UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman VINCENZO R. DENUNNO
United States Air Force

ACM 36762

31 August 2007

Sentence adjudged 18 May 2006 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Barbara L. Brand (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 Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

SOYBEL, Judge:

In accordance with his pleas, the appellant was convicted of one charge and specification of divers uses of methamphetamine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence consists of a bad-conduct discharge, confinement for 4 months, and reduction to E-1.

The appellant claims his trial defense counsel, Captain (Capt) W, provided ineffective assistance of counsel by: 1) Not informing appellant of the possibility of an administrative discharge before trial; 2) Never mentioning the possibility of deferment and waiver of forfeitures; and 3) Failing to object to five records of counseling submitted

by the prosecution, during the sentencing phase of the trial, that did not comply with the 3-day notice requirements of Air Force Instruction (AFI) 36-2907, *Unfavorable Information File (UIF) Program* (17 Jun 2005).[1]

It is undisputed that members of the armed forces are entitled to the effective assistance of counsel. *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007). *See* U.S. CONST. amend. VI; Article 27(b), UCMJ, 10 U.S.C. § 827(b). We review claims of ineffective assistance of counsel de novo. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). An allegation of ineffective assistance of counsel faces a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

To prevail on an ineffective assistance of counsel claim, an "appellant must demonstrate: (1) a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 687) (internal citations omitted). *See Tippit*, 65 M.J. 69.

The appellant shoulders the burden of establishing the truth of the factual allegations that establish the deficient performance. *See United States v. Boone*, 49 M.J. 187, 196-97 (C.A.A.F. 1998). This is commonly accomplished by the submission of post-trial affidavits. That was done in this case by the appellant and, to answer those allegations, by his trial defense counsel.

When the two affidavits create a factual dispute, we cannot resolve it relying on the affidavits alone. In such cases the issue is better decided by a military judge who is able to observe the competing affiants and make the required fact finding decisions. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). However, if the affidavits do not conflict, we may decide the issues without ordering a post-trial hearing. In deciding whether there are conflicting affidavits we are aware of the principle expressed in *Ginn* that, "if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *Id.* at 248.

Regarding his first assertion of ineffective assistance of counsel, the appellant avers in his post-trial affidavit that, "to the best of my recollection, my defense counsel never even mentioned" the possibility of trying to convince the convening authority to grant an administrative discharge in lieu of court-martial.[2] In his post-trial affidavit, Capt W swears they discussed the possibility of a submitting a request for an administrative

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[1] Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.1982).
[2] See Air Force Instruction (AFI) 36-3208, *Administrative Separation of Airmen*, Chapter 4 (9 Jul 2004).

discharge but advised the appellant that given the strong case against him, and the evidence suggesting he may have reported to work under the influence of drugs, the likelihood of success of such a request was low. Additionally, he felt it was better not to spend their valuable pre-trial preparation time on a lost cause.

The two versions of this subject are not in conflict and there is no need to order a post-trial *Dubay*[3] hearing on this issue. Appellant's position is that he cannot recall any discussion and surmised now that he would have "jumped at the chance without hesitation." He does not say the discussion did not occur. Capt W does remember discussing this with the appellant which led to the decision against trying this strategy.

Even if Capt W did not discuss the possibility of submitting a request for an administrative discharge with the appellant, we find no prejudice under the second prong of *Strickland.* The appellant presents absolutely no reason to believe that there is a reasonable probability that, absent errors, the outcome would have been different. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The record contains evidence that the appellant used methamphetamine divers times, confessed to his uses, and may have reported to duty under the influence of illegal drugs. Unless other facts are presented to show why a favorable outcome would be expected, it is unrealistic to believe a convening authority would decide to grant appellant's request under these circumstances. The possibility of the success from such a submission is a hopeful and unrealistic speculation.

The other two issues can also be resolved based on the post-trial affidavits. Regarding the issue of deferment and waiver of forfeitures, Capt W states that they did discuss the matter while the two went over the appellant's post-trial and appellate rights form (Appellate Exhibit II). The appellant admits to this and admits to signing the form, stating he understood those rights. According to his affidavit, appellant just assumed Captain W would take care of it for him. He apparently thought this even though appellant did not even know his dependant's location and was unable to provide the necessary banking information to effectuate the deposits. There is no merit to his claim of ineffective assistance of counsel. He was informed of his rights but did not pursue them.

Regarding the issue of admission of the counseling documents during the pre-sentencing phase of the trial, the government submitted five records of individual counseling given to the appellant. Capt W did not object to their admission. Citing *United States v. Donohoe*, 30 M.J. 734 (A.F.C.M.R. 1990), the appellant claims this was ineffective assistance of counsel because these letters do not indicate on their face the appellant had three days to respond after being served. *Donohoe* states if the instruction that governs records of individual counseling requires the document itself to show the appellant had a three-day opportunity to respond, the Air Force is "stuck" with that rule

[3] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

and cannot prove the appellant had the three-day opportunity to respond through witness testimony.

As the appellant acknowledges, that is not the case here. He concedes that he had opportunity to respond to the letters. His complaint is that the form used to give him the counseling did not, on its face, inform him he had three days to respond. He also complains that the form did not explain to him that, "the documents would become part of his military record" and should therefore not have been used against him. He claims he would have responded differently had he known this information.

Regarding the 3-day notice issue, Appellant's argument places form over substance. He either responded or affirmatively decided not to respond to four of the letters so the issue as to them is moot. However, on one letter of counseling, although he signed it, he left the response box blank. Without even addressing the first prong of *Strickland* we can say there was no prejudice under the second prong. One letter of counseling for being 5 minutes late to training hardly qualifies as something that, even if it should have been kept out, would have prejudiced the appellant to the extent that it deprived him of a fair trial or would have resulted in a different sentence in this case. *See Strickland*, 466 U.S. 668; *United States v. Thompson*, 51 M.J. 431 (C.A.A.F. 1999).

As far as appellant's claim he should have been told the letters of counseling would become part of his military record before they could be used against him, that argument is without merit. The appellant is unable to point to any authority for that statement and we are unable to determine where such a requirement exists.

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

AFFIRMED.

Judge BRAND did not participate.

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, GS-11, DAF
Clerk of Court