UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain MARC P. CHOISNARD
United States Air Force

ACM 36654

15 July 2008

Sentence adjudged 21 September 2005 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dismissal and confinement for 4 years.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major John Page, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jefferson E. McBride.

Before

FRANCIS, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at Kadena Air Base (AB), Japan before a military judge alone. Consistent with his pleas he was convicted of two specifications of willful dereliction of duty[1], one specification of stealing private property of a value less than $500, and one specification of conduct unbecoming an officer for various acts related to conduct with enlisted troops.

[1] One specification was for violating crew rest requirements; the other was for failing to refrain from consuming alcoholic beverages within 12 hours of his flight time.

Contrary to his plea, the appellant was also convicted of one specification of assault with intent to commit rape of Airman (Amn) AH. The charges were in violation of the UCMJ, Articles 92, 121, 133, and 134, respectively, 10 U.S.C. §§ 892, 921, 933, and 934. The adjudged and approved sentence consisted of a dismissal and four years of confinement.

The appellant raises five issues on appeal. First, the confinement portion of his sentence is inappropriately severe. Second, the military judge erred in allowing trial counsel to argue the appellant failed to apologize to the victim of his crime when the appellant plead not guilty to the charge. Third, the trial court lacked jurisdiction over the larceny because, under the Status of Forces Agreement (SOFA), Japan had primary jurisdiction and they did not waive their primary right of jurisdiction. Fourth, the appellant received ineffective assistance of counsel at trial and finally, the appellant was denied due process because unlawful command influence impacted his case. The final three issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We discuss the issues in the order which the appellant raises them in his brief, and for the reasons set forth below, we find against the appellant and grant no relief.

Background

The appellant was a poster boy for success in the Air Force. He was a prior enlisted troop who was accepted into the Air Force Academy. Upon graduation, he became a pilot flying RC-135 reconnaissance aircraft. Unfortunately, he apparently struggled with the concepts of duty and honor. The charges all stem from a single evening of misconduct in which the appellant violated virtually every value that men and women in uniform cherish.

While on temporary duty (TDY) from Offutt Air Force Base (AFB), Nebraska, the appellant and his crew made a stop at Kadena Air Base (AB). After checking into their civilian hotel, he and a few of the other crew members made a trip downtown for an evening of relaxation. Despite crew rest scheduled to begin at 2200 hours, they remained out on the town and did not leave the bars until at least 0300 the next day. During the course of the evening, the three officers ran into three airmen from Kadena AB. They joined this group for the last three or four hours of their evening. During this time, the appellant bought drinks for the airmen and focused his attention on Amn AH. Amn AH was 19 years old and had been in the Air Force for about a year, serving as a dental technician. During the course of the evening, the appellant and the airman flirted with one another. The appellant pointed out to her that he was a Captain and he asked her if she wanted to join him at his hotel.

At some time around 0400 hours, the airmen told the appellant that they were returning to the base. Recognizing that the three airmen needed a cab and had no money, the appellant offered to pay for a cab. When the cab arrived, he invited himself to join

the airmen on the ride to the base. When they arrived at the dormitory, one of the airmen tried to convince the appellant that he would not be permitted in the dorm because a dorm bay chief would check his identification. He responded to this assertion by advising the airmen that he would simply tell the bay chief he was an officer and he was inspecting the dorm.

Undaunted, he followed the airmen into the dormitory. Here again, Amn AH tried to tell the officer that she was not interested in spending the night with him. Apparently acquiescing, the appellant asked Amn AH if there was a restroom available for him to use. She then proceeded to show him a restroom that was enclosed inside the dorm's fitness room. Finally, away from the rest of the group, the appellant made his last desperate effort to get what he wanted. He grabbed Amn AH, shoving her into the restroom. Forcing her against the wall, he took her left hand and forced her to touch his private parts. As she resisted and started to scream, he began to choke Amn AH with both hands and saying "pass out, pass out, pass out so I can f*** you." Energized by his words, Amn AH broke free and ran to a fellow airman's room for safety.

