UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KENNETH W. DILLON
United States Air Force

ACM 36843

23 April 2009

Sentence adjudged 09 August 2006 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 21 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Michael A. Burnat, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, Major Jeremy S. Weber, Major Donna S. Rueppell, and Major Amy E. Hutchens.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

WISE, Chief Judge:

The appellant was tried at Luke Air Force Base, Arizona, by a general court-martial composed of a military judge. Pursuant to his pleas, the appellant was found guilty of rape of a child under the age of 16 years on divers occasions, in violation of Article 120, UCMJ, 10 U.S.C. § 920; sodomy of a child under the age of 12 years on divers occasions, in violation of Article 125, UCMJ, 10 U.S.C. § 925; and indecent acts upon the body of a child under the age of 16 years on divers occasions, in violation of

Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 21 years, and reduction to E-1. The convening authority, after making a provision for monetary payments for the benefit of the appellant's wife and children, approved the sentence as adjudged.

On appeal, the appellant raises three issues. The appellant asserts: (1) he was subjected to post-trial cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution of the United States[1] and Article 55, UCMJ, 10 U.S.C. § 855; (2) his trial defense counsel were ineffective in failing to call a defense expert mental health witness for presentencing proceedings;[2] and (3) his sentence to 21 years confinement was inappropriately severe. Additionally, this Court specified an issue involving the application of *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008), in which our superior court determined that the 2003 amendment to Article 43(b), UCMJ, 10 U.S.C. § 843(b) (2000), extending the application of the statute of limitations for child sex abuse cases from five years to the victim's twenty-fifth birthday, was not retroactive. In response to the specified issue, the appellant requests that this Court amend the time frames for which the appellant was found guilty of the sodomy and indecent acts offenses and order a rehearing on the sentence. We have examined the record of trial, the assignment of errors, the appellant's response to the specified issue, and the government's responses. We amend the findings as indicated in our decretal paragraph and reassess the sentence.

Background

The appellant married RD on 19 October 1996. RD had a daughter from a previous marriage, SP, who was born on 27 October 1990. RD and SP moved into the appellant's residence on 19 October 1996. The appellant repeatedly sexually abused SP between the ages of six and eleven. SP turned six years old on 27 October 1996 and eleven years old on 27 October 2001. All of the crimes committed by the appellant against SP occurred prior to the November 2003 Congressional amendment of Article 43(b), UCMJ, extending the statute of limitations in child sex abuse cases from five years to the victim's twenty-fifth birthday. The Summary Court-Martial Convening Authority receipted for the court-martial charges on 10 April 2006. All sodomies and indecent assaults committed by the appellant against SP prior to 10 April 2001 are barred by the five-year statute of limitations in effect at the time the crimes were committed. *United States v. Tunnell*, 23 M.J. 110 (C.M.A. 1986).

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[1] U.S. CONST. amend. VIII.

[2] Issues 1 and 2 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Cruel and Unusual Post-Trial Punishment

The appellant complains for the first time in an affidavit submitted to this Court that he was subjected to post-trial cruel and unusual punishment. The appellant states that: (1) he was denied his right to physical exercise; (2) no one from his chain of command came to visit him while in post-trial confinement; (3) his meals while in post-trial confinement consisted of whatever Security Forces or other inmates provided him; (4) unlike other inmates, he was handcuffed and fitted with leg restraints when leaving the confinement facility for appointments; and (5) he was placed in restraints when he had visitors while other inmates were able to have free movement.

In order to prevail through the judicial process on allegations of abuse while in post-trial confinement, "[A] prisoner must seek administrative relief prior to invoking judicial intervention. In this regard, [the] appellant must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 [U.S.C.] § 938." *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) (quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997) (quoting *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993))). This requirement "promot[es] resolution of grievances at the lowest possible level [and ensures] . . . that an adequate record has been developed" to aid appellate review. *Miller*, 46 M.J. at 250.

The appellant has failed to show that he attempted to obtain relief pursuant to the prisoner-grievance system at the Luke Air Force Base confinement facility or by filing an Article 138, UCMJ, complaint. Further, the appellant has failed to identify "some unusual or egregious circumstance" that prohibited him from exhausting those remedies.

Beyond the appellant's failure to establish that he attempted to obtain administrative relief for his complaints, he has failed to articulate a valid claim for the relief he seeks. The appellant must establish two factors required for an Eighth Amendment or Article 55, UCMJ, violation regarding conditions of confinement. In order to succeed on these theories, the appellant must: (1) show that the act or omission resulted in the denial of necessities and is "objectively, 'sufficiently serious'" and (2) prove a "deliberate indifference" on the part of his jailors to the appellant's health or safety. *White*, 54 M.J. at 474 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 302-03 (1991))). The appellant's complaints meet neither the "objectively, 'sufficiently serious'" or the subjective "deliberate indifference" factors required to establish an Eighth Amendment or Article 55, UCMJ, violation.

Effective Assistance of Counsel

The appellant was sexually abused by his older brother from approximately age seven until age nine or ten. The appellant's trial defense counsel did not call a mental health professional to testify during presentencing procedures. The appellant insinuates that had his trial defense counsel called a mental health professional, the witness could have detailed, as a mitigating factor, how the abuse suffered by the appellant "might have lead [sic] to the crimes [the appellant] committed against [his] victim." The appellant concludes, "I was denied any expert witness at my trial though my counsel informed me that they would get expert witness [sic] on my behalf." The appellant has not proffered to this Court, by way of affidavit or otherwise, what information such a witness could have provided in this military judge alone trial.

The appellant's wife, RD, was called as a government witness. Trial defense counsel (TDC) had the following exchange with the witness on cross-examination:

> [TDC:] During your relationship, at the beginning of the relationship with Sergeant Dillon, he confided in you that he had been sexually abused as a child?
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> [RD:] Yes.
>
> . . . .
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> [TDC:] When you talked to him about this, he was upset. He talked to you on more than one occasion about it, is that right?
>
> [RD:] Yes.
>
> [TDC:] And his demeanor was sad and crying and etcetera?
>
> [RD:] Yes.
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> [TDC:] And there was a time you accompanied him back to his home for a family reunion, is that correct?
>
> [RD:] Yes.
>
> [TDC:] And he told you that he was sexually abused by his older brother and basically physically forced to engage in oral sex with his older brother?
>
> [RD:] Yes.

[TDC:] And when you went back to the family reunion, you witnessed Sergeant Dillon tell his older brother that I forgive you for hurting me, is that right?

[RD:] Yes.
[TDC:] And he was crying, is that right?

[RD:] Yes, both of them were.

[TDC:] Both of them were crying?

[RD:] Yes.

The appellant elaborated on this abuse during his oral and written unsworn statements:

> My older brother [M], who was six years older than me, abused me from when I was a young boy. First it was physical to where he would beat up on me pretty badly, but starting when I was about 7, he would force me to perform oral sex on him. He would beat me up if I didn't. This lasted two or three years until I told him I wouldn't do it any more. I didn't know how to deal with this and I just sort of carried it with me everywhere. Sometimes I would think about it, but mostly I would try to pretend it never happened. But it did happen and I've never been the same.
>
> My parents did not know this was going on, and I never told them about it until recently. I only wish I had told them about it when it happened so that they could get me help and make it stop. I was always too embarrassed and ashamed.
>
> I have talked with several psychologists about what happened to me as a boy with my older brother. I only wish I had gone to them sooner and gotten help and not tried to deal with this alone. I know now from talking to them that people who are abused are more likely to grow up to abuse others.

The appellant also entered into a stipulation of expected testimony from Dr. BE, a clinical and forensic psychologist, who said, in part:

> The likelihood of an adult who was sexually abused as a child to sexually abuse another child is also greater. This is more likely the case when the victim has not been treated for the abuse. Additionally, this is more likely to occur with males than females.

The testimony of RD concerning the appellant's statements to her about the sexual abuse he suffered at the hands of his older brother, RD's observations of the appellant's confrontation of his older brother and the brothers' respective reactions, the appellant's unsworn statements, and Dr. BE's testimony regarding the elevated potential for abuse by an untreated victim of child sexual abuse were unrebutted by the government.

In response to the appellant's allegations of ineffective assistance of counsel, the appellant's trial defense counsel, Captain HL and Captain SC, have submitted an unrebutted joint affidavit explaining in detail why they did not call a mental heath professional in their case-in-chief during presentencing proceedings. They state that the appellant, just hours after having received an Air Force Office of Special Investigations arranged pretext phone call from SP, claimed to have fallen and hit his head, resulting in a state of amnesia that prevented him from remembering anything after the approximate age of seven. A complete battery of medical tests, including a CT-scan and MRI, showed no organic basis for his condition. A medical professional from Wilford Hall Medical Center found "perceived amnesia not consistent with known psychiatric or neurological causes of amnesia." A Sanity Board, ordered pursuant to Rule for Courts-Martial (R.C.M.) 706, determined that the appellant did not suffer from a severe mental disease or defect at the time of the alleged criminal misconduct and was not suffering from a mental disease or defect rendering him unable to intelligently assist in his own defense.

This exceedingly rare medical condition complained of by the appellant lasted from 17 October 2005 until approximately one week before the 9 August 2006 trial date. The appellant claimed he began recovering his memory through "dreams and other flashes of memory" resulting in his complete memory recovery the day before trial, enabling him to enter into a pretrial agreement. The pretrial agreement required the government to withdraw a malingering charge with two specifications (dealing with his professed amnesiac condition) and capped confinement at 25 years in return for the appellant's pleas to the charges and specifications for which he was convicted.

