeseker to testify about the "degree of cooperation and compliance Tech[nical] Sergeant Blake gave to authorities in connection with the apprehension" without going into "any of those peripheral details--of what happened that evening." (R. at 552). SSgt Haeseker testified that from the time of his first contact with the appellant until he was released from the MP station, the appellant was very cooperative and offered no trouble. Trial counsel then elicited testimony, over defense objection, that the appellant had been apprehended for spousal abuse that evening. Trial counsel asserted the additional evidence rebutted appellant's claim that he was truly cooperative by showing that he was simply trying to deflect interest from himself. The military judge allowed the evidence, but indicated its purpose was very limited.

The appellant then made a lengthy unsworn statement to the military judge recounting his many accomplishments throughout his Air Force career, his community service, and his personal life. He spoke in general terms about his marital separation and other personal problems. Turning to the events of his first cocaine use, he said, "On the 17th of July, we had a heated verbal altercation, and she was extremely upset with me that day, one of the reasons being she knew the truth, that I had used cocaine." (R. at 587). He went on to discuss seeking help at the mental health ward, and his wife's diagnosis of breast cancer. The appellant also refuted the basis for one of the Article 15 punishment actions, and provided additional personal information to the military judge.

The trial counsel then asked the military judge to consider the testimony of the MPs regarding Mrs. Blake's initial statements about what had occurred on the evening of 17 July 2000. The stated purpose was to show that the appellant's contention that this was a "heated, verbal altercation" was incomplete and therefore, misleading. (R. at 605-06). Over strenuous objection, the military judge allowed the government's rebuttal. Thereafter, the appellant reopened his unsworn statement and indicated that his wife's statements to the MPs on 17 July 2000 were false. (R. at 659).

On appeal, the appellant complained that trial defense counsel erred by calling SSgt Haeseker as a witness, because it resulted in admission of "evidence regarding the domestic assault that had been dismissed by the convening authority pursuant to the pretrial agreement . . . ." (Supl. Pet. at 13). The appellant also complained that trial defense counsel did not properly review the appellant's unsworn statement. He alleges that this failure resulted in the appellant making comments about the altercation with his wife on 17 July, and led to the military judge considering evidence of the spousal assault that would not otherwise have been admissible.

In an affidavit provided as required by our superior court, trial defense counsel explained that he recalled SSgt Haeseker because he believed it was important to show the military judge that the appellant was peaceful and cooperative in order to obtain the appellant's deferment of confinement for the Christmas holidays. In fact, the military

judge eventually supported that request. Trial defense counsel notes that he expected no rebuttal, because trial counsel had already argued that the topic was irrelevant. He also contends that it was error for the military judge to allow the testimony about the reasons for the appellant's apprehension, because it did not rebut the defense evidence of the appellant's cooperativeness with authorities.

Trial defense counsel's affidavit directly refutes the appellant's contention that he looked at the draft of the unsworn statement for "less than five minutes." He maintains that he reviewed the proposed unsworn statement extensively prior to trial. He also states that he felt the benefit of having the appellant state his version of events outweighed the risk of rebuttal, because the military judge had not heard the appellant's version of the incident.

We find that trial defense counsel's performance during the sentencing proceedings was not ineffective. It was not deficient performance for trial defense counsel to call SSgt Haeseker as a witness. Evidence of the appellant's cooperation with law enforcement authorities was relevant and admissible in extenuation. Contrary to the appellant's assertion, the evidence in rebuttal was admitted for the purpose of challenging his motive for cooperating with authorities. This matter was so tangential, and the evidence so speculative in nature, that its admission could not have prejudiced the appellant in sentencing.

There is a clear conflict between the affidavits regarding how much time trial defense counsel spent reviewing the unsworn statement. We find it unnecessary to resolve this factual issue however, because even if it were true, we are convinced it did not result in any material prejudice to the appellant's substantial rights. *United States v. Ginn*, 47 M.J. 236, 248 (1997). The evidence at issue was not compelling. The military judge was confronted with some conflicting evidence about the assault, but also knew that the charge had been dropped. In light of the fact that this case was tried before a military judge sitting alone we are convinced there was no prejudice to the appellant.

The 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court