UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL A. COX
United States Air Force

ACM S31575

27 October 2009

Sentence adjudged 28 August 2008 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Thomas A. Monheim (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Anthony D. Ortiz, Captain Tiaundra D. Sorrell, and Captain Andrew Unsicker.

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

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one charge and two specifications of violation of a lawful general order for attempting to develop a personal, intimate, or sexual relationship with two trainees, one charge and specification of violation of a lawful general order for developing a personal, intimate, or sexual relationship with a third trainee, and one charge and three specifications of cruelty toward persons subject to his orders, in violation of Articles 92 and 93, UCMJ, 10 U.S.C. §§ 892, 893. The convening authority

approved a sentence consisting of a bad-conduct discharge, confinement for eight months, reduction to E-1, and a reprimand.[1] The appellant asserts two errors: (1) his sentence is inappropriately severe due to the fact that a coactor received an administrative discharge in lieu of court-martial and (2) his trial defense counsel were ineffective when they failed to object to the inclusion of facts in the Stipulation of Fact involving specifications withdrawn by the pretrial agreement. Finding no error, we affirm.

Background

The appellant was a training instructor at the Air Force Security Forces Academy at Lackland Air Force Base (AFB), San Antonio, Texas, and served as a trainer for the basic apprentice course for enlisted security forces members. All trainers and staff assigned to the Air Force Security Forces Academy are subject to the Air Education and Training Command Instruction (AETCI) 36-2909, *Professional and Unprofessional Relationships* (2 Mar 2007), which is a punitive regulation. Specifically, the instruction provides Air Education and Training Command faculty and staff will not "establish, develop, attempt to develop, or conduct a personal, intimate, or sexual relationship with a trainee." AETCI 36-2909, ¶ 4.3.3.

Despite this prohibition, the appellant preyed upon five female students on his training team by engaging in inappropriate conduct on numerous occasions between September 2007 and December 2007. On or about 14 September 2007, while conducting night operations training at the Medina Annex on Lackland AFB, the appellant told Airman First Class (A1C) LB, his first victim, he wanted to talk to her. Uncomfortable meeting with the appellant alone, A1C LB asked if she could bring A1C SS with her. The appellant told her he could handle two girls at once. After taking the two students to a darkened area under a staircase at the Medina Annex, he told A1C LB her breasts were big and asked to see them. Although he persisted for five minutes, she refused. Afterwards, A1C LB was tearful and upset, and she talked about the incident with A1C SS and another female student, A1C AY.

During night operations training at the Medina Annex on 17 September 2007, the appellant asked A1C SH, a trainee, for her phone number. She complied. After the students returned to the base, the appellant called A1C SH and asked her to meet him outside the dormitory. He drove her back to the Medina Annex, where he unlocked a mock dormitory training building. The appellant and A1C SH had sexual intercourse in a mock dormitory room. The appellant then locked up the training building and drove A1C SH back to her dormitory building.

---

[1] The military judge imposed a sentence of a bad-conduct discharge, confinement for nine months, reduction to E-1, and a reprimand. The pretrial agreement capped confinement at nine months with no other restrictions on sentencing. The convening authority reduced the appellant's total confinement by one month following review of his clemency submissions.

The third victim, Airman Basic (AB) JH, joined the appellant's team in October 2007. While participating in field training, she met with the appellant and Staff Sergeant (SSgt) TB, another instructor, to discuss her training progress. During the discussion, the appellant asked AB JH to perform a 360 degree rotation. As she complied, the appellant made inappropriate comments about her body. In addition, AB JH reported the appellant made other inappropriate comments such as asking for her phone number, suggesting they go to his house for a drink, and asking if she and her boyfriend were serious or "just f------." AB JH told two other students about the appellant's inappropriate comments. On or about 12 December 2007, the appellant asked AB JH to type a document for him in his office. As she typed, the appellant engaged AB JH in a conversation about her relationship with another Airman, asking "are you serious or just f------." AB JH completed typing the document and returned to the classroom for training. Later that day, the appellant again pulled AB JH from the classroom and asked her to re-type the document, saying he had accidentally erased it. The appellant thanked her and extended his hand for a handshake. When AB JH stood to shake his hand, the appellant embraced her and ran his hands down to her buttocks. He squeezed her buttocks and said they were "nice and thick." AB JH pushed the appellant away and returned to the computer. At that point, SSgt TB entered the office. The lights were turned off, and SSgt TB began rubbing AB JH's shoulders and back. She shrugged him off and the lights came back on. When she returned to class, tearful and upset, AB JH told three fellow students about the incident.

