UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUSTIN R. COCKRELL
United States Air Force

ACM S31636

21 September 2010

Sentence adjudged 06 March 2009 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, confinement for 190 days, forfeiture of $933.00 pay per month for 6 months, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major David P. Bennett, Major Matthew C. Hoyer, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officer members sitting as a special court-martial convicted him of one specification of desertion terminated by apprehension in violation of Article 85, UCMJ, 10 U.S.C. § 885.[1] The adjudged sentence consists of a bad-conduct discharge, 190 days of confinement, 30 days of hard labor without

[1] The appellant pled guilty to the lesser-included offense of absence without leave terminated by apprehension in violation of Article 86, UCMJ, 10 U.S.C. § 886, and the government went forward to prove the greater offense of desertion terminated by apprehension in violation of Article 85, UCMJ, 10 U.S.C. § 885.

confinement, forfeiture of $933 pay per month for six months, and a reprimand. The convening authority approved every portion of the sentence except the hard labor without confinement.

On appeal, the appellant asks this Court to set aside his desertion conviction and to reassess his sentence based on the maximum punishment for absence without leave terminated by apprehension[2] or, in the alternative, to set aside his sentence. As the basis for his request, he opines that: (1) his trial defense counsel was ineffective during the findings portion of trial, requiring that the finding of desertion be set aside; (2) his trial defense counsel was ineffective during the sentencing portion of trial; (3) it was plain error for the trial counsel to elicit testimony concerning the appellant's invocation of his right to remain silent and to then comment on such evidence during the findings argument; and (4) the military judge erred by admitting the appellant's journal because it contained irrelevant, prejudicial entries of a sexual nature. Finding no error prejudicial to the appellant, we affirm the findings and the sentence.

Background

At trial, the appellant pled guilty to being absent without leave terminated by apprehension for 11 days. The military judge accepted the appellant's plea to the lesser-included offense of absence without leave terminated by apprehension, but he did not enter a finding because the government elected to move forward to prove the greater offense of desertion terminated by apprehension. In an effort to prove the greater offense, the government called several witnesses and admitted, without defense objection, several of the appellant's belongings, including a spiral ring notebook,[3] a video rental receipt made out to "Eric Meier," and two bus tickets made out to "Eric Marks." The spiral notebook contained material relevant to the charged offense, including what appeared to be a plan for leaving Lackland Air Force Base (AFB) and Air Force control, but it also contained irrelevant material regarding the appellant's sexual relationship with his girlfriend.

Ineffective Assistance of Counsel[4]

Servicemembers 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) (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977))). We review claims of ineffective assistance of counsel de novo under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id*. The appellant bears the heavy burden of

[2] The maximum sentence for absence without leave terminated by apprehension is confinement for six months and forfeiture of two-thirds pay per month for six months.
[3] This notebook is the subject of Issue IV.
[4] Issues I, II, and III are addressed in this section.

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).

To succeed on an ineffective assistance of counsel claim, the appellant must show: (1) that his "counsel's performance fell below an objective standard of reasonableness—that [his] counsel was not functioning as counsel within the meaning of the Sixth Amendment"[5] and (2) that he was prejudiced by his counsel's deficient conduct. *Davis*, 60 M.J. at 473 (citing *United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002)). With respect to the first *Strickland* prong, the appellant's burden is "especially heavy." *Id*. (citing *United States v. Adams*, 59 M.J. 367 (C.A.A.F. 2004)). 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).

To rebut his counsel's presumption of competence, the appellant must show that his counsel committed "specific errors . . . that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *McConnell*, 55 M.J. at 482). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Id*. (citing *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002); *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000); *United States v. Gray*, 51 M.J. 1, 19 (C.A.A.F. 1999)). In determining whether counsel's presumption of competence has been overcome, we ask: (1) "whether the [a]ppellant's allegations are true and, if so, whether there is a reasonable explanation for counsel's actions;" (2) if the allegations are true, whether his "counsel's level of advocacy fell measurably below the performance standards ordinarily expected of fallible lawyers;" and (3) if counsel was ineffective, whether there is prejudice and "whether there is a reasonable probability that, absent the error, there would have been a different result." *Id*. at 474 (citing *Garcia*, 59 M.J. at 450; *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000)).

