UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER D. CHASE
United States Air Force

ACM 35404

30 January 2004

Sentence adjudged 10 September 2002 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: John J. Powers (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major John D. Douglas, and Major Linette S. Romer.

Before

PRATT, GRANT, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

The appellant was convicted, by mixed pleas, of one specification of conspiracy to sell military property, two specifications of sale of military property, and two specifications of knowingly receiving stolen property, in violation of Articles 81, 108 and 134, UCMJ, 10 U.S.C. §§ 881, 908, 934. The approved sentence was a dishonorable discharge, confinement for 24 months, and reduction to E-1.

The appellant argues that his conviction for conspiracy is not legally and factually sufficient. This issue is divided into two sub-issues. The first sub-issue concerns

whether there is sufficient evidence to prove the appellant conspired with Airman (Amn) Smith to sell night vision goggles. The second sub-issue concerns whether there is sufficient evidence to prove the appellant conspired with Amn Smith to sell seven bulletproof vests.[1] The appellant also argues that he received ineffective assistance from his trial defense counsel.[2]

I. Factual Background

The appellant pled guilty to receiving several items of stolen military property and selling those items on the Internet auction site, E-Bay, including a pair of night vision goggles and three bulletproof vests. This plea was supported by a stipulation of fact and an extensive providence inquiry conducted by the military judge. The appellant pled not guilty to a specification alleging conspiracy to sell military property (including the goggles, the vests and a pair of Gore-Tex pants), but the military judge found him guilty of that specification, except for the words "and a pair of Gore-Tex pants."

The appellant and Amn Smith were roommates. Amn Smith worked in supply. He stole military property, including night vision goggles and seven bulletproof vests, and stored the property at the appellant's residence. The appellant used E-Bay to auction the night vision goggles and three bulletproof vests. The three bulletproof vests were sold to Mr. Mark Altman, the owner of a police equipment distribution business. When Mr. Altman inquired about purchasing four additional bulletproof vests, the appellant informed Mr. Altman to get in touch with Amn Smith, as the appellant was "working in association with Smith."

Through a stipulation of expected testimony from Technical Sergeant (TSgt) Daniel Leao, a second connection was established between the appellant and "a friend" who helped the appellant sell items over E-Bay. TSgt Leao purchased Gore-Tex pants over the Internet using an e-mail account registered to the appellant. In explaining a shipping problem to TSgt Leao, the appellant stated that "his friend had sent the pants out in the mail" but "his friend must have copied" the address incorrectly.

The appellant testified that he had sold the night vision goggles without Amn Smith's knowledge. He also testified that he did not accept payment for the transaction involving four of the seven bulletproof vests. Due to the lack of knowledge of Amn Smith concerning the sale of the night vision goggles and the fact that the appellant received no money for the sale of four of the seven bulletproof vests, the appellant submits there is insufficient evidence to prove a conspiracy to sell the night vision goggles and four bulletproof vests.

[1] This issue is raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] This issue is raised by the appellant pursuant to *Grostefon*.

The appellant also asserts his trial defense counsel was ineffective in three areas. First, he contends he informed his trial defense counsel that two government witnesses falsely testified during findings and his counsel failed to raise the issue to the court. Second, he submits his trial defense counsel recommended that he not testify. The appellant wanted to let the court know why he committed the charged acts and believes that if he had testified he would not have received such a harsh sentence. Third, he alleges his trial defense counsel did not allow him to accept a pretrial agreement offer, which would have limited his punishment to a bad-conduct discharge and 16 months confinement, substantially less than the dishonorable discharge and 24 months confinement he received at trial. The trial defense counsel has filed a declaration disputing each of the assertions of ineffective representation.

II. Legal and Factual Sufficiency

We may affirm only those findings of guilt that we find correct in law and fact and that we determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Every reasonable inference from the evidence of record will be drawn in favor of the prosecution. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). We review legal and factual sufficiency de novo. Article 66 (c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

A conspiracy in violation of Article 81, UCMJ, requires:

> (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
>
> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Manual for Courts-Martial, United States, (*MCM*), Part IV, ¶ 5(b) (2002 ed.). The agreement in a conspiracy need not be in any particular form or manifested in any formal words. "It is sufficient if the minds of the parties arrive at a common understanding to

accomplish the object of the conspiracy, and this may be shown by the conduct of the parties." *MCM*, Part IV, ¶ 5(c)(2). In addition, the existence of a conspiracy to sell the night vision goggles and bulletproof vests may be proved through circumstantial evidence. The common understanding or the agreement may be shown by the conduct of the parties. "The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play." *MCM*, Part IV, ¶ 5(c)(2).

In this matter, the appellant and Amn Smith, the co-conspirator, lived together. While living together, Amn Smith stole military property and stored it at their residence. The appellant used E-Bay to auction the night vision goggles and three of the seven bulletproof vests. During negotiations with the purchaser of the bulletproof vests, the appellant instructed the purchaser to get in touch with the appellant's "friend or associate or business partner" concerning the purchase of four additional vests. In an e-mail message to another purchaser concerning the sale of Gore-Tex pants, the appellant referenced "a friend" as having made an addressing mistake on the package that resulted in a delay in the delivery of the pants.

It is reasonable to infer from the above facts the existence of an agreement between the appellant and Amn Smith to sell government property consisting of night vision goggles and seven bulletproof vests. One conspirator stole government property and the other conspirator knew the government property was stolen. The stolen property was stored in the joint residence. Both were active in its re-sale. The appellant posted the property on E-Bay and conducted negotiations. When the appellant referred to Amn Smith as his "friend, associate or business partner" and communicated that he and Amn Smith were working together, it is reasonable to conclude that Amn Smith was the individual the appellant was referring to when discussing the shipping problem with a customer concerning the Gore-Tex pants. All of this evidence, when considered together, establishes beyond a reasonable doubt, that the appellant and Amn Smith had an agreement to sell stolen military night vision goggles and bulletproof vests.

It is of no merit that the Amn Smith had no knowledge of the particulars of the sale of the night vision goggles. Amn Smith stole the goggles and stored them at their shared residence. It is reasonable to conclude that the conspirators had agreed to sell the stolen military property, as was demonstrated by their actions concerning the bulletproof vests. When the appellant sold the night vision goggles, he was merely carrying out the tacit agreement between himself and Amn Smith. Applying the aforementioned tests for legal and factual sufficiency, we find that the conviction for conspiracy to sell government property is both legally and factually sufficient.

III. Ineffective Assistance of Counsel

The second issue before this Court is whether trial defense counsel provided ineffective assistance of counsel to the appellant. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set out a two-pronged test for error and prejudice under such circumstances. "First, the defendant must show that 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." *Id.* 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 (C.A.A.F. 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. In order to demonstrate 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 Court has carefully reviewed the appellant's declaration and his trial defense counsel's declaration and its two attachments regarding the appellant's claims of ineffective assistance of counsel. We find no merit in any of the assertions of ineffective assistance.

IV. 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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator