UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARCIANO A. ESPINOZA
United States Air Force

ACM 36944

15 January 2009

Sentence adjudged 03 October 2006 by GCM convened at Vance Air Force Base, Oklahoma. Military Judge: Eric Dillow and Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Maria A. Fried, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel John P. Taitt, and Major Jeremy S. Weber.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one charge and one specification of conspiracy to commit larceny, one charge and one specification of making a false official statement, one charge and three specifications of larceny, and one charge and one specification of unlawful entry with the intent to commit larceny, in violation of Articles 81, 107, 121, and 130,

UCMJ, 10 U.S.C. §§ 881, 907, 921, 930.[1] The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 15 months, and reduction to E-1. The appellant asserts two errors: (1) the military judge erred when she denied admission of certain defense sentencing evidence and (2) he received ineffective assistance of counsel when his military trial defense counsel failed to submit certain sentencing evidence because such evidence was "lost in transition" following the military trial defense counsel's permanent change of station (PCS) to another installation. Though not raised by the appellant, we also examined whether he is entitled to relief because of appellate processing delays. Finding no error, we affirm.

Background

The appellant was a flight chief with the Security Forces Squadron assigned to Vance Air Force Base (AFB), Oklahoma. Beginning in early 2005, while performing security forces duty, the appellant, along with other, more junior, security forces airmen, unlawfully entered numerous flying squadron buildings by finding unlocked doors or by deciphering the combination locks on the squadron buildings. Once inside the buildings, the appellant and the junior airmen stole alcohol and squadron unofficial social funds. In addition, the appellant stole a government flashlight from a desk in one squadron building. The appellant designated a junior airman serving as desk sergeant to monitor the patrols of other security forces members and the on-duty security forces flight chief to warn of approaching patrols and avoid detection. The "lookout" was rewarded by one of the junior airmen with a cut of the money stolen from the squadrons. This activity occurred on numerous occasions between on or about 1 January 2005 through on or about 31 October 2005. The appellant's crimes were discovered when one of the junior airmen confided to a fellow airman that the alcohol in his dorm room was stolen from a flying squadron and that he and other security forces members stole alcohol and money from the flying squadrons. This was reported to the Air Force Office of Special Investigations. When initially confronted by investigators, the appellant lied about his criminal activity and knowledge of the criminal activity. Approximately one week later, the appellant made another statement to investigators, confessing fully to his involvement in and knowledge of the crimes for which he was convicted.

Sentencing Evidence Excluded by Military Judge

During sentencing and prior to submitting evidence of extenuation and mitigation, the military trial defense counsel asked the military judge to relax the rules of evidence. Mil. R. Evid. 1101(c); Rule for Courts-Martial (R.C.M.) 1001(c)(3). The military judge granted the request. The military trial defense counsel then offered a number of character letters, certificates, awards, letters and e-mails of congratulations and appreciation, and

[1] The Court-Martial Order (CMO), dated 2 February 2007, fails to reflect the appellant's not guilty pleas to Charge V and its two specifications. This charge and its specifications were subsequently dismissed pursuant to the appellant's pretrial agreement with the convening authority. We order the promulgation of a corrected CMO.

photographs. The trial counsel objected to one of the character letters, a letter from Major (Maj) C, the appellant's former squadron commander, on the grounds that the letter was unsigned and the trial counsel had been unsuccessful in their attempts to contact Maj C to discuss the character letter and confirm its authenticity.[2] The letter was forwarded to the appellant via e-mail, with a reference that the attached letter had been mailed; however, the e-mail did not contain the usual evidence of an attached document. The letter was dated 31 May 2006. The military judge was concerned that the letter was unsigned, that the e-mail made no reference that a document actually was attached, that the government had not spoken to Maj C, and that the unsigned letter was dated more than four months prior to trial, giving the defense plenty of time to obtain a signed letter. The military judge did not admit the letter. The appellant asserts this ruling by the military judge was in error, given that she had relaxed the rules of evidence and she admitted another unsigned character letter.[3]

We review a military judge's decision to admit or exclude evidence "under an abuse of discretion standard." *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (additional citations omitted)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). R.C.M. 1001(c)(3) states, "[t]he military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability."

