UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER J. COLVANO
United States Air Force

ACM 37121

17 March 2009

Sentence adjudged 29 August 2007 by GCM convened at Laughlin Air Force Base, Texas. Military Judge: Bryan D. Watson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major David P. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Carrie E. Wolf, and Captain Naomi N. Porterfield.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

In accordance with his pleas, the appellant was found guilty of one specification of dereliction of duty, three specifications of making a false official statement, four specifications of larceny, and one specification of wrongful appropriation, in violation of Articles 92, 107, and 121, UCMJ, 10 U.S.C. §§ 892, 907, 921. The approved sentence consists of a bad-conduct discharge, confinement for 18 months, and reduction to E-1.

The appellant asserts four assignments of error before this Court:[1] (1) whether the appellant's guilty pleas were improvident because he lacked mental responsibility for any of the offenses he was charged with and/or capacity to stand trial; (2) whether the appellant's plea for wrongful appropriation of a notebook computer is improvident where (a) the appellant received permission to take the notebook computer home; (b) the appellant took the notebook computer home to perform assignments; (c) the appellant intended to return the notebook computer to his workplace; and (d) the appellant merely neglected to return the computer; (3) whether the trial defense counsel was ineffective in her representation of the appellant because she permitted her defense paralegal to coerce the appellant into pleading guilty, failed to submit appellant's mental health records as evidence in mitigation contrary to his request, and exchanged the appellant's own oral unsworn statement with one she drafted; and (4) whether the appellant's sentence is inappropriately severe because the bad-conduct discharge deprives him of medical benefits, and 18 months confinement is excessive for the convictions of dereliction of duty, larcenies, and false official statements when the appellant contributed to the Air Force and his community, received a thirty percent disability rating, and was diagnosed with chronic post-traumatic stress disorder (PTSD) arising from his military service.

Background

In August 2006, the appellant began to work part time for the Army and Air Force Exchange Service (AAFES) at Laughlin Air Force Base (AFB), Texas. He worked as a retail store clerk for AAFES at the Base Exchange (BX). Part of his duties included stocking shelves and assisting customers. Sometime in August or September 2006, he stole a 42 inch Phillips plasma television along with a remote control and a power cord. He used the television and accessories for his personal use at his on-base residence. The retail price of the television was approximately $1,757.97.

In October 2006, the appellant stole two rings from the BX at Laughlin AFB. During his shift, he noticed two rings sitting unsecured on top of the jewelry counter. The appellant picked up the rings and placed them in his pocket. Shortly thereafter his shift ended and he departed the BX with the rings. The value of the rings was approximately $1,798.00.

Between 1 August 2006 and 20 November 2006, the appellant stole numerous other items from the BX at Laughlin AFB. He stole a JVC Everio camcorder, valued under $500.00; a Pentax Optio W-10 digital camera, valued at $265.00; three DVD movies, each valued at approximately $20.00; four X-Box Live 12-month gold subscription cards, each valued at $49.95; two musical compact disks, each valued at approximately $12.95; and a compact disk cleaning kit, valued at approximately $20.00. The Pentax camera was in a ziplock bag, which was supposed to be used as a display

[1] All of the assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

model, but instead the appellant decided to keep it for himself. The items were located in the rear of the store or in the stock room. The appellant stole all of the items on the same day.

Between 1 August 2006 and 20 November 2006, the appellant's supervisor at the BX gave him a Toshiba laptop computer to take home to use over the weekend so he could make new flyers for the BX. The appellant was instructed to return the computer the following Monday. Although he intended to eventually return the computer, the appellant kept the computer longer than the period of authorized use, and his retention was without permission.

On two separate occasions between 1 January 2006 and 20 November 2006, the appellant stole two desktop computers belonging to the 47th Security Forces Squadron at Laughlin AFB. Both computers had a value over $500.00. The appellant took them home for his personal use.

In November 2006, fraud investigators from AAFES placed video surveillance cameras in various locations in the Laughlin AFB BX as part of an investigation into employee theft. One of the cameras filmed the appellant removing two DVDs that were not yet ready for public release.

