UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JUSTON A. DAL
United States Air Force

ACM S30957

13 February 2007

Sentence adjudged 27 July 2005 by SPCM convened at Schriever Air Force Base, Colorado. Military Judge: Barbara E. Shestko (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

BROWN, MATHEWS, and FRANCIS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Senior Judge:

The appellant stands convicted, in accordance with his pleas, of conspiring to commit arson, making a false official statement, and arson, in violation of Articles 81, 107, and 126, 10 U.S.C. §§ 881, 907, and 926, respectively. The military judge sentenced him to a bad conduct discharge, confinement for 4 months, and reduction to the grade of E-1. The convening authority approved the

appellant's sentence as adjudged. On appeal, the appellant claims, inter alia, that his plea to conspiracy was improvident, that his counsel was ineffective, and that his sentence was inappropriately severe. We find merit in the first contention but none in the second or third, and modify the findings and reassess the sentence accordingly.

Providency of the Appellant's Plea

The appellant was a member of the 50th Security Forces Squadron at Schriever Air Force Base, Colorado. Prior to the incident that led to his court-martial, the appellant had an excellent record: so much so, in fact, that he was a candidate for early promotion to the grade of E-4. Despite his record, the appellant, apparently lacking confidence, engaged Airman First Class (A1C) P, a friend who was also up for early promotion, in a series of discussions about how to improve their odds. The appellant described these discussions as initially being "jokes," centered on ways they could achieve special recognition prior to the promotion board. Most involved schemes in which the appellant or A1C P would create a real or simulated emergency and then appear to heroically resolve the crisis. One of these schemes, the appellant told the military judge, involved setting a fire in a dormitory dayroom and then "rescuing" the inhabitants of the dorm by putting out the fire before it caused any injury.

In time, as the date for the promotion board neared, the appellant became increasingly worried about his chances. Recalling his earlier discussions with A1C P, the appellant went to an off-base store and bought nail polish remover to use as an accelerant for the dormitory fire. During his providency inquiry, the appellant told the military judge that even after purchasing the nail polish remover, he was still uncertain whether he would go through with the plan and went to A1C P to talk it over. The appellant described what happened next in this colloquy with the military judge:

> ACC: Initially, I asked him [A1C P] if he wanted to go through with "the thing with the thing." He was unsure of what I was talking about. I entailed (*sic*) that -- the fire -- and he then knew what I was talking about.
>
> MJ: And, did he indicate his agreement to go through with it?
>
> ACC: Not necessarily. He claimed that -- he basically told me, "Whatever," or "Do what you gotta do," which I ultimately interpreted as an agreement.

The appellant went on to state that he believed he had an agreement with A1C P and that, in the appellant's mind at least, it "appeared" such an agreement existed.

After the discussion the appellant believed led to an agreement, the appellant left A1C P's room, set the fire, and then went back to get his friend. When A1C P saw the flames, the appellant said, he "seemed very shocked and speechless." A1C P recovered his composure sufficiently to trigger the dorm fire alarm, and the appellant got a fire extinguisher to put out the blaze. The appellant and A1C P were both questioned afterward, and both told the investigators that they had just happened upon the fire while walking through the dorm. Eventually, however, the appellant changed his story and admitted that he was the one who set the fire.

Despite his professed belief to the contrary, the appellant now argues that "the providence inquiry fails to show the existence of an agreement" between himself and A1C P to actually set the fire. The existence of an agreement is a "critical" element of the offense of conspiracy. *United States v. Periera,* 53 M.J. 183, 184 (C.A.A.F. 2000) (citing *Braverman v. United States,* 317 U.S. 49, 53-54 (1942)); *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 5(b)(1) (2005 ed.).[1] The agreement may be manifested by words, gestures, or conduct, and its existence may be proven through solely circumstantial evidence. *United States v. Cobb,* 45 M.J. 82, 84-85 (C.A.A.F. 1996); *MCM,* Part IV, ¶ 5(c)(2). Regardless of how the agreement is to be proven, however, the law is crystal clear: if there is no agreement, there is no conspiracy. The appellant argues that his testimony in the providence inquiry was insufficient to establish the existence of an agreement, and the military judge therefore erred by accepting his guilty plea to conspiracy.

We review the military judge's decision for an abuse of discretion, reviewing the entire record to make our determination. *United States v. Marcy,* 62 M.J. 611, 614-15 (A.F. Ct. Crim. App. 2005) (citing *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996)). Where there is "a 'substantial basis' in law and fact for questioning the guilty plea," the military judge must inquire further or reject the plea, even if the inconsistency is not plausible or credible. *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Lee,* 16 M.J. 278, 281 (C.M.A. 1983); Article 45, UCMJ, 10 U.S.C. § 845. The military judge was clearly alert to this requirement as she analyzed the appellant's claims about the existence of the putative agreement with A1C P, for she conducted a close and careful inquiry on the subject. Unfortunately, the appellant's answers remained equivocal: and although we conclude that the appellant *believed* there was an agreement, the

[1] The 2002 edition of the *MCM,* in effect at the time of the alleged offenses, contained identical provisions.

behavior of A1C P, who the appellant described variously as "surprised," "shocked," and "speechless" at the sight of the fire, casts substantial doubt on whether such an agreement ever actually existed.