It is clear from the record that the military judge was concerned about the authenticity and reliability of this particular unsigned character letter. The fact that the military judge relaxed the rules of evidence with respect to defense sentencing evidence did not absolve the military judge of her duty to ensure the authenticity and reliability of each piece of offered evidence. *See United States v. Boone,* 49 M.J. 187, 198 n.14 (C.A.A.F. 1998) (relaxing rules of evidence does not eliminate requirement that evidence be reliable) (citations omitted)). The military judge clearly indicated her concerns, and in fact noted that the military trial defense counsel had over four months to obtain a signed letter and had not done so. Finally, although not stated by the military judge, we note the unsigned character letter from Maj C was cumulative of other prosecution and defense sentencing evidence admitted and considered by the military judge. Mil. R. Evid. 403. The military judge did not abuse her discretion in ruling the unsigned character letter from Maj C was inadmissible.

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[2] The affidavit prepared by the military trial defense counsel for purposes of this appeal indicates she also was unable to make contact with Major (Maj) C to obtain the signed character letter. She further noted that prior to trial the appellant also attempted to make contact with Maj C, with no success.

[3] The trial counsel specifically limited their objection to the letter from Maj C because they had been able to contact all the authors of the other character letters offered by the military trial defense counsel.

Ineffective Assistance of Counsel

The appellant was arraigned on 20 June 2006, at which time he told the military judge he had just obtained a civilian defense counsel to assist in his defense and would need a delay in the proceedings. The military judge granted a delay. In the meantime, the assigned military trial defense counsel was transferred from her area defense counsel (ADC) position at Grand Forks AFB, North Dakota to the circuit defense counsel position at Randolph AFB, Texas.[4] In August 2006, the military trial defense counsel reviewed her mail at her Grand Forks AFB ADC office prior to departing for Randolph AFB. She saw no mail that pertained to the appellant's case. Before departing, she instructed the defense paralegal to forward all matters pertaining to her cases to her new office at Randolph AFB. She continued to represent the appellant during this time and was present during his 3 October 2006 court-martial. The Grand Forks AFB defense paralegal was reassigned in October 2006. In the days preceding the appellant's 3 October 2006 court-martial, the appellant met with both his civilian and military defense counsel to prepare for trial. The military trial defense counsel and the civilian trial defense counsel compared documentation in their files and noted there were several documents in the civilian trial defense counsel's files which were not contained in the files of the military trial defense counsel. They reconciled their files and went over their trial plan with the appellant. The military trial defense counsel asked the appellant if there was anything else he would like her to present. He responded in the negative. Prior to trial, the military trial defense counsel discussed with the appellant that they would be attempting to submit the unsigned character letter from his former commander, but anticipated problems in getting the document admitted. She informed the appellant that if the letter was not admitted, they would continue to attempt to get a signed letter from the former commander to submit with the appellant's clemency matters.

Following the trial and prior to submission of matters in clemency, the military trial defense counsel received a package from the Grand Forks AFB ADC office, which contained four character documents that pertained to the appellant. She contacted the appellant and included these documents with the matters submitted in clemency. The four documents included: (1) the signed character letter from Maj C;[5] (2) a character

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[4] The events that transpired during the delay between 20 June 2006 and 3 October 2006 were provided in an affidavit from the appellant's military trial defense counsel. We accept the military trial defense counsel's submissions as accurate because there are no other affidavits in conflict with it. *See United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

[5] The letter provided that during Maj C's two years as the appellant's commander he had frequent opportunities to observe the appellant. The letter read, in part:

> During this period, his performance and professionalism were always above average and he displayed a positive attitude regarding the unit, his duties, and his service to the Air Force. . . .
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> . . . .
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> . . . I believe him to be a good person who cares about others, particularly his [family]. They were active in the unit and in several base activities to include preparing and serving meals for the

letter from Master Sergeant (MSgt) (retired) M;[6] (3) a letter of appreciation from Maj C (then Captain C), regarding the outstanding courtesy and professionalism the appellant displayed to a retired military officer entering the installation, which in turn resulted in letters of appreciation from the wing commander and the support group commander, which were attached; and (4) a note from the Air Education and Training Command (AETC) vice commander, addressed to the appellant's squadron commander for the squadron's selection as AETC's outstanding security forces small unit award winner. These four documents were included in the matters submitted in clemency to the convening authority for his review prior to taking action.

