UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RYAN E. EDMONDS
United States Air Force

ACM 36040

5 December 2006

Sentence adjudged 30 June 2004 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: James L. Flanary.

Approved sentence: Dishonorable discharge and confinement for 10 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, Major Sandra K. Whittington, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major Jin-Hwa L. Frazier.

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

SOYBEL, Judge:

The appellant was convicted, contrary to his pleas, of one specification of perjury and two specifications of making false official statements, in violation of Articles 131 and 107, UCMJ, 10 U.S.C. §§ 931, 907. A general court-martial, comprised of officer members, sentenced the appellant to a dishonorable discharge and confinement for 10 months. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts: (1) that the referral was improper because it was based on information received after the Article 32, UCMJ, 10

U.S.C. § 832, report was completed, (2) that the appellant received ineffective assistance of counsel, and (3) the evidence is legally and factually insufficient to support the findings of guilty as to perjury. After careful review of the entire record, we find the appellant's assignments of error to be without merit and affirm the findings and sentence.

Background

This was appellant's second court-martial. In the first, he was convicted at a general court-martial in October of 2003 of three specifications of wrongful drug use in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced to a bad-conduct discharge, confinement for eleven months, forfeiture of all pay and allowances, and reduction to E-1.

In November of 2003, the appellant received a grant of immunity and an order to cooperate with investigators from the convening authority. Additionally, he was ordered to provide information and testify against other drug users, to include two other Airmen, Airman First Class (A1C) P and A1C B.

Captain (Capt) K was a circuit trial counsel assigned to prosecute A1C P and A1C B. Local base counsel, Capts E and C, respectively, assisted him on these cases. On 10 January 2004, in the course of preparing for those two courts, Capts K, E and C met with the appellant to interview him prior to the upcoming trials.

Despite the fact that the appellant made prior statements that he used drugs with A1C P and A1C B - statements that were corroborated by other witnesses - at the first meeting with the three prosecutors he denied any knowledge of their drug involvement. He also denied that A1C P had given him money on one occasion to purchase cocaine, even though others involved in that transaction said the appellant made statements indicating A1C P had contributed money to purchase the cocaine.

Capt K was surprised when the appellant stated that he knew "for a fact" that A1C P had not used drugs on the day in question, because all previous information had indicated that the appellant knew a lot about A1C P's drug use. He suspected the appellant was not being candid with him. Rather than pressing the point, Capt K switched subjects and asked the appellant about A1C B's drug use. His intent was to return to the subject of A1C P's drug use later on in the interview, hoping the appellant would answer in conformity with his prior statements and the statements of other witnesses. Again, to Captain K's surprise, the appellant denied any knowledge about A1C B's drug use, when he raised the subject a second time.

Capt K quickly surmised that the appellant did not want to assist in the prosecution of his friends and had changed his story. In fact, there is some evidence that Capt K thought the appellant was lying very early in the interview. Capt K stopped the interview and advised the appellant of his rights under Article 31, UCMJ, 10 U.S.C. § 831, and the 5th Amendment of the United States Constitution.[1] Capt K also contacted the appellant's military trial defense counsel, Capt O,[2] to tell him what had happened.[3]

The next day, 11 January 2004, after Capt K ensured that the appellant spoke with Capt O, he reinitiated the interview with the appellant who again remained steadfast and did not provide any additional information. Capt K again read the appellant his rights and also called Capt O, who indicated he would once again speak to his client.

Three days later, just before the appellant was scheduled to testify for the government during A1C P's court-martial, Capt K arranged for him to speak with his defense attorneys. In order to facilitate counsel's conversation with their client, Capt K informed defense counsel of his suspicions. Civilian defense counsel was interested in knowing whether the government would really be interested in trying "to come after this kid" if he continued to deny knowledge about A1C P's drug use. The appellant then spoke to both of his counsel on a 3-way teleconference in a private room. After that conversation, he was called as a witness in A1C P's court-martial.

Appellant testified under oath that he could not remember whether A1C P had contributed any money to buy drugs. Capt K, suspecting his testimony was again false, read the appellant his rights while he was still on the stand. A recess was granted so that the appellant could speak to his defense attorneys yet again. When they were done, Mr. D spoke with Capt K and told him it was okay to put his client back on the stand. When the appellant returned to the stand he continued to testify that he could not remember when asked about any of A1C P's drug use.