Frustrated by his evening, the appellant returned to his civilian hotel. Upon arriving at the hotel, he noticed no one at the front desk when he stopped in to arrange for his wake-up call. Sensing another opportunity, the appellant stole a statue of a Shisha dog, worth $250 to $300 dollars, from the area. He advised the military judge he intended to take the statue to the squadron lounge as a souvenir from the deployment. He returned the statue the next day when a fellow officer asked him about the statue.

Inappropriately Severe Punishment

The appellant asks this court to reduce the adjudged confinement, claiming it is inappropriately severe. In support of his claim, his counsel suggests that the appellant made extremely bad choices while under the influence of alcohol. He further asserts that he was an exceptional officer with no prior disciplinary record. Finally, appellant suggests that the assault with the intent to rape was not "from a predatory advance," but stemmed from a "night of flirtation and drinking that may have gotten out of hand."

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 offense, the appellant's record of service, and all matters contained in the record of trial. *See United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J.

219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Matters submitted in clemency may be considered in evaluating sentence appropriateness, including items found in the allied papers. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *Healy*, 26 M.J. at 396.

The appellant's arguments that the sentence is inappropriately severe fail in two regards. First, the arguments fail to acknowledge the significance of the offenses pled guilty to by the appellant. He admits to violating a flying regulation, conduct unbecoming an officer and theft of a high value item from a foreign hotel. As for the impact of alcohol, the first two offenses arise from his very decision to spend the night drinking. As for the third offense, he readily admitted to the judge, under oath, that he was sober enough to form the intent to steal the statue at the time of the offense. Alone these offenses warrant significant punishment. Second, the appellant's conviction for assault with intent to rape is a seriously grievous offense. This is particularly so in this case because of the status of the victim and the impact this crime had on not only the victim but also the other airmen in attendance that evening. Having considered all of the facts and circumstances surrounding these offenses, including the impact of alcohol, we find the sentence appropriate.

Argument of Counsel

Both at trial and on appeal the appellant objects to a portion of the trial counsel's sentencing argument. The relevant portion of the argument is as follows:

> This person feels horrible for all the trouble, all the stress, all the problems that he's brought upon his family, upon his friends. What about Airman [AH]? He apologized to the Air Force. He apologized to his family. He apologized to his friends. He apologized to his wife and son. What about Airman [AH]?[2]

This particular point of argument was apparently offered in response to the appellant's unsworn statement to the judge. In that statement the appellant expressed remorse for his mistakes, indicated he was sorry for what he had done and then offered expressed apologizes to the Air Force, "my fellow airmen and to my family and friends."

[2] This comment was included in trial counsel's argument which consists of slightly less than five total pages of argument in the Record of Trial.

Finally, he apologized to his wife and son. He did not however specifically mention Amn AH in his unsworn statement.

In response to the trial defense counsel's objection that the argument was improper because appellant still has "appellate rights," the military judge overruled the objection and said, "I understand that, but its fair argument."

Our superior court in *United States v. Paxton*, 64 M.J. 484, 486 (C.A.A.F. 2007) recently affirmed the long standing rule that during sentencing argument a trial counsel may not comment upon an accused's exercise of his or her constitutionally protected rights to not testify or to plead not guilty. At the same time, they affirmed that an accused's refusal to admit guilt after findings may be an appropriate factor for consideration in sentencing deliberation on rehabilitation potential but only if a proper foundation has been laid. *United States v. Edwards*, 35 M.J. 351, 354-56 (C.M.A. 1992).

The Court explained that a proper foundation exists when "an accused has either testified or has made an unsworn statement and has either expressed no remorse or his expressions of remorse can be arguably construed as being shallow, artificial, or contrived." *Edwards*, 35 M.J. at 355. Finally, on this point, during sentencing argument, the trial counsel is at liberty to "strike hard, but not foul, blows." *See Berger v. United States*, 295 U.S. 78, 88 (1935).

