UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MICHAEL D. BOUCHILLON
United States Air Force

ACM 34910

12 July 2004

Sentence adjudged 16 November 2001 by GCM convened at Travis Air Force Base, California. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 20 years, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Jennifer Rider, Major Linette I. Romer, and Captain Kevin P. Stiens.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of three specifications of indecent acts with a child and three specifications of indecent liberties with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934; and three specifications of sodomy with a child, in violation of Article 125, UCMJ, 10 U.S.C. § 925. The general court martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 25 years, and forfeiture of all pay and allowances. The convening authority reduced the period of confinement to 20 years but

otherwise approved the sentence as adjudged. The appellant submitted four assignments of error: (1) That he received ineffective assistance of counsel; (2) That he was prejudiced by trial counsel's allegedly improper sentencing argument; (3) That his sentence is inappropriately severe; and (4) That the military judge should have recused himself. This last assignment of error was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error, we affirm.

Facts

The appellant and his family lived in on-base quarters at Travis Air Force Base, California. The appellant was 19 years old during the time alleged in the offenses. From time to time the appellant's 14-year-old brother-in-law, MS, would baby-sit the appellant's stepdaughter. While alone in the house with MS, the appellant would show him pornographic pictures from a website and engage in sexual activity with him. Specifically, the appellant would masturbate MS, fondle his genitals, engage in oral copulation, and have MS perform such activities on him. In addition, the appellant performed anal copulation on MS.

The evidence further established that MS brought his friends, KW and KP, to the appellant's house. His stated reason for doing so was his hope that, if he had friends with him, the appellant would not ask him to engage in sexual activity. However, the appellant engaged in sexual activity with these two boys as well. The activity included showing the boys pornographic materials, placing his hands on their genitals, and engaging in masturbation. KW was 14 years old at the time of the offenses and KP was 11. These acts formed the basis of the charges and specifications. Facts pertinent to the assignments of error will be discussed below.

Ineffective Assistance of Counsel

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). The test for ineffective assistance of counsel is three-pronged:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?";
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)); *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). *See also Strickland v. Washington*, 466 U.S. 668 (1984).

The appellant alleges two grounds in support of this assignment of error. First, prior to trial, the defense obtained funding for a forensic psychologist, Dr. Frank, to consult in preparation for the case. They engaged in some discussions with him but ultimately elected not to seek a delay in the case to accommodate his schedule. As a consequence, Dr. Frank did not examine the appellant nor did he testify at trial or provide matters in clemency. The appellate filings contain a lengthy affidavit from him, stating that, following trial and at the request of appellate defense counsel, he examined the appellant and as a result obtained information that would have been relevant to sentencing. One actuarial tool that Dr. Frank utilized in evaluating the appellant was the Sex Offender Risk Appraisal Guide, which enables the forensic psychologist to estimate the likelihood of recidivism. According to Dr. Frank, the appellant's probability of reoffense within 10 years ranged from 39 to 59 percent.

Dr. Frank also stated that the appellant was not a sexual predator within the meaning of forensic science, that the appellant fell within "a favorable category" for success in sex offender treatment, and that Dr. Frank could have assisted in the cross-examination of the prosecution expert, who testified as to victim impact. Appellate defense counsel argue that, had trial defense counsel sought a delay in the case in order to make Dr. Frank available, and had such information as Dr. Frank obtained post-trial been provided to the court or to the convening authority, there is a reasonable probability that the appellant would have received a lesser sentence.

The appellant also submitted an affidavit, in which he states his own belief that Dr. Frank's assistance would have benefited his case. Furthermore, as an additional ground, he states that, prior to trial, he and the military judge engaged in a 20-45 minute conversation while smoking in a designated smoking area. He does not assert that they discussed the case or that the judge was even aware of who the appellant was. The military judge advised counsel of this on the record, stating that at the time of the conversation he was unaware of the identity of the appellant. He stated that the conversation was "of a friendly nature" and that "[n]othing about this court was mentioned." The military judge further advised that, when the appellant told him that he was visiting the Area Defense Counsel, he stopped the conversation. Neither the prosecutor nor the defense counsel challenged the military judge. The appellant asserts that this failure to challenge the judge was another reason to find their representation ineffective.

Both trial defense counsel, Major P and Major D, submitted affidavits addressing this assignment of error. Major P, a circuit defense counsel, states that he provided Dr.

Frank with the investigative report in the appellant's case, along with verbatim testimony from the Article 32[1] investigation, witness statements, and other evidence.

Major P avers that the defense team spoke with Dr. Frank on several occasions prior to trial. Major P states that Dr. Frank advised him that the preliminary data was "not highly favorable" for the appellant's rehabilitation. Dr. Frank's affidavit confirms this assertion, as does the affidavit of Major D. Major P states that he had worked with Dr. Frank on two prior cases, during the course of which Dr. Frank explained to him relevant aspects of forensic psychology, and that he had obtained professional education in the uses of such evidence in trials. In addition, affidavits from both counsel indicate that they considered the results of a sanity board conducted on the appellant, the confidential portion stating that the appellant "appeared to have narcissistic personality traits" and that he "appeared to exhibit lack of impulse control."