The appellant's clemency submission contained 13 attachments, which included these 4 documents. In her letter requesting clemency for the appellant, the military trial defense counsel explained these documents were sent to her previous office, the Grand Forks AFB ADC office, after her PCS, and were "lost in transition" at the mail office at Grand Forks AFB. She explained that the military judge did not have the opportunity to review these four documents, and asked the convening authority to take them into consideration. The appellant asserts the failure of the military trial defense counsel to include these items as sentencing evidence was ineffective assistance of counsel despite her explanation the evidence was "lost in transition" after her change of assignment.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). 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) (additional citations omitted)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show both deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Counsel is presumed to be competent. *Id.* (citing *Strickland*, 466 U.S. at 689). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the military trial defense counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted). The appellant bears the burden of establishing that his

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> squadron shift workers and for the unaccompanied officers and Airmen in the wing. He and his wife were also pursuing self-improvement through off-duty education programs. . . .
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> . . . .
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> . . . I considered him an asset to the unit while I was the commander. Regardless of the outcome in this matter, I am confident that [he] has the potential and the desire to be a productive member of society.

[6] The letter stated that Master Sergeant (MSgt) (ret) M was assigned as a civilian gate guard, which is how he knew the appellant. The letter stated the appellant "has always been helpful . . . [and] . . . showed professionalism and character." Notwithstanding the appellant's legal troubles, MSgt (ret) M expressed his confidence that the appellant "has the potential to be a strong asset to both the Air Force and the community."

military trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

We need not address the issue of deficient performance as we are convinced that, even assuming the military trial defense counsel's performance was somehow deficient, the appellant suffered no prejudicial harm. 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 694. During trial, the military trial defense counsel presented 3 character witnesses and submitted 6 character letters, 11 certificates, awards, letters, e-mails and letters of appreciation, and a number of photographs. The appellant's enlisted performance records were submitted by the prosecution and contained repeated evidence of the appellant's outstanding military duty, service, and character. With the exception of the offenses for which he was convicted, it is quite clear from the evidence presented during sentencing, including the appellant's performance reports, that this appellant was an outstanding performer, both on and off-duty.

In particular, the information Maj C shares in his character letter is found throughout the sentencing evidence. Likewise, the subject matter of the other three letters received by the military trial defense counsel post-trial and submitted as matters in clemency, is found in the sentencing evidence. The defense sentencing evidence included an e-mail from a retired officer, praising the appellant's professionalism at the front gate, as well as an e-mail from an officer at Vance AFB to the appellant's commander, praising the appellant for his appearance and professionalism. The appellant's performance reports specifically reference his outstanding performance and the praise he received from the wing commander and others for his professionalism. In addition to being referenced in the appellant's performance report, his squadron's selection as the AETC outstanding security forces small unit award winner is reflected in a certificate admitted as evidence.

Comparing the evidence that was before the military judge with the information included in the four missing documents leads this Court to conclude the additional documents were merely cumulative. The military judge would have received little, if any, additional insight into the appellant and his military character, service, and duty. Additionally, the crimes committed by the appellant are serious and egregious. He broke into squadron buildings to steal money, alcohol, and property. He often monitored the patrols of his fellow security forces members to avoid detection by them. His crimes occurred on numerous occasions over a 10-month period and involved a host of junior airmen who were also on-duty security forces members. We are convinced the cumulative information contained in the four missing documents would not have impacted the military judge in her sentencing decision. The appellant did not meet his burden of proving prejudice.

Post-Trial Delay

In this case, the overall delay of 680 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno,* 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to a speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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.

OFFICIAL

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