The trial defense counsel admit that they did not call a mental health professional to testify on the appellant's behalf during presentencing proceedings. They state that Colonel (Col) RC, a board-certified psychiatrist, was appointed as a defense expert consultant. The trial defense counsel explain that Col RC, after interviewing the appellant several times, interviewing SP, and reviewing the evidence:

> became concerned that [the appellant] had at minimum begun what Col [RC] called "grooming" of his [then] 5 year old [natural] daughter and had very likely already sexually abused her as well. This other daughter was the same age [SP] had been when [the appellant] began sexually abusing her. Col [RC] saw the same pattern in his relationship with his other daughter that [the appellant] had used in grooming [SP] to get to the point

> that [SP] would submit to his sexual advances in return for privileges, such as playing outside or going to a friend's house.

The trial defense counsel continue:

> Contrary to [the appellant's] declaration, Col [RC] was present at his court-martial.[3] However, the defense elected not to call him for tactical reasons. First, Col [RC] was strongly of the opinion that [the appellant] had either already sexually abused his other daughter or was grooming her for imminent abuse. Such a revelation would have been disastrous as the single victim would suddenly have become two in the eyes of the military judge. [The appellant's] rehabilitation potential would have looked particularly grim as this abuse [of SP] could no longer be couched as an isolated [victimization]. We wished to keep these conclusions away from the government so we chose to keep Col [RC's] consultations with [the appellant] privileged by not calling him as a witness. In addition, the defense wished to the extent possible to keep out the alleged amnesia. Col [RC] was intimately aware of the amnesia as [the appellant] had professed no recollection of anything subsequent to the age of seven when he first met with Col [RC]. While it may have been possible to put some sort of spin on the amnesia as an acknowledgement of wrongfulness and therefore a sign of favorable rehabilitation potential, the more obvious interpretation was what it appeared to be; a poorly-conceived and absurdly-timed attempt to avoid punishment through apparent lack of understanding of the allegations against him.
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> . . . .
>
> Similarly, the defense agreed the wisest course of action was not to call Capt [M][4] or any witness involved in [the appellant's] mental health treatment leading up to court. As described above, [the appellant] had tried to maintain his story of complete amnesia with these folks (albeit not well). For these reasons, calling any of them would open the door for the government to explore the amnesia issue, which would have allowed them to paint [the appellant] as an unrepentant child molester willing to feign a lack of competency simply to avoid punishment.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance

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[3] We read the appellant's affidavit to complain not that a mental health professional was not present at his court-martial but that a mental health professional did not testify on his behalf during presentencing proceedings.

[4] Captain M was another mental health professional mentioned by the appellant in his affidavit complaining of ineffective assistance of counsel.

of counsel, the appellant must show: (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The appellant must identify specific acts or omissions that rendered the trial defense counsel's performance "outside the wide range of professionally competent assistance" that could have been provided in any given case. *Id.* at 690. We will not second guess the trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). The prejudice prong requires that the appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Stickland*, 466 U.S. at 694. Even if the defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004) (quoting *Strickland*, 466 U.S. at 687).

The appellant has identified the specific omission committed by his trial defense counsel that he claims was ineffective. The appellant does not complain, and cannot complain, that the sentencing body, in this case the military judge, did not receive evidence from a mental health professional that an untreated adult who was himself subjected to child sexual abuse is more likely to commit child sexual abuse as an adult. The appellant complains only that a mental health professional was not called to testify in person on his behalf to provide this evidence to the military judge. The trial defense counsel's choice to present this evidence through a background witness, the appellant's unsworn oral and written statements, and a stipulation of expected testimony from an eminently qualified mental health professional was not deficient, particularly when all of the evidence went unrebutted by the government. Further, the trial defense counsel have provided compelling tactical reasons for not calling such a witness and thereby opening the door on cross-examination to potentially devastating evidence to the appellant. Contrary to the appellant's claim, the trial defense counsel's performance was not deficient but was remarkably proficient. Having determined that counsel's performance was: (1) not deficient and (2) guided by sound tactical analysis, there is no legal purpose in determining whether the appellant would have received a better result had a mental health professional testified, as the appellant now desires, during the defense sentencing case-in-chief. However, all indications are that such an approach would have been disastrous for the appellant. The appellant was not subjected to ineffective assistance of counsel.

