UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman EDWARD L. DIAS II
United States Air Force

ACM S31987

05 April 2013

Sentence adjudged 17 August 2011 by SPCM convened at Hurlburt Field, Florida. Military Judge: Michael J. Coco.

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

At a special court-martial composed of officer members, the appellant pled guilty to wrongfully using methamphetamine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consisted of a bad-conduct discharge, confinement for two months, and reduction to E-1. The convening authority approved the sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant contends his trial defense counsel was ineffective for failing to submit evidence of his mental health issues in mitigation, contrary to his request. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

The appellant used methamphetamine on four occasions with a civilian while socializing at a local pool hall. One use was in mid-May 2011, which was detected when the appellant tested positive during a unit inspection urinalysis. After being questioned by agents of the Air Force Office of Special Investigations about that drug use, the appellant used methamphetamine again on three additional occasions that month. A consent urinalysis following that interview also tested positive for methamphetamine.

In sentencing, the defense called a staff sergeant who served as the noncommissioned officer in charge (NCOIC) of the Special Maintenance Operations Squadron at Hurlburt Field, Florida, where the appellant worked for her as an aerospace maintenance apprentice for a year. She described the appellant as an outstanding performer who had a very strong and dedicated work ethic and provided high quality work, even after he was under investigation. The NCOIC also testified about problems the appellant was having with his marriage and work after September 2009, when he found his wife was having a sexual relationship with his best friend and unit co-worker. Initially the appellant had to work with this member, but the unit eventually issued "no contact" orders in December 2009 after the appellant informed the unit that his co-worker and wife were continuing to see each other. According to the NCOIC, there was a high level of tension within the unit, and supervisors within the unit did not properly handle some of the issues. She also testified about why she refused to grant the appellant's requests to stay home from work because of her concern about him being alone, given all the stress he was under.

The appellant's first sergeant also testified on his behalf in sentencing. She described his good work performance, which continued even after he was under investigation. She also testified about the appellant's wife being arrested for domestic violence based on an altercation she had with her paramour after the appellant moved out. She also observed evidence that the appellant's wife was having their child call the paramour her "new daddy," and how much this upset the appellant.

In his unsworn statement, the appellant described his marital problems. He attempted to salvage his relationship with his wife but ultimately requested a divorce in February 2010. His wife filed for a civilian restraining order, which largely prevented the appellant from seeing his child, and her paramour moved into the appellant's house with the appellant's wife and child while the appellant moved into the dormitory on base. He described being involved in multiple court hearings and lawyer appointments while his divorce proceedings dragged on for more than a year. He had also taken a second job to pay for his home and other expenses. Regarding his offenses, the appellant said he went to a local pool hall in May 2011 to "drink his sorrows and emotions away" and ended up playing pool with a civilian who offered him crystal methamphetamine. Describing

himself as depressed and having lost focus and interest in his life, the appellant said he chose to take the drug on that occasion and three other times.

The Government argued for a sentence that included a bad-conduct discharge and eight months of confinement. Arguing, in part, that the appellant's difficult personal situation at the time of his offenses mitigated his decision to use drugs, the defense counsel argued such a harsh sentence was inappropriate for the appellant. The sentence adjudged by the members included a bad-conduct discharge, two months of confinement and reduction to E-1.

In his lengthy clemency letter to the convening authority, the appellant provided additional details regarding the martial and personal difficulties brought up during his trial. He also described mental health problems he was experiencing, as well as suicidal thoughts and gestures he made before and during his period of drug use. The letter stated he began weekly counseling sessions in April 2010 with a counselor at the Hurlburt Field mental health center, which continued until April 2011. According to the appellant, in August 2010, the mental health counselor recommended his removal from the flight line due to the severity of his mental health issues, and he was subsequently placed in the mission support equipment shop.

On appeal, the appellant contends his trial defense counsel was ineffective during the sentencing phase of his court-martial by failing to elicit information about the appellant's mental health problems and treatment through his records and the testimony of his counselor. He argues his unsworn statement was insufficient to demonstrate to the panel the depth of his problems and despair, and there was no legitimate tactical reason for his defense counsel to fail to bring his mental status to the members' attention.

Ineffective Assistance of Counsel

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), where the 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) 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."

The deficiency prong requires the appellant to show his defense counsel's performance "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. We do not "second-guess the strategic or tactical decisions made at trial by defense counsel," and if an appellant attacks them, he "must show specific defects in counsel's performance that were 'unreasonable under

prevailing professional norms.'" *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (internal quotation marks and citations omitted). The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

To establish ineffective assistance of counsel, the appellant "must surmount a very high hurdle." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000), *cited in Perez*, 64 M.J.at 243 (citations omitted). This is because counsel is presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *Alves*, 53 M.J. at 289.

In a sworn declaration submitted to this Court, the appellant's area defense counsel described his conversations with the appellant about the defense sentencing case in general and mental health issues specifically. According to the defense counsel, the appellant expressly asked him not to call the mental health counselor (or any other witness) on his behalf as he did not want that part of his life displayed before the panel and did not want to ask for the panel's sympathy.[*] After considerable efforts by the defense counsel, the appellant reluctantly agreed to call only the two noncommissioned officers from his squadron as a compromise of his "no witnesses" position. Within the constraints laid out by the appellant's position, the defense counsel presented the sentencing evidence in a manner designed to show the appellant used the drugs as a means to escape from the difficult marital and child custody situation he was experiencing, and to provide information to the members about how that situation was adversely affecting him. We find the defense counsel made reasonable strategic and tactical decisions when preparing for and presenting the defense sentencing case. As such, his performance was not deficient.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

[*] In his brief, the appellant contends he expressly asked his defense counsel to present evidence about his mental health problems through the testimony of his counsel and the introduction of his medical records. As this claim is not supported by a sworn declaration or affidavit, there is no disputed question of fact for us to resolve on this matter. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court