UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TAE YOON CHUNG
United States Air Force

ACM 38168

17 January 2014

Sentence adjudged 15 May 2012 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: W. Shane Cohen.

Approved Sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

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

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

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of theft of military property with a value over $500, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 3 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

On appeal, the appellant contends trial defense counsel was ineffective when he conceded, after a litigated court-martial, the appellant's guilt during sentencing argument. We disagree and affirm the findings and sentence.

Background

At the time of trial, the appellant was a 24-year-old Senior Airman with over three years of service, and a South Korean national. The appellant deployed to Kandahar Air Base, Afghanistan, in April 2011 and was assigned to the base supply store. Toward the end of his deployment, the appellant sent several "pelican" cases full of goods to a friend at his permanent duty location to store for him. The cases contained personal items and a variety of military supplies, including a fire retardant Airman Battle Uniform blouse and pants, an M-4 cleaning kit, flashlights, and knives. When questioned, the appellant admitted that some of the items were obtained from the base supply store. During the findings portion of the trial, part of the defense's theory was that the appellant had a mistaken belief that he was authorized to take the military property. The military judge instructed the members on this mistake of fact defense, but the members found the appellant guilty as charged.

Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (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)).

The deficiency prong requires the appellant to show his defense counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89. The appellant must establish the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). The prejudice prong requires the appellant to show 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. In doing so, the appellant "must surmount a very high hurdle." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted); *see also United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998). This is because counsel are presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *Alves*, 53 M.J. at 289 (citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

We apply a three-part test to determine whether and appellant has overcome the presumption of competence:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions . . . ?
>
> 2. If they are true, did the level of advocacy fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?
>
> 3. If ineffective assistance of counsel is found to exist, is . . . there . . . a reasonable probability that, absent the errors, [there would have been a different result]?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (internal quotation marks and citations omitted).

"[T]he defense 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). When there is a factual dispute, appellate courts determine whether further fact-finding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If, however, the facts alleged by the defense would not result in relief under *Strickland*, we may address the claim without the necessity of resolving the factual dispute. *See Ginn*, 47 M.J. at 248.

Sentencing Argument

The appellant asserts his trial defense counsel was ineffective because he conceded the appellant's guilt during sentencing argument. We find this claim to be without merit. As the sentencing argument is contained in the record, there is no need for an additional hearing. *See Ginn*, 47 M.J. at 248.

The maximum sentence authorized at trial was a dishonorable discharge and 10 years of confinement. During sentencing argument, trial counsel argued for a sentence of a bad-conduct discharge, 12 months of confinement, total forfeiture of all pay and allowances, and reduction to E-1. Trial counsel argued that it was an aggravating factor that the thefts took place from the deployed supply store. Trial defense counsel's argument was that the members were "the tribal elders, the warrior elite of the Air Force" and they should use their collective wisdom and experience to determine a sentence that was fair to the appellant and could rehabilitate him. Trial defense counsel explained each potential sentence option to the members and asked them to consider that Congress authorized those sentencing options at a general court-martial and they should consider each option. Trial defense counsel argued against a punitive discharge:

> You have the option of a dishonorable discharge or a bad conduct discharge. Those are at the last of the line. The judge explained that those are very severe punishments. They're very severe punishments for someone of this age, and in particular for someone who has deployed. Yeah, you know what, he was deployed and, well, he should have known better, he shouldn't have done it. That's what some people think, he should have known better. Well that's true with everything, everything we do in life and every mistake we make in life. But if your objective is to ruin him, then make sure he goes to jail, make sure you hit him with a bad-conduct discharge so that we now have a person with a punitive discharge getting out of prison, who is probably going to be deported – maybe not, who knows – and we end up in a situation where someone who had a bright future made some bad decisions that he's been convicted of who now has to overcome tremendous hurdles the rest of his life.

Trial defense counsel concluded his argument by asking the members to return a fair and reasonable sentence. The members sentenced the appellant to a bad-conduct discharge, confinement for 3 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Our superior court wrote:

> [I]n general, when an accused has consistently denied guilt, a functional defense counsel should not concede an accused's guilt during sentencing, not only because this can serve to anger the panel members, but also because defense counsel may be able to argue for reconsideration of the findings before announcement of the sentence.

United States v. Wean, 45 M.J. 461, 464 (C.A.A.F. 1997).

At the time of the *Wean* trial, members were allowed to reconsider findings of guilty at any time before announcement of the sentence. *Id.* at 464 n.4. Currently, and at the time of this court-martial, Rule for Courts-Martial 924 allows members to reconsider findings only before they are announced in open court.[1] *See also* Drafter's Analysis, *Manual for Courts-Martial, United States*, A21-71 (2008 ed.). With this change, the rationale that lead to the *Wean* decision is weakened. Members are just as likely to be angered by an obstinate trial defense counsel who refuses to acknowledge their verdict.

[1] Only the military judge sitting alone can reconsider findings after they have been announced, but before the announcement of a sentence. *See* Rule for Courts-Martial 924.

We distinguish *Wean* both on the basis of the change to underlying law and the facts. In *Wean*, civilian trial defense counsel stated during sentencing argument that his client had "'an illness of the mind [which] compelled him to do these things,'" even though his client had pled not guilty and there was no evidence to support this statement. *Id.* at 463 (alteration in original). In the instant case, trial defense counsel's comments were well within the standards of an effective argument. Unlike the counsel in *Wean*, the argument here did not seek to introduce new evidence and an *ad hominem* attack upon his own client. Here, the argument was a continuation of the argument made during findings: the appellant's mistake of fact. The members were convinced beyond a reasonable doubt that it did not apply because they convicted the appellant, but that does not mean that the evidence of his mistake of fact was not a relevant matter in extenuation and mitigation. Trial defense counsel was reasonable to argue that this "mistake" should be considered by the members as a matter in mitigation. While acknowledging the members' decision on findings, trial defense counsel sought to have the members adjudge a sentence that did not include lengthy confinement or a punitive discharge.

Furthermore, the adjudged sentence was significantly less than what trial counsel asked for, particularly in light of the maximum punishment authorized. We find that the appellant has failed to meet his burden on either of the *Strickland* prongs.

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. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court