UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN H. BONNER
United States Air Force

ACM 37371

19 April 2010

Sentence adjudged 21 October 2008 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge, confinement for 1 year and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

Pursuant to the appellant's pleas, a military judge convicted the appellant of one specification of fraudulent enlistment, one specification of failing to obey a lawful order, three specifications of divers wrongful use of a controlled substance, one specification of wrongful use of a controlled substance, one specification of wrongful possession of a controlled substance, two specifications of indecent exposure, and one specification of assault consummated by a battery, in violation of Articles 83, 92, 112a, 120, and 128, UCMJ, 10 U.S.C. §§ 883, 892, 912a, 920, 928.

Contrary to his pleas, a panel of officer members convicted the appellant of two specifications of wrongful sexual contact and one specification of assault consummated by a battery, in violation of Articles 120 and 128, UCMJ.[1] The adjudged and approved sentence consists of a bad-conduct discharge, one year and six months of confinement, forfeitures of all pay and allowances, and reduction to the grade of E-1.[2]

On appeal, the appellant asks this Court to set aside his indecent exposure convictions, to replace his indecent exposure and wrongful sexual contact convictions with disorderly conduct and assault consummated by a battery convictions, and to reassess the sentence or grant other appropriate relief. As the basis for his request, he opines that: (1) his trial defense counsel were ineffective because they failed to inform him that he would definitely be required to register as a sexual offender if he pled to and was found guilty of indecent exposure[3] and (2) as the requirement for sexual offender registration is too severe and onerous given the specific facts of this case, this Court should use its Article 66(c), UCMJ, 10 U.S.C. § 866(c), powers to replace his indecent exposure and wrongful sexual contact convictions with disorderly conduct and assault consummated by a battery convictions. We disagree and, finding no prejudicial error, we affirm the approved findings and sentence.

Background

Over the course of a three-month period of time, the appellant grabbed the breast of a fellow airman, pinched the buttocks of another airman, exposed his penis to female and male members of his unit, and exposed his buttocks to members of the public.[4] During the providency inquiry, Major (Maj) SC, one of the appellant's trial defense counsel, told the military judge that he had advised the appellant that as a result of pleading guilty to the indecent exposure offenses he might be required to register as a sexual offender in Texas. The military judged asked the appellant if he understood that as result of his pleas he might be required to register as a sexual offender. In response, the appellant stated that he understood and nonetheless wanted to plead guilty to the offenses.

Ineffective Assistance of Counsel Claim

It is well-established that service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J.

---

[1] Regarding Specification 3 of Charge IV, although the government attempted to prove the appellant's guilt of wrongful sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920, the members found the appellant guilty of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928.

[2] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to certain charges and specifications in return for the convening authority's promise to dismiss or not go forward on other charges and specifications and to not approve confinement in excess of twenty months.

[3] This assignment of error is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] The appellant referred to his act of exposing his buttocks to the public as "mooning."

469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was in fact deficient and, if so, (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). To establish a claim of ineffective assistance of counsel, the appellant must rebut this presumption by pointing out specific errors made by his defense counsel that were unreasonable under prevailing professional norms. *McConnell*, 55 M.J. at 482 (citing *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)).

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. 'In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Scott*, 24 M.J. at 188 (alteration in original) (quoting *United States v. Cronic*, 466 U.S. 648, 690 (1984)). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

While trial defense counsel are not expected to become knowledgeable about sexual offender registration laws enacted in every state, for cases tried after 29 November 2006, they are required to inform an accused prior to trial of any charged offense that requires registration as a federal sexual offender. *United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006). However, failure to so advise is not per se ineffective assistance of counsel—it is simply a factor to consider in evaluating allegations of ineffective assistance of counsel. *Id.*

The appellant asserts that prior to trial, Maj SC informed him that he did not believe that guilty pleas to the indecent exposure offenses would require the appellant to register as a sexual offender. The appellant further asserts that, in reliance upon this advice, he pled guilty. In response to the appellant's ineffective assistance of counsel assertions, the government submitted a post-trial affidavit from Maj SC. Maj SC's affidavit is silent on whether he advised the appellant prior to trial that he would not be required to register as a sexual offender.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone and must resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the record as a whole compellingly demonstrates the improbability of the asserted facts or when the affidavit alleges an error that would not result in relief even if the factual dispute was resolved in the appellant's favor. *Id.* Such is the case here. We need not decide whether Maj SC previously advised the appellant that he would not be required to register as a sexual offender because the record is abundantly clear that prior to the acceptance of pleas, Maj SC advised the appellant that any pleas to the indecent exposure offenses may require the appellant to register as a sexual offender. The appellant, understanding this, decided to nevertheless plead guilty. In short, prior to the military judge's acceptance of the pleas, Maj SC properly advised the appellant of the possible sexual offender registration requirement and the appellant decided to nonetheless plead guilty. Maj SC's conduct was not deficient.

Moreover, even assuming that his conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The appellant's decision to plead guilty to the indecent exposure offenses, a decision that came on the heels of the sexual offender registration inquiry that occurred on the record, belies his newfound assertion that he would not have pled guilty to the indecent exposure offenses if he had known that he would be required to register as a sexual offender. Under the aforementioned facts, we find no prejudice.

Nullification of the Indecent Exposure and Indecent Assault Convictions

This Court recently decided that it has the authority under Article 66(c), UCMJ, to nullify or not approve a conviction that was correct in law and fact. *United States v. Nerad*, 67 M.J. 748, 751-52 (A.F. Ct. Crim. App. 2009). In *United States v. Nerad*, this Court nullified a factually and legally sufficient child pornography conviction because we found that the conviction unreasonably exaggerated the appellant's criminality. *Id.* at 752-53. We are mindful that our superior court has certified the issue of whether service courts have the authority to nullify factually and legally sufficient convictions. Assuming that this Court's opinion in *United States v. Nerad* survives legal scrutiny, we decline to grant this appellant the requested relief. The appellant's indecent exposure and wrongful sexual contact convictions do not unreasonably exaggerate his criminality, and the fact that he is required to register as a sexual offender is a collateral consequence that does not warrant a nullification of his convictions based on the circumstances in this case.

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.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court