A1C P was found not guilty of distribution of a controlled substance and was found guilty of a one-time use of a controlled substance.[4] A1C B was administratively discharged based upon appellant's "lack of memory" having so severely crippled the government's case against him. Thereafter, the government

[1] U.S. CONST. amend. V.
[2] Capt O is one of the defense counsel accused of ineffective assistance of counsel in appellant's second assignment of error.
[3] Mr. D, a civilian defense counsel, also represented the appellant, but only Capt O was called at that time.
[4] A1C P was found guilty of a single use of cocaine, however the specification as originally charged alleged divers use.

decided to prosecute the appellant again, this time for the two alleged false official statements made to Capt K during the second attempt to interview him regarding A1C P and A1C B's involvement with illegal drugs, as well as for his alleged perjury in A1C P's court-martial.

Gearing up for the second prosecution of the appellant, on 30 March 2004, the government held an Article 32, UCMJ, investigation with Capt S as the investigating officer. As expected, Capt K testified and was a major part of the government's case. He testified about the two interviews he had with the appellant in preparation for the courts-martial of A1C P and A1C B, as well as the appellant's suspected false testimony in A1C P's court-martial.

Unfortunately, after Capt K testified at the Article 32, UCMJ, hearing there were two versions of his testimony prepared and handled by Capt S. One was a 6-page document, dated 7 April 2004, as first summarized by Capt S.[5] The other version was the one reviewed and edited by Capt K. His edits shortened the original long version by a page.[6]

The copy of the Article 32, UCMJ, report given to the defense contained the long version of Capt K's statement. The copy of the Article 32, UCMJ, report given to the convening authority contained the short version of Capt K's statement. The defense did not receive the short version of Capt K's statement until the day before trial.

At trial, the defense put forth that Capt K's edits were designed to minimize the admissions of his own "misconduct" made at the Article 32, UCMJ, hearing concerning his questioning of the appellant. The defense made a motion for a new referral based on the fact they were denied an opportunity to comment under Rule for Courts-Martial (R.C.M.) 405(j)(4), on the short version of Capt K's Article 32, UCMJ, testimony that went to the convening authority.

In response to the defense motion for a new referral, the military judge made findings of fact and conclusions of law regarding the two versions of the Capt K statement. He found that the two documents were "substantially the same documents" despite the edits. The military judge reasoned that "[m]ost of the information deleted from [the long version] is simply a rehash [or] clarification of information found in both [versions]." The court found that the short version of the statement contained all of the relevant information found in the long version. The military judge offered to grant a delay to the defense in case they needed more

[5] The 7 April 2004 document will be referred to as the "long version."
[6] The second document signed by Capt S on 13 April 2004 and Capt K on 22 April 2004 will be referred to as the "short version."

time, given they only received the long version the day before trial. The defense declined this offer.

The Article 32, UCMJ, report was forwarded with recommendations to the general court-martial convening authority on 14 April 2004, even though it contained the Capt K statement signed by Capt S on 22 April 2004. Adding to the confusion is the fact that the staff judge advocate's (SJA) advice was signed on 21 April 2004, a day before Capt S supposedly signed the short version of Capt K's statement. The convening authority referred the charges on 29 April 2004.

Referral of Charges

We find that referral was not improper under the facts of this case. Article 32, UCMJ, and R.C.M. 405, govern pretrial investigations. Article 32(a), UCMJ, provides: that the investigation "shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline." This information is presented to the convening authority for his consideration, "accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused." Article 32 (b), UCMJ.

If there are reasonable grounds to believe an offense has been committed, the accused committed it, and the specification alleges an offense, the convening authority may refer it to trial. R.C.M. 601(d)(1). Under this rule, a finding may be based completely on hearsay and information "from any source" may be considered. *Id.* The convening authority is not required to resolve "legal issues, including objections to evidence" before referring charges to a general court-martial, as long as there has been "substantial compliance" with the investigation requirements of R.C.M. 405. *Id.*

The appellant contends that referral was improper because it was based on information received after the Article 32, UCMJ, report was completed. We are not convinced that this statement reflects the best summary of the facts. It is true we do not know how one version of Capt K's testimony got into the defense's copy of the Article 32, UCMJ, report while another version was included in the convening authority's copy. The record is not clear as to the exact chronology of events. The bottom line is that all of the information was received at the Article 32, UCMJ, hearing and none was received after it was closed. Regardless of the problematic dates on the two versions of Capt K's testimony, the real problem as we see it, is that the defense had a different version of Capt K's testimony than the convening authority, and submitted their R.C.M. 405(j)(4) objections believing the convening authority also had the original long version instead of the short version.

