UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DANIEL A. FREY
United States Air Force

ACM 37759

03 July 2013

Sentence adjudged 10 June 2010 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Military Judge: Le T. Zimmerman.

Approved Sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Major Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Charles G. Warren; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial comprised of officer members of one specification of aggravated sexual contact and one specification of rape of a child who had not attained the age of 12 years, in violation of Article 120, 10 U.S.C. §§ 920. The adjudged sentence consisted of a dishonorable discharge, confinement for 8 years, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant raised five issues for our consideration: (1) whether the appellant received ineffective assistance of counsel; (2) whether the trial counsel's sentencing argument was improper; (3) whether the appellant's personal data sheet presented to the convening authority erroneously omitted the appellant's combat service; (4) whether the appellant's sentence was inappropriately severe; and (5) whether the appellant suffered cruel and unusual punishment while confined at a civilian facility.[1] Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

On 31 December 2008, the appellant and his fiancée had an argument while returning from a holiday trip the two had planned so she could meet the appellant's family for the first time. Because the family visit did not go well, she told the appellant to immediately move out of her home. As a result, the appellant called his good friend (and supervisor) Master Sergeant (MSgt) KK and asked if he could stay with him, given the problem with his fiancée. MSgt KK agreed and the appellant moved some of his belongings into MSgt KK's home.

That night, MSgt KK was hosting a New Year's Eve party and told the appellant he was welcome to attend. Also attending the party were several co-workers and MSgt KK's two daughters, seven-year-old EK and ten-year-old RK. Around midnight, MSgt KK and several of the guests began to go to bed, leaving the appellant in the basement playing a video game with MSgt KK's daughters. After they finished playing the video game, the appellant and the girls watched a movie, with the appellant and RK lying on a pull-out couch.

Sometime during the movie, RK and the appellant fell asleep. RK awoke and turned off the movie projector, awakening the appellant in the process. RK fell back asleep and then woke up again when she realized the appellant's hand was on her stomach underneath her shirt. Frightened, she laid still on her back as his hand moved up her chest and fondled her breasts. He then slid his hand inside her pajama pants and underwear, rubbed her vagina, and digitally penetrated her vagina with his finger, causing her pain. Next, he fondled her breasts a second time before moving his hand back down her body to once again touch her vagina. RK then got up and went upstairs.

RK awakened KW, her 12-year-old friend and told her what happened. KW encouraged her to tell her father. Too frightened to talk to him, RK left him a note that said "Daddy, the guy that moved in downstairs was touching me in the wrong places."

[1] The appellant originally raised two additional issues: whether the evidence is factually and legally sufficient to sustain the rape conviction and whether his confession was voluntary. On 11 April 2012, the appellant asked this Court for permission to withdraw these issues from consideration because he determined that they were not viable. On 20 April 2012, the Court granted the appellant's request.

Meanwhile, the appellant had unexpectedly moved his belongings out of MSgt KK's home. The police were called and the appellant was interviewed by two civilian detectives under rights advisement. In a taped interview, he initially denied doing other than tickling RK on her sides and stomach. He later said "I don't know if I did this or not. . . . maybe I did, and if I did, I feel so horrible for that girl." Minutes later, the appellant said, "I guess I did . . . I really don't remember . . . there are times when I wake up next to my fiancée . . . and I'll roll over and I'll rub her back . . . . Maybe I thought [my fiancée] was there." He admitted RK had no reason to lie and, if she said it happened, than it must have. The appellant said he thought his fiancée was next to him and, as he often rolled over and put his hand on her stomach, he could have done so with the child. He then admitted he touched her vaginal area under her clothes and may have penetrated her. He claimed to have then realized it was not his fiancée, and removed his hand.

Although the defense presented evidence from a forensic psychiatrist who testified the appellant may have touched the child while suffering from a sleep disorder that allowed him to engage in directed physical activity while asleep, the panel convicted the appellant of unlawfully touching the RK's breasts and genitalia and raping her by digitally penetrating her vagina.

Ineffective Assistance of Counsel

The appellant contends his trial defense counsel was ineffective because he advised the appellant to reject a pre-trial agreement that would have resulted in a more favorable sentence than the one the panel members adjudged. Specifically, in October 2009, the appellant and his counsel discussed an offer of a pre-trial agreement from the Government that would limit his confinement to three years confinement in exchange for a plea of guilty to both offenses. He asks this Court to forego an evidentiary fact finding hearing and reassess the sentence to reflect the terms of the proposed pre-trial agreement.