Based on all of this, Major P states that he and Major D did not believe that evidence of future dangerousness would be helpful. He states that he knew that the prosecution expert would testify only as to victim impact. He notes that if the defense had introduced "future dangerousness" into the case, the prosecution would have then been permitted to elicit harmful facts on cross-examination or in rebuttal, to include the fact that the appellant exhibited certain "risk factors" for recidivism. Major P states he knew about risk factors based on his discussions with Dr. Frank and another psychologist in previous cases. These factors include the youth of the appellant, that his victims were young males, that two of the victims were extra-familial, and that one was prepubescent.

In addition, Major P asserts that other factors, such as the appellant's having made violent threats against others, having violated no-contact orders, and his own self-admitted impulsiveness, would likewise become relevant in challenging any possible favorable evidence as to future dangerousness. Both trial defense counsel state that their strategy was not to seek a continuance to accommodate Dr. Frank's schedule or otherwise to present evidence of the appellant's probability for recidivism. Major D's affidavit asserts that the appellant concurred with their decision.

Major P further states that nothing in Dr. Frank's affidavit changed his mind as to this course of action. While not questioning the validity of Dr. Frank's medical conclusions, Major P asserts that, in his judgment, testimony from Dr. Frank would not have benefited the appellant. For example, he opines that even a 39 percent chance of recidivism within 10 years would on balance have been more likely to hurt his client. For similar reasons he discounts the value of the other areas of possible testimony by Dr. Frank.

[1] Article 32, UCMJ, 10 U.S.C. § 832.

Furthermore, both he and Major D state that they discussed the value of challenging the military judge but concluded that, on balance, the conversation in question might have served to humanize the appellant in the eyes of the military judge and, therefore, be beneficial in sentencing. In any event, they did not believe that such a challenge would be likely to succeed. Major D stated that the appellant agreed with the decision not to challenge the judge.

Examining this case in light of *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we find that many of the appellant's assertions are speculative or conclusory in nature. Furthermore, we find that trial defense counsel have not denied the underlying facts contained in Dr. Frank's affidavit; rather, they have disagreed with the legal significance of those facts. Neither do they deny that the military judge had a conversation with their client nor that they elected not to challenge him. Therefore, we conclude that we can resolve this assignment of error without post-trial fact finding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

After careful consideration of the appellate filings and the record as a whole, we find that trial defense counsel have articulated a reasonable explanation for their actions at trial. The decision not to introduce future dangerousness is clearly defensible. We find no basis to second-guess their position that such testimony as Dr. Frank would have provided could forseeably have ended up hurting their client. A 39 to 59 percent probability for recidivism within 10 years after release is not clearly mitigating. In any event, such evidence would arguably have permitted the admission of uncharged misconduct, which the defense had kept from the sentencing authority through the pretrial agreement.

The defense relies upon *Wiggins v. Smith*, 539 U.S. 510 (2003) in support of this assignment of error. In *Wiggins*, the Supreme Court held that defense counsels' failure to adequately investigate for mitigation evidence fell short of the standard for effective counsel set forth in *Strickland*. By failing to obtain easily discoverable information about the defendant's unfortunate childhood, counsel foreclosed the presentation of evidence that might have swayed at least one juror to resist the imposition of death. *Id*. at 536. Likewise, in the case sub judice, appellate defense counsel believe that trial defense counsel did not conduct an investigation sufficient to enable them to make an informed choice as to whether or not to present the sort of evidence described by Dr. Frank.

We conclude that *Wiggins* is distinguishable from the appellant's case. In the first place, as stated above, *Wiggins* involved the death penalty, which perforce entails a different level of judicial scrutiny. More to the point, however, is that in *Wiggins* trial defense counsel failed to conduct an adequate investigation to support their chosen strategy, which included the presentation of at least some mitigating evidence. *Id*. at 526-27. By failing to ascertain the true scope and nature of such information, counsel denied themselves access to the facts necessary to make an informed strategic decision.

The appellant's reliance upon *Wiggins* would be more persuasive had Major P and Major D declined to present evidence of future dangerousness because they had neglected to fully explore the facts needed to support such a strategy. As it stands, however, we find that the investigation that they conducted—which entailed extensive pretrial discovery into the facts and circumstances of the offenses as well as the disciplinary background of the appellant, a sanity board, and discussions with Dr. Frank—was adequate to support their conclusion that evidence from Dr. Frank would likely do more harm than good, both in sentencing as well as clemency. Therefore, we hold that their conduct in preparing for and conducting the case for the appellant, including the decisions to not submit forensic evidence or challenge the military judge, were reasonable and the appellant was not denied effective assistance of counsel.

We resolve the other issues adversely to the appellant. As to whether the trial counsel's argument was improper, we conclude that the appellant's failure to object waived the issue. Rule for Courts-Martial (R.C.M.) 1001(g); *United States v. Sherman*, 32 M.J. 449 (C.M.A. 1991). In any event, even if erroneous, the argument did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). Given this was a bench trial, we can presume the military judge properly applied the law and filtered out any impermissible argument. *See United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000).

Concerning sentence appropriateness, we find no reason to compare the appellant's sentence with those cases he cites in his appellate filings. *See United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). We conclude that the sentence adjudged and approved is not inappropriately severe. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Finally, we conclude trial defense counsel waived any error concerning bias of the military judge. R.C.M. 902(e). Even if not waived, the military judge did not abuse his discretion in failing sua sponte to disqualify himself. We conclude that his prior interaction with the appellant would not cause his impartiality to reasonably be questioned. R.C.M. 902(a); *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001).

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 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator