UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DANIEL L. ELLIS
United States Air Force

ACM 37113

12 December 2008

Sentence adjudged 22 August 2007 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory Gaudette (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 11 years, forfeiture of all pay and allowances, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Coretta E. Gray.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge sitting as a general court-martial found the appellant guilty of two specifications of divers indecent acts with a child, one specification of possessing child pornography, one specification of adultery, four specifications of communicating indecent language to a child, one specification of carnal knowledge, and two specifications of attempted communication of indecent language to a

child, in violation of Articles 134, 120, and 80, UCMJ, 10 U.S.C. §§ 934, 920, 880.[1] The adjudged and approved sentence consists of a dishonorable discharge, 11 years confinement, total forfeitures of pay and allowances, and a reduction to the grade of E-1.[2]

On appeal the appellant asks this Court to set aside the Action, set aside the sentence and order a rehearing, reduce the sentence of confinement, or grant other appropriate relief. The basis for his request is that he asserts: (1) the military judge abused his discretion by allowing the government's expert witness to testify concerning the appellant's recidivism risk; (2) trial defense counsel were ineffective when they failed to call a defense expert witness to rebut the government testimony that the appellant was a moderate high risk for re-offense; (3) trial defense counsel were ineffective when they failed to submit clemency matters; and (4) the appellant's sentence to 11 years confinement is inappropriately severe. Finding no error, we affirm.

Background

In December 2004, the appellant met VC, then a 13-year-old female, on an Internet chat room. During their initial chat, VC identified herself as a 13-year-old, seventh grader living in Anchorage, Alaska, and the appellant identified himself as a 23-year-old male also living in Anchorage, Alaska. In February 2005, the appellant arranged a meeting between himself, VC, and VC's mother at a local coffee shop. At the meeting, VC's mother informed the appellant that VC was only 13 years old.

Two weeks later, the appellant visited VC and VC's mother at their residence. Approximately 30 minutes after the appellant arrived, VC's mother departed with friends and left the appellant and VC alone in the house. While alone, the appellant and VC kissed and "made out." Later that month, the appellant visited VC's mother at her house and while there engaged in sexual intercourse with VC's mother. A few weeks after kissing VC, the appellant visited her again at her home and the two engaged in intimate, sexual touching--culminating with the appellant placing his finger inside of VC's vagina.

Over the next several months, the appellant and VC engaged in on-line, sexual banter. This sexual banter would eventually lead to more egregious misconduct. On several occasions between mid-March 2005 and October 2005, the appellant secretly met VC, kissed her breasts, and digitally penetrated her vagina. On one of theses occasions, the appellant committed the acts in an elementary school parking lot. On yet another

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[1] The military judge found the appellant guilty by exceptions on the adultery and possessing child pornography specifications and by exception and substitution on two of the communicating indecent language to a child specifications. With respect to the latter, while the military judge found the appellant guilty of communicating indecent language to a child at a location not charged, such findings are not fatal. Minor variances like the location of the offense do not necessarily change the nature of the offense. *See United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003).

[2] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise not to approve confinement in excess of 13 years.

occasion, the appellant and VC engaged in sexual intercourse at VC's house while her mother slept.

In October 2005, the appellant was reassigned to Cannon Air Force Base, New Mexico. After arriving in New Mexico, the appellant continued to engage in on-line, sexual banter with VC. On 19 June 2006, VC's mother discovered the appellant's on-line chats with VC and reported him to Air Force law enforcement authorities. A few months later, the Air Force Office of Special Investigations (AFOSI) sought, obtained, and executed a search warrant of the appellant's on-base residence. The AFOSI seized the appellant's personal computer and forwarded the hard drive to a forensic laboratory for analysis.

An analysis of the appellant's hard drive revealed: (1) two movie files and a graphic file of known child pornography; (2) nine movie files and two graphic files of suspected child pornography; (3) chat logs between the appellant and VC; and (4) chat logs between the appellant and "Mandy," someone the appellant believed was a 14-year-old girl but who was in reality an Immigration and Customs Enforcement (ICE) agent. As with VC, the appellant engaged in on-line sexual banter with "Mandy," the last occasion occurring approximately one month after initial charges were preferred against him.

Recidivism Testimony

The appellant contends the military judge abused his discretion by allowing a government expert witness to testify during the sentencing proceedings about the appellant's risk of recidivism. Specifically, the appellant argues that the expert's opinion was improper because the expert, in failing to "review the appellant's records, the Article 32 report, and the victim's testimony or statements," lacked the factual basis to provide an opinion on the appellant's recidivism risk. We find this argument to be without merit. Dr. TB, a prosecution witness, testified as an expert about the appellant's likelihood of recidivism. Dr. TB opined that the appellant falls within the moderate high category for recidivism. The trial defense counsel challenged the expert's methodology in formulating an opinion, citing *United States v. Stinson,* 34 M.J. 233 (C.M.A. 1992) as authority for his position. The gist of his argument was that Dr. TB did not have sufficient personal information about the appellant to form an opinion.

A psychologist does not have to personally interview an accused before testifying. *United States v. Amador*, 61 M.J. 619, (A.F. Ct. Crim. App. 2005) *review denied* 63 M.J. 183 (C.A.A.F. 2006). In the case at hand, Dr. TB testified that it was acceptable in his field to form an opinion about recidivism risk without interviewing an accused and that it is common to do a recidivism risk assessment based on a records review. He also testified that he formulated his opinion using the appellant's *Care* inquiry, the stipulation of fact, the forensic analysis report of the appellant's computer hard drive and the images

contained therein, the chat logs, the charges and specifications, and his discussion with a Cannon Air Force Base confinement official about Air Force rehabilitative options available to Air Force inmates. Moreover, Dr. TB was candid. When pressed by the military judge, Dr. TB acknowledged that he did not have an opportunity to interview the appellant and this fact may affect the reliability of his opinion.

In short, Dr. TB was qualified as an expert, the testimony was well within the limits of his expertise, it was based upon a sufficient factual basis to make it relevant, and its relevance outweighed the potential for unfair prejudice. *Stinson,* 34 M.J. at 238-39. We hold that the military judge did not abuse his discretion in admitting Dr. TB's testimony.

Ineffective Assistance of Counsel (Failure to Call Expert Rebuttal Witness)

Unquestionably, 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)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent and we will not play "Monday Morning Quarterback" and second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the heavy 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). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient and, if so, (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant submitted a post-trial affidavit wherein he states that his trial defense counsel were ineffective because they failed to call Dr. PC, the defense forensic expert consultant, as a witness to rebut Dr. TB's testimony. The government submitted two post-trial affidavits, one from each of the appellant's trial defense counsel. Of particular note are counsels' assertions that: (1) Dr. PC did not disagree with Dr. TB's testimony nor the methodology Dr. TB used to arrive at his opinion; (2) Dr. PC was of the opinion that the appellant was minimizing his culpability; (3) admitting Dr. PC's testimony would not only have run the risk of revealing his negative opinion about the appellant, it would also have potentially "opened the door" to uncharged misconduct (other instances in which the appellant allegedly molested another victim); and (4) in light of the foregoing, they made a tactical decision not to call Dr. PC as a witness.

Under these facts, we find that trial defense counsel made a tactical decision not to call Dr. PC as a witness and that such a decision does not amount to ineffectiveness of counsel. Moreover, assuming trial defense counsels' conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. Under the aforementioned facts we find no prejudice.

Ineffective Assistance of Counsel (Failure to Submit Clemency)

Prior to taking final action, the convening authority must consider matters submitted by the accused under Rule for Courts-Martial (R.C.M.) 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). An appellant may waive his right to submit clemency matters. R.C.M. 1105(d). We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)).

The appellant submitted a post-trial affidavit wherein he essentially states his trial defense counsel did not advise him of his post-trial and appellate rights and specifically about his right to submit character statements as part of his clemency package. He also complains that his counsel were ineffective because they failed to submit character statements on his behalf. However, the appellant specifically informed the military judge that trial defense counsel informed him of his post-trial and appellate rights and that he had no questions about his rights. Additionally, the appellant signed a written acknowledgment that trial defense counsel had advised him of his post-trial and appellate right.

Moreover, Captain BL, one of the appellant's trial defense counsel, submitted an affidavit wherein he states he experienced reluctance, at least from a few potential supporters, to write character letters on behalf of the appellant and that a tactical decision was made to forego rehashing the appellant's sentencing case during clemency in return for a personal plea from the appellant to the convening authority.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). However, if the appellate filings and record as a whole "compellingly demonstrate" the improbability of the appellant's assertions, we can resolve the factual dispute without resorting to a post-trial fact finding hearing. *Id.* at 248. In the case sub judice, the appellate filings and record as a whole "compellingly demonstrate" the improbability of the appellant's assertions. Captain BL's affidavit makes clear that he discussed clemency matters with the appellant. The appellant's written post-trial rights advisement, signed by the appellant and Captain BL, supports Captain BL's claim that he advised the appellant of his right to submit clemency

matters. Moreover, the appellant advised the military judge that he had been advised of his post-trial and appellate rights and had no questions about his post-trial and appellate rights.

In short, we find that: (1) Captain BL advised the appellant of his right to submit character statements as part of his clemency package; (2) Captain BL made a tactical and strategic decision to advise the appellant to forego rehashing his sentencing case during clemency in return for a personal plea from the appellant to the convening authority; (3) the appellant, following the advice of counsel, knowingly and intelligently chose not to submit character statements as part of his clemency package; and (4) therefore, Captain BL's advice to the appellant does not amount to ineffectiveness of counsel. Additionally, assuming trial defense counsels' conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. The appellant offers no evidence of prejudice and offers mere conjecture. Under the aforementioned facts we find no prejudice.

Inappropriately Severe Sentence

Article 66(c), UCMJ, 10 U.S.C. § 866(c) provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

Engaging in sexual relations with a child and possessing child pornography are some of the most heinous offenses in society. Moreover, the fact that he would attempt to develop a sexual relationship with yet another child, at a time when court-martial charges were pending, belie any notion of rehabilitative potential. In the classical sense of the word, the appellant is a child predator. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

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.

OFFICIAL

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