At some point prior to Thanksgiving 2007, AB JB was cleaning her weapon during training at Camp Bullis. She asked the appellant a question regarding the weapon cleaning. The appellant told her he did not know the answer, but said he wanted to kidnap her for a weekend before she left training so they could have some fun. She understood his comment to be a suggestion to engage in sexual activity. On 3 December 2007, as the team was conducting patrol operations at Camp Bullis, the appellant approached AB JB and other female trainees while they were urinating in the bushes. On one occasion, he made inappropriate sexual comments to AB JB and another female trainee. He also asked what they were doing for the weekend and said he wanted to hang out with them. The next day, the appellant asked AB JB whether she was going to find a new man after her boyfriend graduated from training. Based on his tone and manner, AB JB understood the appellant's comment to be a suggestion that he should be the new man.

On or about 6 December 2007, while the team was at Camp Bullis for training, the appellant noticed AB KJ was upset. She had just broken up with her boyfriend. The appellant asked AB KJ if she had ever been with a black man before, and AB KJ indicated she had not and would not. The appellant asked her why not and said he could show her a good time. The appellant continued commenting they should get together. During the conversation, the appellant asked AB KJ to perform a 360 degree rotation. As she complied, the appellant made inappropriate sexual comments about her body.

Following the investigation, the appellant and SSgt TB were served with court-martial charges. The appellant's trial was scheduled to begin on 27 August 2008, and was planned as a fully litigated, multi-day trial.[2] On 21 August 2008, SSgt TB and the government entered into a pretrial agreement, in which he agreed to testify against the appellant in exchange for an administrative discharge in lieu of court-martial. On 22 August 2008, the convening authority granted testimonial immunity. SSgt TB provided information regarding the appellant's inappropriate comments toward AB JH and the appellant's admissions about engaging in sexual intercourse with A1C SH at the Medina Annex. Based on the information SSgt TB provided, the appellant was served with the additional charge of violation of a lawful general regulation. On 27 August 2008, the appellant and the government entered into a pretrial agreement, in which he agreed to plead guilty to some but not all the charges and specifications, to enter into a reasonable Stipulation of Fact, to waive all waivable motions, and to be tried by military judge alone. In exchange, the convening authority agreed to withdraw and dismiss two charges: Charge III, wrongful sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and Charge IV, indecent language, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority also agreed to limit confinement to nine months. Upon review of the post-trial submissions, it appears SSgt TB was administratively discharged.

Sentencing Appropriateness

The appellant asserts his sentence is inappropriately severe due to the fact that SSgt TB, a coactor, received an administrative discharge in lieu of court-martial. We do not concur.

Sentence appropriateness is reviewed de novo. *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). 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. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *Rangel,* 64 M.J. at 686. 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. Borunda*, 67 M.J. 607, 608 (A.F. Ct. Crim. App. 2009), *pet. denied*, 68 M.J. 74 (C.A.A.F. 2009). Matters submitted in clemency may be considered in evaluating sentence appropriateness. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

[2] Upon motion by both parties to allow for further pretrial agreement negotiations, the military judge delayed the trial until 28 August 2008.

