**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant MICHAEL M. BRIDGES**
**United States Air Force**

**ACM 38141**

**15 October 2013**

Sentence adjudged 27 January 2012 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Dawn R. Eflein and J. Wesley Moore.

Approved Sentence: Dishonorable discharge, confinement for 15 years, total forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

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

Before

ROAN, HECKER, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial, the appellant was convicted, consistent with his pleas, of aggravated sexual contact with a child under the age of 12; aggravated sexual contact by use of force with a child who had attained the age of 12 but had not yet attained the age of 16; assault consummated by a battery; assault consummated by a battery on a child under the age of 16 (eleven specifications); wrongfully communicating a threat; committing indecent acts upon a child under the age of 16 (two specifications); and taking indecent liberties with a child under the age of 16, in violation of Articles 120, 128 and 134, UCMJ; 10 U.S.C. §§ 920, 928, 934. A panel of officer members sentenced the appellant to a dishonorable discharge, confinement for 30 years, forfeiture of all pay and

allowances, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority lowered the confinement to 15 years and approved the remainder of the sentence as adjudged.

On appeal, the appellant contends (1) He received ineffective assistance from his civilian trial defense counsel when that counsel failed to properly investigate his case, failed to tell him he would have to register as a sex offender if he pled guilty, and told him to lie to the military judge during the guilty plea inquiry;[1] (2) The military judge abused his discretion by failing to ensure he understood he would have to register as a sex offender; and (3) His approved sentence is inappropriately severe.[2]

*Background*

In February 2002, the appellant married a woman, AB, with three children aged 7, 5, and 2. The couple also had three children together between the years of 2001 and 2005. The appellant and AB were stationed in Germany from April 2003 until September 2009, when they filed for legal separation and AB and the children moved to Texas. Although AB had been aware of her children's allegations that the appellant was physically and/or sexually abusing them for several years, and had witnessed some of the abuse herself, she did not report the allegations until May 2010, near the end of their divorce proceedings.

After the allegations came to the attention of military investigators, the appellant was assigned a local military defense counsel in August 2010. He also retained a civilian defense counsel in Germany in April 2011 after charges were preferred and in advance of the Article 32, UCMJ, 10 U.S.C. § 832, investigation held in June 2011. According to declarations submitted on appeal, this civilian counsel and the military defense counsel interviewed multiple witnesses who ultimately testified at the Article 32, UCMJ, hearing. The convening authority referred the case to trial in August 2011, but directed it take place at a base in Texas because the appellant's wife was unlikely to travel back to Germany due to an outstanding warrant there for her arrest. At the appellant's arraignment in August 2011, the appellant unsuccessfully moved to keep the case in Germany, arguing that the transfer to Texas would force him to sever his relationship with his civilian defense counsel due to the increase in expenses.

In September 2011, the appellant retained a new civilian defense counsel who was based in Washington, D.C. On 24 January 2012, the appellant's court-martial re-convened in Texas, and the defense litigated several motions asking that the Article 32, UCMJ, investigation be reopened, that certain tape-recorded conversations between the

[1] That aspect of the ineffective assistance of counsel issue involving being told to lie is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] This issue is raised pursuant to *Grostefon*.

appellant and his wife be suppressed, and that the child victims not be permitted to testify remotely. The military judge denied all three motions.

The court-martial was then in recess until 26 January 2012, to allow the parties additional time to interview witnesses. On 26 January 2013, prior to the court-martial reconvening, the parties agreed to a pretrial agreement where the appellant would plead guilty to most of the charges in exchange for a confinement cap of 15 years. The appellant then pled guilty to multiple offenses relating to his abuse of his children and stepchildren over a multi-year timeframe. During the guilty plea inquiry, he described in detail striking, shoving, kicking and punching them on multiple occasions; fondling himself on multiple occasions when he became sexually aroused while wrestling with his two stepdaughters and having his stepson witness and "referee" these activities; rubbing the buttocks and genital area of one of his stepdaughters while lying in bed behind her; threatening to kill or hurt that stepdaughter if she reported his physical and sexual abuse of the children; and masturbating in the presence of his stepson.

*Ineffective Assistance of Counsel*

We review de novo claims of ineffective assistance of counsel, including when an appellant challenges a guilty plea on those grounds. *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, including as they are deciding whether to plead guilty to an offense. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (citing *Missouri v. Frye*, 566 U.S. __, 132 S. Ct. 1399, 1405 (2012); *Lafler v. Cooper*, 566 U.S. __, 132 S. Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 363-65 (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*, 562 U.S. __, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). A reviewing court does not second-guess strategic or tactical decisions by trial defense counsel, as long as the counsel made an "objectively reasonable choice in strategy from the alternatives available at the time." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2011); *see also United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993); *United States v. Davis*, 60 M.J. 469, 475 (C.A.A.F. 2005).