We review de novo claims of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial, including as they are deciding whether to plead guilty to an offense. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (citing *Missouri v. Frye*, __ U.S. __, 132 S. Ct. 1399, 1405 (2012); *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010)). To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 788

(2011) (citing *Strickland*, 466 U.S. at 690). In evaluating counsel's performance under the first *Strickland* prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688-89.

Here, the appellant and his lead trial defense counsel acknowledged that the appellant rejected the Government's offer for a three-year pre-trial agreement. However, they have different versions of the rationale behind the decision to reject the offer.

The appellant claims that he rejected the offer of a pre-trial agreement based solely upon his attorney's recommendation, which was made during a single conversation about the offer. His declaration states the defense counsel provided no basis for his recommendation other than stating he would not accept the deal if he was in the appellant's place and the appellant would do better than that at trial.

In a declaration submitted pursuant to an order from this Court, the trial defense counsel describes multiple conversations with the appellant about the difficulties with his case and the possibility of entering into a pre-trial agreement, as well as approaching the trial counsel and procuring the three-year cap from the trial counsel (who was motivated to avoid having RK go through a trial) and advising the appellant about that pre-trial agreement. He denies telling the appellant he thought they would do better by pleading not guilty. Instead, he told the appellant this was a "good deal" but he would have to get through the guilty plea inquiry in order to accept it and there was no point in taking the deal if he could not do so. The appellant then decided to reject the offer and expressed relief that he would be pleading not guilty.

Although there are factual differences between the two declarations, we need not order an evidentiary hearing pursuant to *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) since this legal issue can be resolved based on the "appellate filings and the record." *Id.* at 248. They "compellingly demonstrate" the improbability of appellant's allegation that he chose to plead not guilty based on vague advice from his defense counsel. *Id.* First, the appellant's declaration is inconsistent with his clemency letter, where he said he chose to plead not guilty because he did not believe he was mentally responsible for his actions. Second, this latter position is consistent with the declaration from the trial defense counsel, who describes his own pre-trial belief, formed after multiple conversations with the appellant, that the appellant would not have been able to successfully plead guilty to these offenses. He also describes the appellant becoming very upset when the counsel brought up the possibility of pleading guilty and asking why Air Force lawyers are so afraid to plead not guilty. Third, the appellant does not expressly claim, even on appeal, that he was prepared, willing, and able to plead guilty and admit under oath that he engaged in this conduct with RK.

We find that the appellant's allegations about his trial defense counsel's advice are not accurate. There are reasonable explanations for the counsel's advice and his level of advocacy on the appellant's behalf was not "measurably below the performance normally expected of fallible lawyers." *United States* v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks and alterations omitted) (citations omitted). Given the appellant's unwillingness and inability to plead guilty, the trial defense counsel elected to present a defense of lack of mental responsibility. Although this strategy proved unsuccessful, it was reasonable at the time and under the circumstances, and was consistent with the appellant's views (as demonstrated by his clemency letter). Therefore, we will not second guess this strategic decision. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). In short, the appellant's trial defense counsel were not ineffective.

Sentencing Argument

The appellant asserts that trial counsel unduly inflamed the passions of the panel members by improperly insinuating that the appellant would commit future acts of child molestation. Our test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). It is improper for trial counsel to seek unduly to inflame the passions and prejudices of the sentencing authority. *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983). Counsel should limit their arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Baer*, 53 M.J. at 237 (citation omitted). During sentencing argument "the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quotation marks and citation omitted). An accused's refusal to admit guilt after being found guilty may be an appropriate factor for the sentencing authority's consideration of his rehabilitation potential, but only if a proper foundation has been laid. *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007) (citation omitted). The predicate foundation can be met if the accused has made an unsworn statement and "has either expressed no remorse or his expression of remorse can be arguably construed as being shallow, artificial, or contrived." *Id.* (quotation marks and citation omitted). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001).