In making a sentence appropriateness determination, we are required to examine sentences in closely related cases and are permitted, but not required, to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

Cases are "closely related" when, for example, they involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id.* Here, the appellant has failed to meet his burden. We reviewed the entire record including the appellant's clemency submissions. We note the only common thread between the appellant and SSgt TB's conduct involved AB JH, the appellant's third victim. As previously noted, SSgt TB was present for a portion of the two occasions when the appellant behaved inappropriately with AB JH. Other than this one victim, there is no evidence to establish the appellant and SSgt TB were coactors in a common criminal scheme or that there was some nexus between the two men. Granted, they both were involved in inappropriate behavior with trainees; yet, there is nothing in the record establishing they were acting in concert with each other with respect to the appellant's other four victims.

We note during the *Care*[3] inquiry and in his unsworn statement, the appellant blamed SSgt TB and minimized his own responsibility for the misconduct. He informed the military judge that SSgt TB told him A1C SH was interested in him, which led to his having sexual intercourse with her at the Medina Annex. He also claimed A1C LB and A1C SS met with him under the staircase to tell him about rumors they were hearing about SSgt TB. Therefore, assuming arguendo that the appellant's comments make the two cases closely related and noting there is a disparity between a court-martial and an administrative discharge, we next look to whether there was a rational basis for the disparity. We find there is a rational basis for the "sentence" disparity, noting that an administrative discharge is not a sentence.

The appellant was charged with making inappropriate comments and engaging in inappropriate conduct with five female trainees, all of which occurred during training and on military installations. The appellant's actions impacted his five victims but they also affected other trainees, as his actions were committed in the presence of fellow trainees and were made known to additional trainees as the victims related his misconduct. Not only did he blatantly violate the professional relationship instruction, but he also exhibited cruelty toward trainees. Additionally, the facts surrounding the sexual

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

intercourse with A1C LH are highly aggravating. In conclusion, we find the appellant's misconduct toward these five trainees to be quite egregious.

The appellant blames SSgt TB for leading him into his criminal conduct. We note there is no evidence in the record to support this claim other than the appellant's assertion. In fact, review of the appellant's record belies his assertion. The appellant was a 29-year-old Airman. He was a very sharp troop, and his record is impressive. He received his bachelor's and two associate's degrees. He was selected as the Airman Technical Training Instructor of the Quarter for April 2007 to June 2007. He was selected and had a line number for promotion to staff sergeant. He was not led down a path of destruction; he took himself there.

SSgt TB's charge sheet indicates less egregious misconduct. Additionally, his agreement to assist the government resulted in an additional charge being served against the appellant for the sexual intercourse with A1C SH. He also provided evidence regarding the charges involving AB JH. Furthermore, as a result of SSgt TB's agreement to assist the government, the appellant agreed to enter into a pretrial agreement one day before his fully-litigated trial was scheduled to begin.[4] In response to the appellant's clemency submission, the staff judge advocate prepared an addendum in which he addressed sentence disparity issues raised by the appellant.[5] We find the matters outlined in the addendum to be compelling justification for the decisions to prosecute the appellant and administratively discharge SSgt TB. Thus, we conclude there was a rational basis for the disparity.

We carefully examined the facts of this case. In light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial, we hold the sentence is appropriate in this case.

Ineffective Assistance of Counsel

The appellant asserts his counsel were ineffective when they failed to object to the inclusion of the following facts in the Stipulation of Fact: (1) the appellant touched and squeezed the buttocks of AB JH; (2) the appellant asked AB JH "are you serious or just f-----," in reference to her boyfriend; and (3) the appellant also asked AB JH "are you and

[4] Staff Sergeant (SSgt) TB told investigators of additional misconduct committed by the appellant, which the government had planned to investigate. The additional misconduct was not charged.