On or about 20 November 2006, during the search of the appellant's on-base residence, the appellant stated to Special Agent JG, "I purchased the Toshiba laptop computer at Best Buy." This statement was totally false, and the appellant knew it was false. During this same search, Special Agent JG found accessories for a Pentax Optio W-10 camera and after asking the appellant about the location of the Pentax camera, the appellant stated, "I did not take the Pentax camera, it is at the BX as a display model." This statement was totally false ,and the appellant knew it was false. On 22 November 2006, while searching the appellant's residence, Special Agent JG again inquired about the Toshiba laptop computer and the appellant stated, "The Toshiba laptop computer was given to me by Ausa Pierce," which was another false statement. The appellant made all of these statements to mislead Special Agent JG so he would leave his residence.

Finally, during the search of the appellant's residence on 20 November 2006, Special Agent JG found that the appellant possessed three additional Common Access Cards (CAC cards) other than his current card. The appellant would frequently lose his CAC cards and would negligently fail to turn in his old cards upon finding them.

Providency of Guilty Pleas

The appellant asserts that he is entitled to a new sanity board since he has recently been diagnosed with chronic PTSD which existed at the time of the offenses. Further, he

disputes the findings of the sanity board conducted prior to trial and claims he may not have been mentally responsible at the time of the offenses or competent to stand trial.

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). "[A] military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). "Mental capacity will be presumed unless the contrary is established by a preponderance of the evidence." *United States v. Collins,* 60 M.J. 261, 265 (C.A.A.F. 2004) (citing Rule for Courts-Martial (R.C.M.) 909 (b), (e)(2)). "The question of whether an accused is mentally competent to stand trial is one of fact, and 'we will overturn the military judge's determination on appeal only if it is clearly erroneous.'" *United States v. Barreto*, 57 M.J. 127, 130 (C.A.A.F. 2002) (quoting *United States v. Proctor,* 37 M.J. 330, 336 (C.M.A. 1993)). An accused is presumed to be mentally responsible at the time of the alleged offenses until the accused establishes by clear and convincing evidence that he was not mentally responsible at the time of the alleged offenses. *Collins,* 60 M.J. at 265 (citing R.C.M. 916(k)(3)(A)).

Pursuant to a request by the appellant's trial defense counsel, the convening authority ordered a sanity board under R.C.M. 706 prior to trial. The sanity board determined that the appellant could appreciate the wrongfulness of his misconduct, was capable of understanding the nature of the proceedings against him, and could cooperate intelligently in his defense. During the *Care*[2] inquiry, the military judge discussed each charge and specification with the appellant and the appellant admitted that he was able to appreciate the nature and wrongfulness of his conduct. The appellant also admitted that he agreed with the findings of the sanity board. The military judge then made the following finding:

> And I will note for the record that I have been paying very close attention to Airman Colvano during the course of this morning's inquiry. He appears alert to this court. He's been able to respond very quickly to my questions without any hesitation. He appears, in my opinion, to be extremely alert. He doesn't seem to be tired. He's been responding appropriately to my

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

questions, not only verbally but also with facial expressions and hand gestures. There's nothing, based upon my dealings with Airman Colvano during this morning's inquiry that would indicate to me that he was even taking any sort of medications. He appeared to be responding as I would expect anyone to respond during the course of an inquiry such as that as which was required.

On appeal, the appellant submitted a declaration from Dr. SH, a licensed psychologist, who began counseling the appellant in the spring of 2008. Dr. SH diagnosed the appellant with PTSD and stated that the appellant has suffered from PTSD for several years.[3] However, the appellant provides no evidence that PTSD caused him to lack the mental responsibility to commit the offenses or the mental capacity to stand trial. As such, the appellant has not met his burden of showing he lacked the mental responsibility to commit the offenses nor has he shown that the military judge's determination he was mentally competent to stand trial was clearly erroneous. Accordingly, we find the appellant's guilty pleas were provident.