In his unsworn statement, the appellant told the panel he was disappointed in the outcome of the trial but respected their decision. He then apologized to RK and her family and stated, "It was never my intention for any of this to ever happen at all." In his sentencing argument, the trial counsel stated, "What does that say for how he will act in the future if 18 months . . . later he still can't admit to it?" Although not objecting to the argument, the trial defense counsel responded in his sentencing argument by saying, "there's absolutely no evidence before you that the appellant is a threat to little girls out

there." In his rebuttal argument, trial counsel acknowledged as much but then stated, "But think what we know, common sense, ways of the world about child molesters." At this point, trial defense counsel objected but the military judge overruled him. In his surrebuttal argument, the defense counsel reiterated the lack of evidence that the appellant will reoffend. Immediately following, the military judge reminded the panel that the arguments of counsel are not evidence and they should apply their common sense and knowledge of the ways of the world regarding any implication raised by the counsel in argument.

The appellant contends error occurred because the trial counsel insinuated to the members that child molesters are serial offenders and thus the appellant would re-offend unless they adjudged a lengthy sentence to confinement. He also contends it was error for the military judge not to sustain his objection to the trial counsel's argument because there were no facts in evidence that the appellant would re-offend or had committed similar offenses in the past. We agree that this argument went beyond the evidence of record and any reasonable inference that can be derived from it, including the appellant's unsworn statement, and thus find error.

However, we find that the appellant was not materially prejudiced by this error. These comments by the trial counsel were only a brief part of the sentencing argument and they were rebutted by the defense counsel's argument (which also pointed out the appellant had not engaged in prior misconduct or any misconduct in the 18 months preceding the trial) and further undermined by the curative instruction provided to the military judge. When placed in the context of the total sentencing argument and the adjudged sentence (which was two years less confinement than the trial counsel requested), we are not convinced that the improper portions of the trial counsel's argument unduly inflamed the panel members. *Clifton*, 15 M.J. at 30. We are confident the members sentenced the appellant on the basis of the evidence alone. *Schroder* 65 M.J. at 58-59.

Erroneous Personal Data Sheet

The appellant asks this Court to set aside the convening authority's action and remand this case for new post-trial post processing because an erroneous Personal Data Sheet (PDS) was provided to the convening authority during the clemency stage.

During presentencing, trial counsel provided the panel with a PDS with the word "none" typed in the two sections of the PDS specifically provided to describe the appellant's overseas and combat service history. The defense did not object. This PDS omitted the appellant's 2005 deployment to Al Dhafra Air Base in the United Arab Emirates and a 2003 prior deployment in support of Operation Enduring Freedom. However, the PDS does state that the appellant was awarded the Global War on

Terrorism Expeditionary Medal, and the appellant's enlisted performance reports for those time periods do refer to the deployments and his performance during them.

The acting staff judge advocate (SJA) later attached that same PDS to his Staff Judge Advocate Recommendation (SJAR). The defense clemency submission did not point out the error in the PDS and did not reference the appellant's combat or overseas service history, or attach his enlisted performance reports.

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Failure to timely comment on matters in the SJAR or on matters attached to it waives any later claim of error in the absence of plain error. Rule for Courts–Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). In the context of a post-trial recommendation error, this means the appellant must make a colorable showing of possible prejudice in terms of how the omission potentially affected the appellant's opportunity for clemency. *Id.* at 436-37.

In this case, the acting SJA included a PDS in the Addendum to the SJAR that incorrectly stated the appellant had no combat and overseas service. This omission was error.[2] Here, the appellant's EPRs, his biography and the PDS which mention the GWOT-Expeditionary Medal sufficiently apprised the panel members of his combat service and overseas service. Because the convening authority is not required to read the entire record of trial or the personnel records of the appellant, we are not convinced that the inclusion of the GWOT-Expeditionary medal along with the other awards and decorations listed is sufficient evidence that he actually considered the appellant's combat service history. R.C.M. 1105 and 1107.

We find, however, that the appellant has not made a colorable showing of how this omission potentially affected his opportunity for clemency. Although it is the SJA's responsibility to ensure that the convening authority receives accurate information, it is notable that neither the appellant nor his counsel mentioned his deployments during the sentencing portion of the trial or in their respective clemency submissions. Given the appellant's conviction for aggravated sexual contact and rape of a child, even with the low threshold for establishing prejudice during the clemency phase, we are confident that the knowledge of the appellant's two deployments would have had no impact on the convening authority's action in approving the adjudged sentence. After carefully

[2] Prior to 2010, Rule for Courts-Martial (R.C.M.) 1106(d)(3)(C) expressly stated that the staff judge advocate must provide the convening authority with a "summary of the accused's service record." *See Manual for Courts-Martial, United States*, Part II-150 (2008 ed.). In 2010, the Rule was modified to eliminate that requirement, although the Drafter's Analysis states this was done to "allow[] for the use of personnel records of the accused instead." *MCM*, A21-88 (2012 ed.). Regardless of the language of the R.C.M., the information provided to the convening authority must be correct.

considering the entire record in this case, we find the appellant has not made a colorable showing of possible prejudice.