1. Legal Standard

The appellant's brief cites *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958), and its progeny through *United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981), for the proposition that if an accused is denied a substantial right, reversal is required, upon timely complaint, regardless of whether the accused suffered prejudice. The appellant made a timely complaint at his trial in a motion for a new referral. However, in *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988), our superior court established different rules. In *Murray*, the Court reviewed a general court-martial conviction where pretrial advice was never provided to either the convening authority or the defense. *Murray*, 25 M.J. at 447. The first time the defense raised the issue was on appeal. Although the case dealt mainly with the question of whether the issue was waived at trial, the Court rejected the idea that such an omission was, per se, prejudicial error. Instead they held "that an error such as the one before us now requires reversal only when the accused has suffered actual prejudice." *Id.* Courts of military review should review the record of trial to determine if lack of pretrial advice would effect the legality or the fairness of the findings "instead of declaring that a court–martial lacks the power to proceed and automatically reversing the findings." *Id*. at 449. *See also United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985).

In *Davis*, a defective Article 32, UCMJ, investigation did not cause automatic reversal. There, our superior court examined the case for prejudice when the Article 32, UCMJ, hearing was improperly conducted because the investigating officer, who was the chief of military justice at the naval base, was also the defense counsel's supervisor. Likewise, we hold in this case, the proper procedure is to examine the case for prejudice rather than automatically ordering a new referral.

At the heart of our examination for prejudice lay the two versions of Capt K's summarized testimony. The appellant claims that the "short version" removed "any references that were indicative of either prosecutorial misconduct or insufficient evidence of a violation of Article 107, UCMJ - evidence which the investigating officer herself had clearly heard." Appellant contends that the long version revealed that during his interviews of the appellant, Capt K delayed reading the appellant his rights under Article 31, UCMJ, even though he suspected the appellant of making a false official statement. Appellant maintains that it was improper to recall the appellant to the stand in A1C P's court-martial after Capt K read the appellant his rights, because Article 31, UCMJ, and the 5th Amendment[7] require counsel to be "present" after someone's right to counsel is invoked.

[7] U.S. CONST. amend. V.

Finally, the appellant asserts that it was improper for Capt K to reinitiate the questioning of the appellant once he asked for an attorney.[8] Thus, the appellant was denied the opportunity to "submit any objections to the summarized testimonies contained within it," and to "respond to the watered-down version of Capt K's statement as the appellant was entitled under R.C.M. 405(j)."

While it is true the appellant missed the opportunity to object to the "watered-down" testimony of Capt K, we find that the difference between the two versions would not have prejudiced the appellant. As noted above, the military judge found that the two documents were "substantially the same documents" and only extraneous information was removed from the short version.

We review a trial judge's findings of fact under a clearly erroneous standard. *United States v. Cravens*, 56 M.J. 370, 375 (C.A.A.F. 2002); *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993). We see no reason to overturn the trial judge's findings. Moreover, in this case, we are able to compare both documents ourselves and we also find that essentially all of the information contained in the long version is also contained in the short version. Indeed, the short version tracks very well with the summary of facts in the appellant's R.C.M. 405(j), submission that was based on the long version.

We are convinced that any differences between the two versions of Capt K's testimony would not have caused the convening authority to alter his decision to refer the charges and specifications against the appellant. First, even with only seeing the "short version" of the summarized testimony the appellant's R.C.M. 405(j), submission clearly shows the convening authority was made aware of the allegation of prosecutorial misconduct. The issue was addressed in the appellant's submissions and the SJA's advice to the convening authority. Secondly, the convening authority does not have to resolve legal issues before referral under R.C.M. 601(d)(1). The convening authority left the issue of any alleged misconduct for the military judge to decide. Third, the conduct the appellant focuses on has nothing to do with his own behavior. Whatever language was left out about Capt K's conduct in the "watered-down" version does not alter what the convening authority would have read concerning the *appellant's* behavior. Finally, the convening authority certainly was aware of this entire issue before he took action in the case, and easily could have corrected the problem if he thought he was denied important information at the time he referred the charges. With the entire issue presented to him after the trial, he still approved the findings of the court.

[8] These issues were not specifically raised on appeal as assigned errors, but were addressed in appellant's brief.

2. Other Considerations

The fact that the two versions were "substantially the same documents," also satisfies R.C.M. 405(a), which states: that no charges or specifications may be referred to a general courts-martial until an Article 32, UCMJ, investigation is conducted "in substantial compliance with this rule." *See* R.C.M. 405(a). The discussion section goes on to say that failure to substantially comply with the rule, must prejudice the accused in order to result in delay of the disposition of the case or disapproval of the proceedings. Because the two documents contained essentially the same information, we further find that there was substantial compliance with R.C.M. 405(j)(3), and no prejudice to the accused occurred.

