UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DUANE M. FOREHAND
United States Air Force

ACM 37055

10 October 2008

Sentence adjudged 09 February 2007 by GCM convened at Aviano Air Base, Italy. Military Judge: Adam Oler.

Approved sentence: Bad-conduct discharge, confinement for 60 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, Major Donna S. Rueppell, Major Brandon K. Tukey, Captain Coretta E. Gray, Captain Jefferson McBride, and Captain Megan E. Middleton.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to his pleas, a panel of officer members sitting as a general court-martial found the appellant guilty of four specifications of housebreaking, three specifications of indecent assault, and one specification of engaging in conduct prejudicial to good order and discipline or service discrediting conduct (wrongfully peeping at an individual in the shower), in violation of Articles 130 and 134, UCMJ, 10 U.S.C. §§ 930, 934. The court-martial panel sentenced the appellant to a bad-conduct discharge, six years confinement, a reduction to E-1, and a reprimand. The convening authority approved the findings, the

bad-conduct discharge, 60 months of the confinement, the reduction to E-1, and the reprimand.

On appeal, the appellant asserts that: (1) the evidence is legally and factually insufficient to sustain his convictions; (2) he was denied effective assistance of counsel when his trial defense counsel failed to voir dire the panel members concerning their views regarding homosexuality where the appellant was charged with housebreaking, peeping, and indecent assault against members of the same sex;[1] and (3) his sentence, which includes a bad-conduct discharge and 60 months confinement, is inappropriately severe. Finding no error, we affirm.

Background

In late November 2002, the appellant, returning from a night of partying outside Osan Air Base, Korea, entered NLG's on-base dormitory room and began stroking NLG's legs while he slept.[2] NLG awoke, chased, and detained the appellant, and turned the appellant over to security forces. While security forces investigated the matter, no action was taken against the appellant for this misconduct until his present court-martial.

In May 2003, the appellant was reassigned to Aviano Air Base, Italy. During one Friday evening in November 2004, a drunken DJH returned home from a night of partying with friends and fell asleep in the day room of his dormitory.[3] The appellant happened upon him and advised him not to sleep in the day room. The appellant escorted DJH to DJH's on-base dormitory room and left. A short while later, the appellant returned to DJH's room, entered uninvited, and spied on DJH as DJH showered. DJH caught the appellant spying and asked him to leave. The appellant apologized and left.

Approximately a week later, DJH, drunk again, returned to his dormitory room after a night of partying with friends. DJH fell asleep in his room only to be awakened later by the appellant groping DJH's genitals. Upon discovering that DJH was awake, the appellant ran and DJH gave chase. DJH caught and searched the appellant and discovered that the appellant had stolen DJH's room key card. DJH retrieved his key card; the appellant apologized and left.

The appellant's last victim was Sergeant DAR.[4] During the early morning hours of 21 May 2005, Sergeant DAR returned to his dormitory room after a night of drinking with friends. Sergeant DAR, drunk and sick, passed out on the bathroom floor in his

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[1] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] NLG was an airman in the United States Air Force at the time of the incident but had separated from the United States Air Force by the time of the appellant's court-martial.
[3] DJH was an airman in the United States Air Force at the time of the incident but had separated from the United States Air Force by the time of the appellant's court-martial.
[4] At the time of the offense, Sergeant DAR was Specialist DAR.

dormitory room. Sometime during the morning, the appellant entered Sergeant DAR's room and began stroking Sergeant DAR's penis. Sergeant DAR awoke, confronted the appellant, and the appellant ran. Sergeant DAR gave chase, and as the appellant ran away, he was identified by a fellow airman. The next day, Sergeant DAR reported the appellant to security forces.

Discussion

Legal and Factual Sufficiency

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

"[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable factfinder could have found, beyond a reasonable doubt, all of the essential elements of the specifications of which the appellant was convicted. Testimony by the victims (NLG, DJH, and Sergeant DAR) that the appellant sexually assaulted them in their dormitory rooms and the inference on the appellant's intent at the time he entered the respective dormitory rooms[5] are legally sufficient to support the appellant's convictions. Such is true notwithstanding the appellant's testimony to the contrary and the testimony of those who testified to the appellant's good military character and character for truthfulness.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. §866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the charges and specifications of which he was convicted.

[5] With respect to the offense of housebreaking, the law allows the trier-of-fact to infer intent to commit an offense if the appellant, after entering the building or dwelling commits an offense therein. *See Manual for Courts-Martial, United States*, Part IV, ¶ 56.c.(2) (2005 ed.).