The appellant claims his civilian counsel was ineffective in his trial preparation and in the advice he provided to the appellant and that his guilty plea should therefore be set aside. He has submitted a declaration describing his observations of the civilian defense counsel's preparation for trial, the civilian defense counsel's predictions about the government's likelihood of success at trial, and his advice to the appellant, as well as declarations from his parents, his girlfriend, his prior civilian defense counsel, and several individuals who testified at the appellant's Article 32, UCMJ, hearing. In response to an order from this Court, the appellant's military and civilian trial defense attorneys submitted affidavits addressing these allegations.

One of the appellant's allegations is that the civilian defense counsel failed to investigate his case and ensure certain defense witnesses would be present for his trial, and that the absence of these witnesses "heavily factored" into his decision to plead guilty. In his affidavit, the civilian defense counsel describes his preparation, which included a review of the summarized testimony of the witnesses from the Article 32, UCMJ, investigation, a review of the videotaped testimony of the appellant's ex-wife and other information made available to him by the appellant, and conducting research and drafting the motions filed on 24 January 2012. The affidavits of both trial defense counsel agree the military defense counsel was responsible for submitting the defense witness list on 10 January 2012 and arranging for the testimony of witnesses who resided in Germany. When the appellant expressed concern to him about his witnesses not being in place days prior to the trial, his military defense counsel explained this was not unusual, given the associated expense. The military defense counsel's affidavit also indicates he has "no doubt" that the witnesses would have been present for trial if they were needed and that the appellant never indicated his decision to plead guilty was based on the status of the witnesses.

The appellant also implies his civilian defense counsel improperly advised him to plead guilty. He claims the attorney was originally optimistic about the defense's chances of success at a litigated trial but that opinion changed after he interviewed two of the appellant's stepchildren the week of trial. The civilian defense counsel then advised the appellant he was likely to be convicted of many of the offenses and recommended he enter into a pretrial agreement with the Government. In his affidavit, the civilian defense counsel described interviewing the appellant's children with the defense expert psychologist, where the children provided very detailed, specific, and credible recollections of the appellant's abuse. After consulting with the defense expert, the civilian defense counsel came to believe the appellant would be convicted of abusing the children and would face decades in prison. Accordingly, he discussed the possibility of a pretrial agreement with the appellant and, after the appellant agreed to plead guilty, he approached the Government with proposals of 10, 12.5 and 15 years. The convening authority agreed to a 15-year cap on 26 January 2012, and the appellant entered a guilty plea to multiple specifications.

Prior to entering guilty pleas, the appellant told the defense expert consultant he wanted to talk to his civilian defense counsel about pleading not guilty to certain specifications. When that meeting was arranged, the appellant's declaration indicates the defense counsel became "noticeably agitated and proceeded to yell in a loud manner that I must convince the judge that I did, in fact, do the alleged acts or that I risked my life." The declarations from the appellant's parents indicate he told his lawyers he was not actually guilty of these offenses and that the civilian defense counsel responded by telling the appellant he needed to lie to the judge. The affidavits of both defense counsel describe the civilian defense counsel "forcefully" telling the appellant he could not lie to the military judge, and that he could only plead guilty if he was, in fact, guilty and willing to tell the military judge what he had done. The military defense counsel also advised the appellant of this on several occasions prior to January 2012.

We note the accused "bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Even if there are opposing affidavits raising a factual dispute that is "material" to the resolution of the post-trial claim, we can resolve the claim without a fact-finding hearing if an assessment of the appellate filings (apart from the conflicting declarations) and the record as a whole compellingly demonstrate the improbability of the facts alleged by the appellant. *United States v. Ginn*, 47 M.J. 236, 244-45, 248 (C.A.A.F. 1997); *United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004).

In a guilty plea case, a fact-finding hearing should not be ordered if the appellate court's review of the pleadings and court-martial record "conclusively show that [an appellant] is entitled to no relief." *Ginn*, 47 M.J. at 244 (alteration in original). In conducting this review, we must consider whether the factual allegations raised by the appellant contradict his admissions during the guilty plea inquiry, including his avowed satisfaction with his trial defense counsel. *Id.* If an appellant's post-trial allegation of fact covers a matter within the record of his earlier guilty plea and no reason is provided for rejecting the earlier assertion by the appellant, his post-trial allegation can be rejected as inherently incredible and no rehearing should be ordered. *Id.* at 245.