Statute of Limitations

The appellant was charged with committing sodomy with SP, a child under the age of 12, from on or about 1 January 1996 to on or about 26 October 2002, in violation of Article 125, UCMJ, and performing indecent acts upon SP, a child under the age of 16, from on or about 1 January 1996 until on or about 31 December 2003, in violation of Article 134, UCMJ. The Summary Court-Martial Convening Authority receipted for

charges in the appellant's case on 10 April 2006. The trial was convened on 9 August 2006. Our superior court in *Lopez de Victoria* determined that the 2003 amendment to Article 43(b), UCMJ, extending the application of the statute of limitations for child abuse cases from five years to the victim's twenty-fifth birthday, was not retroactive. *Lopez de Victoria*, 66 M.J. at 74. Therefore, only those sodomy and indecent act offenses committed by the appellant against SP after 10 April 2001 are actionable.[5] We will order appropriate corrections in our decretal paragraph.

Sentence Reassessment

The military judge improperly considered those sodomies and indecent acts that occurred prior to 10 April 2001 as charged misconduct for findings and sentencing purposes. The trial counsel, during his sentencing argument, focused, in part, on the number of sexual offences the appellant subjected his daughter to prior to the running of the statute of limitations and improperly asked the military judge to punish the appellant for those offenses. This evidence would have been admissible as uncharged misconduct pursuant to R.C.M. 1001(b)(4) as evidence in aggravation "directly relating to . . . the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4); *see United States v. Tanner*, 63 M.J. 445, 448-49 (C.A.A.F. 2006); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990). However, it was plain error for the military judge to punish the appellant for those offenses that occurred prior to 10 April 2001. *United States v. Denney*, 28 M.J. 521 (A.C.M.R. 1989); Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 8-3-20 (15 Sep 2002).

If a military court of criminal appeals "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred" it must order a rehearing on sentence. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). However, if this Court is convinced "that even if no error had occurred at trial, the accused's sentence would have been at least of a certain magnitude" then we "need not order a rehearing on sentence, but instead may [ourselves] reassess the sentence." *Id.* We conclude that we can properly reassess the sentence.

The appellant raped SP on at least two occasions when she was approximately 11 years old. The appellant routinely and repeatedly committed sodomy with and perpetrated indecent acts upon SP subsequent to 10 April 2001. The appellant coerced SP to engage in these activities through use of his parental control. As a result of limiting criminal liability for the sodomies and indecent acts committed by the appellant to those that occurred after 10 April 2001, there is no change in the "penalty landscape." *United*

[5] The appellant, during the *United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969), inquiry said the rapes occurred sometime between 2000 and 2001 although the stipulation of fact entered into by the appellant said the rapes occurred when SP was 11 years old, which would have placed the rapes closer to 27 October 2001. We need not determine precisely when the rapes occurred as there is no statute of limitations for the offense of rape under Article 120, UCMJ, 10 U.S.C. § 920. *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998).

States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003). The maximum period of confinement that could have been imposed remains life imprisonment without parole.[6] After taking into account all the facts and circumstances surrounding the offenses for which the appellant was found guilty, we find the appellant's sentence to a dishonorable discharge, reduction to E-1, and 21 years confinement appropriate for the crimes for which he was convicted. However, that does not end our inquiry.

We must be convinced not only that the sentence, as adjudged, "is appropriate in relation to the affirmed findings of guilty" but also "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). The military judge improperly sentenced the appellant for crimes of sexual abuse committed against SP dating back to 1996. While it is very possible the military judge would have adjudged the sentence he imposed for those crimes committed by the appellant subsequent to 10 April 2001, we cannot ignore the possibility that he punished the appellant for those earlier offenses.

We are convinced beyond a reasonable doubt that had this experienced military judge not received evidence of those sexual offenses committed by the appellant prior to 10 April 2001, he would have adjudged a sentence of at least a dishonorable discharge, reduction to E-1, and 19 years confinement. Therefore, we reassess the sentence to a dishonorable discharge, reduction to E-1, and 19 years confinement. Furthermore, we find the sentence, as reassessed, to be appropriate. *See United States v. Peoples*, 29 M.J. 426, 427-28 (C.M.A. 1990). In view of our decision to reassess the sentence, we need not address the appellant's claim that his sentence to 21 years confinement is inappropriately severe.

Conclusion

The findings are modified as follows: that portion of the Specification of Charge III which states, "on divers occasions, from on or about 1 January 1996 to on or about 26 October 2002" is amended to read "on divers occasions, from on or about 10 April 2001 to on or about 26 October 2002." That portion of the Specification of Charge IV which states, "on divers occasions, from on or about 1 January 1996 to on or about 31 December 2003" is amended to read "on divers occasions, from on or about 10 April 2001 to on or about 31 December 2003."

The approved findings, as modified, and the 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).

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[6] The case was referred non-capital for the rape offense.

Accordingly, the approved findings, as modified, and the sentence, as reassessed are

AFFIRMED.

Judge HELGET did not participate.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court