Ineffective Assistance of Counsel

Axiomatically, 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 second guess trial defense counsels' strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the 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 government, in its response to the appellant's brief, submitted a post-trial affidavit from Captain MDC, the appellant's trial defense counsel. In the affidavit, Captain MDC avers that: (1) he made a tactical decision not to inquire into the area of homosexuality; (2) homosexuality was not a central theme of the case in that neither the appellant or any of the victims claimed to be homosexuals; (3) any questions about homosexuality that were intended to identify potential prejudices would be speculative at best; and (4) he advised the appellant of his strategy and the appellant concurred with trial defense counsel's approach.

This Court granted the appellant leave to respond to Captain MDC's affidavit. On 18 September 2008, the appellant submitted an affidavit wherein he asserts: (1) at no time did Captain MDC discuss with him whether to question the prospective members for *potential bias* against homosexuality; (2) while *homosexuality was not a central theme* during findings, Captain MDC should have discussed this issue with him so he could help decide whether to question the prospective members on this issue in the likelihood that the case went to a sentencing hearing; (3) Captain MDC's deficient legal advice denied him an opportunity to decide whether to raise this issue before the prospective members during voir dire; and (4) Captain MDC's failure to inform him about this *potential bias* and to inquire about it for potential sentencing purposes left the appellant exposed to *potential prejudice* and *led to an unusually severe sentence*. (Emphasis added.)

In the case *sub judice*, the affidavits conflict only on the issue of whether Captain MDC discussed his strategy with the appellant – Captain MDC avers he did and the appellant asserts Captain MDC did not. When conflicting affidavits create a factual

dispute, we usually 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, we can resolve the factual dispute without resorting to a post-trial hearing under the following circumstances: (1) if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis; or (2) if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue. *Ginn*, 47 M.J. at 248.

Assuming for the sake of argument that Captain MDC did not advise the appellant on the trial defense strategy, such still would not entitle the appellant to relief. First, the appellant is mistaken in his belief that it was within his bailiwick to decide which questions to pose to the members. Voir dire was within the sole province of the appellant's trial defense counsel – Captain MDC. Air Force Standards for Criminal Justice, Standard 4-5.2, *Control and Direction of the Case* (15 Oct 2002).

Second, assuming voir dire was within the appellant's bailiwick, there is no evidence that the appellant availed himself of the opportunity to ensure the prospective members were questioned on the issue of homosexuality bias. If such questions were of paramount importance, as the appellant would have this Court believe, the appellant should have dissented at trial. Rather, the appellant sat idly by and availed himself of Captain MDC's defense strategy, and now complains anew because the strategy was not successful. In sum, assuming Captain MDC committed error by failing to advise the appellant of the trial defense strategy, the error is harmless and would not result in relief for the appellant.

Moreover, the appellant's affidavit and the record as a whole compellingly demonstrate the improbability of the appellant's assertions. Of note is the appellant's concurrence that "homosexuality was not a central theme during findings." This statement convinces us that Captain MDC advised the appellant of the trial defense strategy and that the appellant, without objection, agreed with the trial defense strategy.

Additionally, assuming Captain MDC's 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. On this point, the appellant has fallen markedly short. Rather than offer facts that establish prejudice, the appellant offers conjecture. Though stated repeatedly in his affidavit, such hardly qualifies as evidence of prejudice. There is simply no evidence that the members found the appellant guilty and imposed the sentence they imposed because they believed

the appellant was homosexual. Nor is there evidence that the members were biased against homosexuals.

Simply put: (1) Captain MDC had tactical and strategic reasons for electing not to question the members about any potential homosexual bias; (2) Captain MDC advised the appellant of this strategy and the appellant concurred; (3) Captain MDC's election does not amount to deficient conduct and he therefore was not ineffective; and (4) assuming ineffectiveness of counsel, the appellant was not prejudiced.

Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. When considering sentence appropriateness, we should give "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotations omitted).

When conducting our review, we should also be mindful that Article 66(c), UCMJ, has a sentence appropriateness provision that is "a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)). Our duty in this regard is "highly discretionary" and does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant abused his position of trust as a dormitory manager and a non-commissioned officer to prey upon and sexually molest three vulnerable[6] service members in the one place they should have been safe – their on-base dormitory rooms. In so doing, he clearly departed not only from the standards expected of service members, he departed from societal standards. 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. *See Baier*, 60 M.J. at 383-84; *Healy*, 26 M.J. at 395. Rather, the appellant's sentence is appropriate for the crimes of which he was convicted.

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;

[6] All three victims were drunk and asleep at the time of the indecent assaults.

United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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Deputy Clerk of the Court