We find the appellant has failed to meet his burden of establishing deficient performance by his civilian defense counsel, or by his defense team regarding their pretrial investigation and contact with potential defense witnesses. *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001) (the effectiveness of counsel is measured by the combined efforts of the defense team as a whole). The affidavits by the defense counsel indicate the counsel both made "reasonable investigations" of the case and were preparing to have defense witnesses available to testify at trial. *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999) (defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigation unnecessary). Following the investigation conducted by both counsel and after determining that the appellant faced the likelihood of a significant sentence, the civilian defense counsel recommended to the appellant that he enter into a pretrial agreement, and successfully negotiated an agreement which ultimately halved the confinement adjudged by the panel. There are reasonable explanations for the civilian defense counsel's actions and advice, and his level of advocacy on the appellant's behalf was not "measurably below the performance ordinarily expected of fallible lawyers." *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks and alterations omitted) (quoting *United States v. DiCupe*, 21 M.J. 440, 442 (C.M.A. 1986)). Furthermore, we note that the appellant expressed satisfaction with his defense team at trial, including that he was "most definitely satisfied" with their work relative to the pretrial agreement.

Regarding the appellant's claim under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his civilian defense counsel told him to lie to the military judge during his guilty plea inquiry, we find the record compellingly demonstrates the improbability of this allegation, and that the appellant has failed to meet his burden. Both counsel indicate they advised the appellant he could not lie to the military judge, and the civilian defense counsel denies ever telling the appellant otherwise. Before engaging in the guilty plea inquiry with the appellant, the military judge advised him he must actually be guilty and would be required to admit every element of the offenses. A similar discussion took place between the military judge and the appellant regarding the stipulation of fact entered into evidence in the case. Notably, the appellant's declaration does not allege that he did, in fact, lie to the military judge during his guilty plea inquiry, nor does it allege that he is innocent of the allegations he pled guilty to.

*Sex Offender Registration*

The appellant contends the military judge abused his discretion in accepting his guilty plea to the sexual assault charges without ensuring the appellant understood he would have to register as a sex offender as a result of that plea. He also claims his civilian defense counsel was ineffective because he never told him he would have to register as a sex offender if he pled guilty to the sexual abuse allegations. We find against the appellant on both grounds.

In *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013), our superior court held a military judge abused his discretion when he failed to question the appellant's defense counsel about the accused having to register as a sex offender as a consequence of his guilty plea. Here, the military judge did ask the civilian defense counsel if he had informed the appellant about sex offender registration, and the defense counsel responded affirmatively. The trial then recessed for the night. The following morning, the military judge asked the appellant if he still wanted to plead guilty but did not specifically ask the appellant if the sex offender advice had indeed been provided to him. The appellant

contends this was an abuse of discretion by the military judge and that his guilty plea should be set aside. We disagree. The military judge's colloquy with the civilian defense counsel complied with the requirements of *Riley*.

The appellant's post-trial declaration contends his civilian defense counsel never advised him of this requirement, that this failure constituted ineffective assistance of counsel, and that he would not have pled guilty if he had been aware of the requirement. In contrast, the declarations of both trial defense counsel describe their pretrial advice to the appellant that he would be required under federal and state law to register as a sex offender based on his guilty plea to child sexual abuse charges. Our review of the record as a whole compellingly demonstrates the improbability of the appellant's claim that he was unaware of this requirement. *Ginn*, 47 M.J. at 248. Accordingly, we find he has not met his burden of demonstrating that his civilian defense counsel was ineffective.

*Sentence Severity*

Pursuant to *Grostefon*, the appellant next argues that his sentence consisting of a dishonorable discharge and 15 years of confinement is inappropriately severe. To support his claim, the appellant cites his good military record and lack of any government evidence regarding his lack of rehabilitation potential. We find the sentence appropriate.

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We "may affirm only such findings of guilty and the sentence or 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 assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 142, 146 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We next consider whether the appellant's sentence was appropriate "judged by 'individualized consideration' of the particular [appellant] 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. Under these circumstances, we find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[3] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a); 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] The promulgating order contains a clerical error regarding the date the sentence was adjudged. To correct this clerical error, we direct the convening authority to withdraw the original promulgating order and substitute a corrected order. Rule for Courts-Martial 1114; Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10 (6 June 2013).