> The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. "In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."

United States v. Scott, 24 M.J. 186, 188 (C.M.A. 1987) (alteration in original) (quoting *United States v. Cronic*, 466 U.S. 648, 690 (1984)). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

[5] U.S. CONST. amend. VI.

In his brief, the appellate defense counsel alleges a laundry list of ways in which the trial defense counsel was ineffective, to include failing to object to the testimony of multiple witnesses and allowing the trial counsel to question one witness, Detective RS, regarding all the statements that the appellant *did not make* when apprehended at a bus stop. In response to the appellant's ineffective assistance of counsel assertions, the government appellate counsel submitted two post-trial affidavits from the appellant's trial defense counsel, Captain (Capt) AD.

Based on a review of the record and Capt AD's affidavits, we find that even if the appellant's allegations are true, there are reasonable explanations for Capt AD's actions and tactical decisions, and her level of advocacy clearly did not fall measurably below the performance standards ordinarily expected of fallible lawyers. To the contrary, Capt AD zealously represented the appellant. She developed a theme and theory—specifically, that the appellant temporarily left Lackland AFB because he was confused; he was returning to Wichita, Kansas, to turn himself in to his recruiter; and he never had the intent to remain away permanently. The trial defense counsel pursued this theory throughout the trial.[6] Knowing that the appellant was going to exercise his right to testify during the trial, she was able to take the sting out of obvious rebuttal by permitting the government to question Detective RS about the appellant's demeanor when he disembarked from the bus in Wichita. Specifically, the trial defense counsel did not object during trial counsel's colloquy with Detective RS about the appellant's lack of statements indicating any intent to return to military control.

Although the trial counsel's questioning of Detective RS regarding the lack of statements made by the appellant upon his arrest in Wichita was arguably inadmissible during the trial counsel's initial presentation of evidence, they were clearly admissible as rebuttal after the appellant took the stand and they were alluded to when the trial defense counsel laid out the direction of the appellant's case in her opening statement. Permitting the trial counsel to present the evidence initially to reduce its effect was a tactical decision made by the trial defense counsel. As such, it was proper advocacy and there is no need to explore the lack of objection under the plain error standard.[7]

Admission of Evidence

The appellant argues that the admission of his journal was in error because it contained irrelevant, prejudicial entries of a sexual nature. We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10

[6] Some of the evidence contrary to the defense theory of the case included the fact that the appellant left behind his military uniforms and his military identification card and, when arrested, he possessed two bus tickets in a name other than his own.

[7] The remaining allegations on the laundry list can easily be explained as tactical decisions consistent with the presentation of the appellant's case and warrant no additional discussion.

(C.A.A.F. 1997)). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)). When addressing the admission of evidence, notice may be taken of plain errors. Mil. R. Evid. 103(d). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)).

The appellant's journal, a spiral notebook containing 104 single pages (although referenced as containing 70 pages front and back), was authenticated by the appellant's father and was properly admitted into evidence without an objection from the trial defense counsel. The notebook contained potential evidence of intent as well as evidence consistent with the defense theory of the case. The very minor sexual reference was not unfairly prejudicial to the appellant. Although the trial defense counsel did not object, a discussion of plain error is not necessary because the admission of the evidence was not error. Even assuming, arguendo, that it was error, there was 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.[8] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[8] The Court notes that the Court-Martial Order (CMO), dated 16 April 2009, incorrectly identifies the military judge as Timothy D. Wilson, whereas it should reflect Grant L. Kratz as the military judge. The Court orders the promulgation of a corrected CMO.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court