We find the appellant's testimony more than sufficient, however, to establish that he committed the lesser-included offense of attempted conspiracy, in violation of Article 80, UCMJ, 10 U.S.C. § 880. *See, e.g., United States v. Valigura,* 54 M.J. 187 (C.A.A.F. 2000); *United States v. Jiles,* 51 M.J. 583 (N.M. Ct. Crim. App. 1999); *United States v. Baker,* 43 M.J. 736, 743 (A.F. Ct. Crim. App. 1995) (where one party does not share in the criminal intent of the other, there is only an attempted conspiracy). We therefore modify the findings of guilty to the sole specification of Charge I by excepting the words "conspire with," substituting therefor the words "attempt to conspire with" and finding the appellant not guilty of the excepted words, guilty of the substituted words, and of Charge I, not guilty, but guilty of a violation of Article 80, UCMJ.[2]

Effectiveness of Counsel

The appellant complains that his trial defense counsel's performance was deficient both at trial and afterward. He claims, inter alia, that he was not guilty of making a false official statement because his statement was "not totally false *as required by the elements* of false official statement." He claims that he pled guilty only because his lawyer mistakenly informed him that the facts were sufficient to establish his guilt.[3]

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).

[2] Our disposition of this issue renders moot the appellant's Supplemental Assignment of Error.
[3] The appellant also contends that he improvidently pled guilty to conspiring with A1C P, arguing that A1C P "never really took … seriously" the appellant's plans to set fire to the dayroom. We have accorded the appellant the relief he is due on this point by modifying the findings as set forth above.

The appellant's assignment of error betrays a fundamental misapprehension about the law: there is no requirement for the statement to be "totally false" in order to violate Article 107, UCMJ. *See MCM,* Part IV, ¶ 31(f). Although there was initially some confusion about the totality of the appellant's lies at trial, the military judge was able to focus the appellant on the relevant falsehood. The appellant acknowledged that his statement claiming he was "walking through the dayroom" at the time he "spotted the fire" was false, because he "actually set the fire." He further admitted that he made the statement with the intent to mislead the investigator. The appellant's trial defense counsel states that his review of the evidence showed that the appellant's statement was made with the intent to deceive and was false by omission, and that, in his judgment, contesting the Article 107 specification would have been "a 'challenge'."

Reviewing the entire record, we see no deficiency in the trial defense counsel's advice to the appellant that the facts were sufficient to establish the appellant's guilt, nor in the trial defense counsel's tactical judgment that contesting the appellant's guilt would likely prove futile. *See, e.g., United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993) (appellate courts do not ordinary second-guess strategic or tactical decisions of trial defense counsel). The appellant has not carried his burden of establishing ineffective assistance of counsel at trial. *Garcia,* 59 M.J. at 450.

Nor has the appellant established his counsel was ineffective post-trial. The appellant focused his clemency request to the convening authority on two things: disapproval of his bad-conduct discharge or, in the alternative, endorsement of his request for entry in to the Air Force's Return to Duty Program (RTDP). The appellant's trial defense counsel echoed these requests, to the exclusion of other forms of clemency, because he judged that "asking for a hodge-podge of relief would detract from our goal to focus the convening authority on RTDP." Ultimately, this strategy was successful: the convening authority endorsed the appellant's RTDP request.

The appellant now contends that, in addition to requesting entry in the RTDP, he would have asked for deferment or waiver of automatic forfeitures for the benefit of his spouse. The appellant claims he "became concerned about [his] wife['s]" financial situation prior to trial, but acknowledges he "didn't specifically inquire" about seeking deferment or waiver for her benefit. He further admits his trial defense counsel advised him of his right to seek such a deferment or waiver, but contends he did not understand these rights might extend to his wife, because she was also an airman on active duty.

As is common practice in Air Force courts-martial, the appellant's trial defense counsel provided him with a written advisement of his post-trial and

appellate rights, which bears the appellant's signature and is attached to the record of trial as Appellate Exhibit IV. That document contains no language suggesting the appellant's right to request deferment or waiver of forfeitures was limited by the appellant's wife's status on active duty. The military judge asked the appellant prior to announcement of sentence, whether he had "any questions at all" about those rights. The appellant replied that he did not.

We find the trial defense counsel's decision to concentrate focus in clemency on the appellant's entry into the RTDP was considered and consistent with the appellant's expressed wishes. We further find that, despite ample opportunity to do so, the appellant did not raise any concern about his wife's finances with the convening authority, the military judge, or his trial defense counsel. We therefore conclude that the appellant has not demonstrated his counsel's post-trial representation was unreasonable under prevailing professional norms. *Cf. McConnell,* 55 M.J. at 482.

Sentence Reassessment and Appropriateness

Because we modified the findings, we must next consider whether we can reassess the sentence. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. Our modification of the findings does not affect the maximum sentence that could have been imposed. The evidence concerning the appellant's acts, and his criminal state of mind, remain unchanged. We find the military judge would have imposed the same sentence at trial.

Moreover, we find that sentence eminently appropriate. The appellant admitted during his unsworn statement that, by his arson, he "put many lives in danger or at risk." He did so, he said, because he wanted to be promoted early and was afraid he would lose out "to someone who may have been less deserving." Whether such a less-deserving person actually exists is entirely a matter of conjecture; but we are certain the appellant deserved the punishment he received.[4] *United States v. Peoples,* 29 M.J. 426, 427 (C.M.A. 1990); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

[4] We have carefully considered the appellant's final complaint, that his sentence is disproportionately greater than that of A1C P (who was convicted of making a false official statement but acquitted of conspiracy, arson, and damaging government property), and find it without merit. As the appellant has argued, and we have found, A1C P did not share in the appellant's criminal plan to set fire to the dormitory dayroom. Even if the two cases required comparison under *United States v. Lacy,* 50 M.J. 286 (C.A.A.F. 1999), we conclude that there is a rational basis for the disparity. *Id.* at 288.

Conclusion

The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt , USAF
Chief Court Administrator