Our standard of review for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). In this case, the military judge indicated that he understood the trial defense counsel's argument that the comment was inappropriate while also indicating that it was fair comment. We agree the argument was fair comment to the extent it reflected a lack of remorse or rehabilitative potential. Looking to the rest of the trial counsel's argument on this point, we note that immediately after the judge overruled the objection, the trial counsel expressly indicated that the failure to apologize to Amn AH went to his lack of rehabilitation.

While we believe the military judge was aware that the comment cannot go to the appellant's exercise of his constitutional rights, we do not need to resolve this case on the exact meaning of the judge's comments. It is sufficient that we resolve this case on a lack of prejudice to the appellant. Not only did the trial counsel expressly tie his comment to rehabilitation, but the argument was but one of many points made to a judge sitting alone. Finally, despite trial counsel's argument for ten years of confinement, the military judge only imposed four years of confinement. Therefore, we find no material prejudice to the appellant even if you were to conclude the argument was in error.

Lack of Jurisdiction over Theft Charge

Appellant argues that the Court-Martial did not have jurisdiction over the theft from the local Japanese hotel. In support of his claim, he references the Status of Force Agreement (SOFA) between the United States and Japan. The SOFA provides that Japan shall have the primary right of jurisdiction over any offense against a Japanese person or interest not committed in the performance of official duties. It also permits Japan to waive this right. The record contains no evidence of a waiver of jurisdiction by Japan.

We agree with the appellant's reading of the relevant SOFA. Unfortunately, for appellant this issue is squarely addressed in both the Rules for Court-Martial and in standing precedent. These authorities provide that he has no standing to object to "violations" of the SOFA and even if he did, the court-martial still would have jurisdiction because of the appellant's active duty status. *See* R.C.M. 201(d)(3); *United States v. Murphy*, 50 M.J. 4, 6 (C.A.A.F. 1998); *Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922); *United States v. Solorio*, 483 U.S. 435 (1987)

Claim of Ineffective Assistance of Counsel

On appeal, via a post-trial affidavit, the appellant alleges that his three military defense counsel were ineffective in that they failed to raise a speedy trial motion, failed to make tactical decisions that would have undermined the victim's testimony, prevented the appellant from testifying, forced the appellant to keep his attorney during post-trial processing and finally, mismanaged the case in general, as evidenced by his counsel's lack of sleep during trial.

Service members 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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the 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). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997).

A) Speedy Trial

The appellant's first complaint is that his lawyers should have raised a speedy trial motion because he was restricted to Kadena AB for 6 days from 20 Jan -26 Jan 2005. He argues that since this restriction started the speedy trial clock, he was denied his right to speedy trial. The appellant was arraigned on 20 Sept 2005, 243 days after imposition of the restraint and 181 days after preferral of charges. The appellant's affidavit raises no suggestion that he understands the concept of accountable days or factors that will stop a speedy trial clock. His trial defense counsel's affidavit explains why they elected to not raise a claim of illegal pretrial punishment based upon the restriction but does not address the speedy trial contention.

Despite the counsel's failure to address his contention in their affidavit, we still find no basis for concluding the appellant has overcome the presumption of competence on the speedy trial claim of ineffective assistance of counsel. *See United States v. Melson*, 66 M.J. 346 (C.A.A.F. 2008). As the appellee correctly points out in their reply brief, the record squarely shows that the appellant was brought to trial within 120 *accountable* days. The Record of Trial includes a memorandum dated 25 June 2005, indicating that the military judge excluded all days between 19 Jul and 20 Sept 05 "for purposes of speedy trial consideration." Once these days are excluded, the appellant's claim could only have merit if the speedy trial clock was not stopped between the date restrictions ended (26 Jan 05) and the date of preferral (23 Mar 05).

To answer this question we need only look to R.C.M. 707(b)(3)(B). It provides that if an "accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of" preferral or re-imposition of restraint. *See United States v. Ruffin*, 48 M.J. 211 (C.A.A.F. 1998). In the appellant's own submission, he admits that after six days of restraint he was flown back to the United States. He does not allege any additional restraint upon his arrival in the United States but simply asks us to accept the Kadena restriction as a standing order. In addition to the illogical nature of this argument, considering that he was not even in Okinawa, Japan, the restriction order submitted by the appellant expressly provides in paragraph 2 that it terminated upon the appellant's directed departure from the installation. Finally, we find no indication in any other area of the record suggesting that the appellant was restrained in any other manner when he returned to the United States.