Sentence Appropriateness

We review sentence appropriateness de novo, *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005), making such determinations in light of the character of the offender, the nature and seriousness of his offense, and the entire record of trial, *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises 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). Given the nature of all the facts and circumstances of this case, we have no reason to conclude that the adjudged and approved sentence is inappropriately severe for these offenses and this offender. Any sentence relief under these circumstances would amount to clemency. *Healy*, 26 M.J. at 396.

The appellant asserts his sentence is inappropriately severe given his character, the facts of the case, and the cumulative error from the trial counsel's improper sentencing argument. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service (including his two combat deployments), and all other matters contained in the record of trial. In this case, when the appellant sexually assaulted the 10-year-old daughter of a close friend and digitally raped her, he clearly deviated from the standards of conduct expected of Airmen. Given that the maximum punishment for his crimes includes confinement for life without the opportunity for parole, we find that the approved sentence was clearly within the discretion of the panel members and the convening authority, was appropriate in this case, and was not inappropriately severe.

Civilian Post-trial Confinement

After the appellant was sentenced on 10 June 2010, he was housed in the Monmouth County confinement facility until 26 July while awaiting transport to Fort Leavenworth. In the defense clemency submission, submitted on 8 October 2010, the defense counsel states the appellant was deprived of certain prescription medication during the 56 days he was confined in the civilian facility, which included medication for panic attacks, anxiety and insomnia. The appellant's letter says he was told he could not take his prescribed medication because that facility did not offer it. He then asks the convening authority to reduce his sentence by at least the number of days the appellant went without his medication. On appeal, he now argues this constituted cruel and unusual punishment and asks us to award him 56 days of "administrative credit and reassess the sentence accordingly."

We review claims of cruel and unusual post-trial punishment de novo. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007); *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). "In our evaluation of both constitutional and statutory allegations of cruel or unusual punishment, we apply the Supreme Court's Eighth Amendment[3] jurisprudence 'in the absence of legislative intent to create greater protections in the UCMJ.'" *Pena*, 64 M.J. at 265 (quoting *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006)). "Denial of adequate medical attention can constitute an Eighth Amendment or Article 55[, UCMJ,][4] violation." *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001) (citing *United States v. Sanchez*, 53 M.J. 393, 396 (C.A.A.F. 2000)). However, medical care provided to inmates need only be reasonable, not "perfect" or "the best obtainable." *Id.* at 475 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991)). To prevail, the appellant "must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he 'has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ." *United States v. Lovett*, 63 M.J. 211, 216 (C.A.A.F. 2006) (omission in original) (footnotes and citations omitted).

Although the appellant testified at trial that he was on two medications, he has not submitted any medical records in support of his claim, and he does not allege that he suffered any adverse effects from not taking the medication that would rise to the level of cruel and unusual treatment or punishment. Additionally, information submitted by the Government indicates that one prescribed medication was discontinued at the appellant's request.

Assuming, without deciding, that the appellant's post-trial treatment was as he claims, we find that he has not sustained his burden of showing deliberate indifference to his health and safety. This burden requires that the appellant show that officials knew of and disregarded an excessive risk to his health or safety. *Lovett*, 63 M.J. at 216. As our superior court has opined, we need not speculate about what prison officials knew of the specific conditions of the appellant's confinement, or what conclusions they might have drawn. *Id.* The burden to make this showing rests upon the appellant, and he has failed to establish that prison officials were deliberately indifferent to conditions that might have violated the Eighth Amendment or Article 55, UCMJ. In addition, we find the appellant neither exhausted his administrative remedies nor petitioned for relief under Article 138, UCMJ. He has, therefore, failed to establish his Eighth Amendment and Article 55, UCMJ, claim.

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

[4] In addition to prohibiting "cruel or unusual punishment," Article 55, UCMJ, 10 U.S.C. § 855, prohibits "[p]unishment by flogging or by branding, marking, or tattooing" and "[t]he use of irons . . . except for the purpose of safe custody." None of the specific prohibitions are at issue here.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).