Importantly, submission of objections under R.C.M. 405 is not an absolute guarantee. R.C.M. 405(j)(4), states that any objection to the report by the defense must be made within five days after its receipt. However, it goes on to say "[t]his subsection does not prohibit a convening authority from referring the charges . . . within the 5-day period." Thus, the appellant's right to object to the way the Article 32, UCMJ, investigating officer summarized Capt K's testimony is not a bar to the convening authority's ability to refer charges to trial. Furthermore, if the appellant had been served with the same version as the convening authority, he would have had enough time to object within the five days since the convening authority took longer than that to refer. Our point is that while R.C.M. 405(j) is an important right, it is obviously not an essential part of military due process since the convening authority does not have wait for the defense's submission before he refers a case to trial.

We are convinced beyond a reasonable doubt that the convening authority would have referred this case to trial even if he had seen the original long version of Capt K's summarized testimony. Appellant was not prejudiced by the mistake.

Ineffective Assistance of Counsel

Citing *Strickland v. Washington*, 466 U.S. 688 (1984), the appellant claims that he received ineffective assistance of counsel during the informal pretrial phase of his trial because his trial defense counsel did not seek an additional grant of immunity from the convening authority after Capt K read him his Article 31 rights at A1C P's court-martial. Because this is a case alleging pretrial ineffective assistance of counsel, a narrow application of *Strickland* may not be appropriate to gauge defense counsel's actions in this case.

It is well established that the standards enunciated in *Strickland* are tied to the appellant's right to counsel under the 6th Amendment of the United States

Constitution.[9] To prevail on a claim of ineffective assistance of counsel, the appellant must show: (1) that counsel's performance was deficient; and (2) that counsel's deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687. However, this right does not attach until the initiation of "adversary judicial criminal proceedings." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). In the military, the trigger point for the protections of the 6th Amendment has been identified as the perferral of charges. *US v. Harvey*, 37 M.J. 140, 141 (C.M.A. 1993). In looking at the stage of the appellant's representation in which he alleges ineffective assistance of counsel, it is clear his 6th Amendment rights did not attach in this case.

That is not to say that an accused is not entitled to effective assistance of counsel during his pretrial representation. Indeed, that right has been recognized in the military. *See United States v. Lincoln*, 40 M.J. 679, 690 (N.M.C.M.R. 1994), *rev'd, in part, on other grounds by United States v. Lincoln*, 42 M.J. 315 (C.A.A.F. 1995); *United States v. King*, 27 M.J. 664, 669 (Army Ct. Crim. App. 1998).

We are satisfied that applying the traditional test under *Strickland*, the appellant did receive effective assistance of counsel. However, since this claim of ineffective assistance of counsel is alleged to have occurred well before the start of the formal adversarial process, another test may be better suited. Indeed, the Court in *Strickland* acknowledged that outside of a formal adjudicatory proceeding, a different test might be appropriate. In that case they were reviewing counsel's conduct during a Florida state capital sentencing proceeding which is "sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial . . . to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland*, 466 U.S. at 686-87. The Court also noted, "[w]e need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance." *Id.* at 686.

Without a doubt, the convening authority's decision whether or not to provide the appellant a second grant of immunity, is so unlike a trial in its "adversarial format and in the existence of standards for decision" that the *Strickland* test would not be workable. *Id.* However, it is not necessary to create a test for pretrial ineffective assistance of counsel today. Whatever that particular test comes to look like, one of its components is sure to be derived from *Strickland*, and cases making that case applicable to the military. *Cf. United States*

[9] U.S. CONST. amend VI.

v. Grigoruk, 52 M.J. 312 (C.A.A.F. 2000). Namely, a reasonable probability must exist that the result or outcome would have been different. *Id*. at 315.

Without deciding whether defense counsel should have asked for a second grant of immunity, we do not think the results would have been different in this case even if defense counsel had asked for a second grant of immunity. It is not enough to say that another counsel would have asked for additional immunity or that the convening authority might, or could have, granted additional immunity if the appellant asked for it. That is not enough for the appellant to meet his burden. "We will . . . require an appellant to establish a factual foundation for a claim of ineffective representation. Sweeping, generalized accusations will not suffice." *Id*. at 315 (citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

Without a showing of evidence to the contrary, the appellant cannot meet his burden of showing ineffective assistance of counsel, or overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 694. We are not convinced that appellant received ineffective assistance of counsel.

Legal and Factual Sufficiency

We have also reviewed the appellant's remaining assignment of error, which challenges the sufficiency of the evidence offered to prove appellant's alleged perjury, in violation of Article 131, UCMJ, 10 U.S.C. § 931. The evidence admitted at trial was both legally and factually sufficient to support the appellant's conviction for perjury. Article 66(c), UCMJ, 10 U.S.C. § 866(c); United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

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). Accordingly, the approved findings and sentence are

AFFIRMED.

Senior Judge ORR participated prior to his reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court