Improvident Plea to Wrongful Appropriation

The appellant also asserts that his plea to the wrongful appropriation of the Toshiba notebook computer that belonged to AAFES was improvident. In his post-trial declaration, the appellant states, "Not returning the computer was simply an oversight on my part and not a willful misconduct or calculation in order to secure equipment for a longer period of use similar to not returning videos from Blockbuster because they are late." As stated above, we review a military judge's decision to accept a guilty plea for an abuse of discretion. *Eberle*, 44 M.J. at 375.

During the *Care* inquiry, the military judge fully explained the elements of the offense and ensured that a factual basis for each element existed. The appellant specifically admitted that he held onto the computer longer than he should have and that he formed the specific intent to temporarily deprive AAFES of the use and benefit of the said notebook computer. The appellant's position now that he never formed the requisite intent is without merit. Accordingly, we find that his plea of guilty to the wrongful appropriation specification was provident.

Ineffective Assistance of Counsel

In his sworn post-trial declaration, the appellant asserts that he received ineffective assistance of counsel[4] when: (1) his trial defense counsel allowed her defense paralegal

[3] According to Dr. SH, the post-traumatic stress disorder was triggered when the appellant attended four weeks of specialized training in urban warfare in 2004.

[4] At trial, the appellant was represented by two trial defense counsel, Captain SB and Captain LL; however, his declaration only mentions Captain SB.

to pressure him to plead guilty; (2) his trial defense counsel failed to introduce an excerpt of the medical review board report as evidence in mitigation during sentencing against his wishes; and (3) his trial defense counsel exchanged his own oral unsworn statement with one she had written for another client causing him to make an unavailing presentation before the military judge.[5]

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, 248 (C.A.A.F. 1997).

The appellant was effectively represented by his trial defense counsel at his court-martial. In his post-trial declaration the appellant states he felt coerced to plead guilty when the defense paralegal told him that he "wouldn't want to know" what sentence she would impose if she were sitting on his panel. However, a review of the entire record shows that after this alleged conversation took place, and immediately prior to announcing findings, the appellant informed the military judge that he was pleading guilty voluntarily and of his own free will and that no one had made any threat or tried in any way to force him to plead guilty. He further informed the military judge that he was satisfied with his defense counsel and his defense counsel's advice. Considering the record as a whole, we find the appellant's post-trial assertion that the defense paralegal coerced him to plead guilty to be improbable.

Concerning the trial defense counsel's tactical decision not to introduce the results of the medical board as evidence in mitigation during sentencing, it is clear from the record this was done to prevent the government from having the opportunity to review the appellant's mental health records which may have disclosed damaging information against the appellant.[6] When attacking trial tactics, an appellant must show specific

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[5] According to the record of trial, the last sentence of the appellant's unsworn statement reads, "This is not all the way and in addition to my Air Force career." In her post-trial declaration, the appellant's trial defense counsel states that it was intended that the appellant would say, "This is not at all the way I envisioned my Air Force career."

[6] The medical evaluation report included such comments as: "His pattern of responding is indicative of an individual in psychological distress that has a tendency to exaggerate the severity of symptoms"; "His response style

defects in counsel's tactical decisions that were "unreasonable under prevailing professional norms." *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (quoting *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)). In addition, the appellant must show prejudice. *Strickland*, 466 U.S. at 687. The appellant has not shown his trial defense counsel's decision was unreasonable nor has he shown how he was prejudiced by the decision not to introduce his medical board results.

Finally, the appellant has not shown how he was prejudiced by the minor error in the language of his unsworn statement. Accordingly, the appellant has failed to meet his burden that his trial defense counsel was ineffective.

Inappropriately Severe Sentence

The appellant asserts that his sentence, which includes a bad-conduct discharge and 18 months confinement, is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). 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. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises 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).

The maximum punishment in this case was a dishonorable discharge, confinement for 36 years and 3 months, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for 18 months, and reduction to E-1. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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;

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is indicative of an individual in acute turmoil that has a tendency to magnify his level of experienced illness in addition to being self-pitying"; and "pattern of responses are also indicative of a tendency to blame others for problems."

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