There being no evidence of any restraint from 26 Jan 05 to date of preferral, we are satisfied that the appellant's affidavit does not meet the threshold burden of showing that a speedy trial motion existed in this case.

B) Tactical Decisions Regarding Amn AH.

The appellant's second complaint is that his attorney made a number of errors on how to best attack the credibility of the victim, Amn AH. Specifically, he alleges it was ineffective for his counsel: a) not to seek a polygraph of the victim, b) not to undermine

the victim's version of events with a conflicting timeline of events from Amn RK, c) not to call Captain (Capt) GK to testify that the victim sat on his lap during the evening and d) not to call Amn DR to testify that Amn AH had admitted she "made out" with the appellant prior to the assault. The appellant argues that each of these factors would have either undermined the credibility of the victim or alternatively provided mitigation for his conduct.

Trial defense counsel responds by correctly highlighting that the rules of evidence expressly prohibit not only the results of a polygraph examination, but also the mention of an offer or refusal to take a polygraph examination. *See* Mil. R. Evid. 707. On the remaining three points, the trial defense counsel provided reasonable and practical explanations for declining to pursue the line of evidence the appellant now suggests. On the timeline issue, counsel points out the witnesses' testimony was not sufficiently specific enough to draw an important distinction. On the testimony that the victim was a willing participant, the counsel does not dispute the appellant's version of the suggested testimony, but points out that both would have come at a cost. Capt GK would have had to admit that the appellant made some damaging admissions to him prior to trial and Amn DR would also have admitted that the victim told her that she was slapped at the time of the assault, in addition to indicating that the victim's story to her was consistent with her in-court testimony.

When attacking trial tactics, an appellant must show specific defects in counsel's tactical decisions were "unreasonable under prevailing professional norms." *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (citation and quotation marks omitted). In addition the appellant must show prejudice. *Strickland*, 466 U.S. at 687. We consider whether counsel was ineffective and whether any errors were prejudicial under a de novo standard of review. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001); *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006).

Even accepting the appellant's version of the facts, the appellant has not established either error or prejudice. While arguably the evidence may have shown some inconsistencies in the victim's testimony, none of these inconsistencies go to the ultimate point that while choking the victim, the appellant implored her to pass out so that he could rape her. As for his claim that this evidence would have shown that the Airman invited the conduct, raising such a suggestion by trial defense counsel would have offered great potential to only aggravate the military judge and result in the appellant receiving an even stiffer sentence. We thus find no fault with declining to offer such evidence as "mitigation" for appellant's assault. Therefore we find no ineffective assistance regarding these claims.

C) Prevented the Appellant from Testifying and Forced to Keep Lawyer for Clemency

Next, appellant makes two separate but related claims. First, he claims his lawyers prevented him from testifying. Second, he asserts his lawyers prevented him from relieving them during the post-trial clemency phase of his court-martial. In response, his trial defense counsel not only explains the basis of their decision to not put the appellant on the stand but also offers a signed document from the appellant that indicates he "chose not to testify on [his] own behalf." In addition, the attorney offers two documents signed by the appellant indicating that he did not want to change lawyers for post-trial clemency processing. Applying the fourth factor in *Ginn*, 47 M.J. at 248, we find that the record "compellingly demonstrates" the improbability of the appellant's claim that he was not permitted to testify or that he was forced to retain his counsel against his wishes.

D) Attorneys Mismanaged their Time.

Finally, as for the final claim that his counsel mismanaged their time, when we apply the second factor set out in *Ginn*, we also find no basis to support a claim of ineffective assistance of counsel. The appellant's claims are merely conclusory observations and therefore rejected on that basis alone.

Final Matters

We have also considered the appellant's remaining assertion of error. Having considered his claim of command influence, we find it to be without merit and not requiring further discussion. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

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

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