[5] The military judge submitted a memorandum recommending clemency because of a perceived sentence disparity between the appellant and SSgt TB. The military judge wrote he believed the adjudged sentence was appropriate. However, the military judge also stated he might have imposed a different sentence had he believed the appellant's comment in the unsworn statement that SSgt TB was not being court-martialed. He concluded by stating he did not know all the facts of SSgt TB's case and there are many possible reasons for apparent punishment disparity. Upon review of the appellant's clemency submission, the staff judge advocate recommended the convening authority approve confinement for eight months rather than the nine month cap agreed upon in the pretrial agreement.

your boyfriend serious or just f------." After review of the entire record, we do not concur.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). 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, 687 (1984). An appellant must show both deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Counsel is presumed to be competent. *Id.* (citing *Strickland*, 466 U.S. at 689). Where there is a lapse in judgment or performance alleged, we first ask whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Applying the factors set forth in *United States v. Ginn,* 47 M.J. 236, 244 (C.A.A.F. 1997), we conclude we can resolve this assertion of ineffective assistance of counsel based upon the record and the appellant's filings. We note the trial defense counsel responded to his assertions of ineffective assistance of counsel with a jointly signed post-trial affidavit filed with this Court. We find the record as a whole, to include the trial defense counsel's post-trial affidavit, "compellingly demonstrates" the improbability of the appellant's claims of ineffective assistance. *See Ginn,* 47 M.J. at 238 (quoting *United States v. Perez,* 39 C.M.R. 24, 26 (C.M.A. 1968)).

Here, the appellant asks us to conclude his counsel were ineffective for failing to object to the inclusion of facts in the Stipulation of Fact involving two charges that were withdrawn and dismissed by the pretrial agreement. The trial defense counsel responded in their affidavit that these facts were actually facts and circumstances surrounding certain charges and specifications which were not withdrawn and dismissed. In addition, they also point out one statement to which the appellant objected was not made in connection with either dismissed charge.[6] We concur. Upon review of the entire record, it is clear these facts were facts and circumstances directly relating to Specification 1 of Charge I and Specification 2 of Charge II, both of which were not dismissed and of which the appellant was found guilty.

[6] According to the trial defense counsel, the appellant asking Airman Basic JH, "are you and your boyfriend serious or just f------," did not apply to either of the two dismissed charges.

Additionally, the trial defense counsel specifically discussed the inclusion of these facts with the appellant. As background, when the trial defense counsel approached the government with the offer of a pretrial agreement which would result in dismissal of two charges, the government's response was that the facts now objected to by the appellant were critical to the government's case. The appellant was actively involved in the preparation of the Stipulation of Fact and numerous revisions were submitted back and forth between the defense and the government. The appellant was specifically asked whether he agreed with the terms of the Stipulation of Fact and was told if he did not agree, his counsel would continue negotiating with the government. The appellant then signed the Stipulation of Fact after a thorough discussion with his trial defense counsel.

During the trial, the military judge conducted a thorough and proper inquiry into the Stipulation of Fact. Rule for Courts-Martial (R.C.M.) 811(c) requires a military judge to "be satisfied that the parties consent to" a stipulation before accepting it in evidence. R.C.M. 811(c). From review of the record, we are convinced the military judge ensured the appellant understood his rights regarding the Stipulation of Fact, he understood the Stipulation of Fact itself, and he consented to it. *See* R.C.M. 811(c), Discussion.

Finally, the trial defense counsel also note in their affidavit that the government's agreement to withdraw the charge and specification involving wrongful sexual contact was in the best interest of the appellant. The trial defense counsel believed a conviction for wrongful sexual contact pursuant to Article 120, UCMJ, would have subjected the appellant to the potential of registering as a sex offender.

In addition to ensuring the appellant understood and agreed to the Stipulation of Fact, we find the trial defense counsel made a tactical and strategic decision not to object to the inclusion of these facts. It is clear from the record that the decision was made to protect the appellant. When attacking trial tactics, an appellant "must show specific 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)). Moreover, the appellant must show prejudice. *Strickland*, 466 U.S. at 687. The appellant has neither shown his trial defense counsel's decision was unreasonable nor has he shown how he was prejudiced. Accordingly, the appellant has failed to meet his burden of showing his trial defense counsel were ineffective.

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).

The approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court