UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain WENDY C. CARDONA
United States Air Force

ACM 37362

08 March 2010

Sentence adjudged 27 October 2008 by GCM convened at Travis Air Force Base, California. Military Judge: Charles E. Wiedie (sitting alone).

Approved sentence: Dismissal.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Mark L. Waple, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted her of one specification of divers violation of a lawful general regulation, one specification of divers fraternization, and one specification of divers adultery, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The appellant's adjudged and approved sentence consists of a dismissal. On appeal, the appellant asks this Court to set aside her sentence and remand the case for a sentence rehearing. As the basis for her request, she opines that her trial defense counsel provided ineffective assistance during the sentencing portion of the trial because they failed to

present evidence of her Bipolar II disorder diagnoses by Dr. MR and Dr. JW. We disagree with the appellant's assertion. Finding no prejudicial error, we affirm.

Background

In January 2008, Staff Sergeant (SSgt) JT attempted suicide after discovering his wife's infidelity. SSgt JT was admitted for inpatient psychiatric treatment at the David Grant Medical Center and while there, he received treatment from the appellant. After his release from the hospital, the appellant and SSgt JT developed a personal relationship, and on two occasions they engaged in sexual intercourse. During the same time period, they socialized together, engaged in personal conversations, and drank alcohol together.

On 5 August 2008, the appellant was admitted for inpatient psychiatric treatment at Heritage Oaks Hospital, where she was diagnosed with Bipolar II disorder. In the diagnostic portion of the appellant's Heritage Oaks Hospital report, her civilian psychiatrist stated, inter alia, that the appellant has a "history of using shrooms." On 12 August 2008, Dr. MR, a member of the appellant's medical evaluation board, diagnosed the appellant with Bipolar II disorder. On 12 October 2008, Dr. JW, a civilian psychologist, confirmed the appellant's Bipolar II disorder diagnosis.

Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Service members unquestionably have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 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) (citing *Strickland*, 466 U.S. at 687); *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).

In response to the appellant's ineffective assistance of counsel assertion, the government submitted post-trial affidavits from the appellant's trial defense counsel,

Major ME and Captain MF. The trial defense counsel assert that they made a tactical and strategic decision not to admit Dr. MR's and Dr. JW's reports, or any other mental health report on the appellant, for fear of disclosing the appellant's Heritage Oaks Hospital report and her civilian psychiatrist's statement that the appellant has a "history of using shrooms." Both state that such a disclosure would not have been in keeping with the appellant's desires and Captain MF asserts that she believed the disclosure of the appellant's alleged use of hallucinogenic mushrooms could have tarnished the appellant's character before the court and could have resulted in a more severe sentence.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone; rather, we must resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, in the case at hand the affidavits do not conflict. All acknowledge that the appellant's trial defense counsel failed to admit Dr. MR's and Dr. JW's reports. The question is whether such a failure constitutes deficient conduct and whether the appellant was prejudiced by her counsel's action. We answer both questions in the negative. The appellant's trial defense counsel made a tactical and strategic decision not to admit Dr. MR's and Dr. JW's reports and we will not second-guess these tactical and strategic decisions. Put simply, their conduct was not deficient.

Moreover, assuming, arguendo, deficient conduct, 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. Not only is there no reasonable probability that the appellant would have benefitted from the admission of Dr. MR's and Dr. JW's reports, it is possible the disclosure of her alleged pre-service drug use could have harmed her sentencing case. Under the aforementioned facts, we find no prejudice.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court