UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DAVID J. GARCIA
United States Air Force

ACM 35009

26 February 2003

Sentence adjudged 10 January 2002 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Jeffrey A. Vires, Major Karen L. Hecker, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Nurit Anderson.

Before

BURD, STONE, and LOVE
Appellate Military Judges

OPINION OF THE COURT

LOVE, Judge:

At a general court-martial, a military judge convicted the appellant, in accordance with his pleas, of wrongful use on divers occasions of methylenedioxymethamphetamine, more commonly known as "ecstasy," of wrongful possession with the intent to distribute ecstasy on divers occasions, and of violating a lawful general order. Articles 112a and 92, UCMJ; 10 U.S.C. §§ 912a, 892. He was charged with, but acquitted of, stealing government identification card covers. Article 121, UCMJ, 10 U.S.C. § 921. His approved sentence consists of a bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant contends that he was denied effective assistance of counsel because he was not advised that he could request a pretrial

agreement and/or an administrative discharge in lieu of a court-martial. We disagree and affirm.

FACTS

The appellant was a 21-year-old airman serving his first assignment at Lackland Air Force Base (AFB), Texas. He and some fellow airmen frequented a local "rave club" where they purchased, shared, and used ecstasy.

In an effort to discourage drug abuse, the wing commander at Lackland AFB placed certain establishments off limits for military personnel. The "rave club" frequented by the appellant was placed off limits on 21 February 2001, yet the appellant and his friends continued to go there. This led to the charge of violating a lawful general order. Eventually, the Air Force Office of Special Investigations (AFOSI) identified one of the appellant's friends as a drug user and the friend identified the appellant. During his AFOSI interview, the appellant admitted his drug use.

The appellant now claims that he was not adequately defended because he was not counseled about pretrial agreements or administrative discharges in lieu of trial. The implication of his claim (which he does not expressly state) is that if he had known of these options, he would have pursued them and possibly avoided his court-martial or minimized his sentence.

In response, his defense counsel states, in a sworn affidavit, that the appellant advised her that he could plead guilty to the charges, except for the charge involving theft. Defense counsel's experience led her to believe that unless the appellant pled guilty to all charges, government officials would not agree to either a pretrial agreement or an administrative discharge. After explaining this to the appellant, he decided not to pursue either action.

INEFFECTIVE ASSISTANCE OF COUNSEL

The ultimate conclusions whether counsel was ineffective and whether those errors were prejudicial are reviewed de novo. *United States v. Wean*, 45 M.J. 461, 463 (1997); *United States v. Wiley*, 47 M.J. 158 (1997). In determining counsel's ineffectiveness, we have adopted the Supreme Court's test for effectiveness of counsel set out in *Strickland v. Washington*, 466 U.S. 668 (1984), as well as the presumption of competence articulated in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *United States v. Grigoruk*, 52 M.J. 312, 315 (2000) (citing *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)). *See also United States v. Gibson*, 46 M.J. 77, 78 (1997). Our superior court has adopted a three-part test to determine whether the appellant has overcome the strong presumption: (1) Whether the allegations made by the appellant are true; and if they are, whether there is a reasonable explanation for counsel's actions; (2) If

they are true, whether the level of advocacy fell "measurably below the performance . . . [ordinarily expected] of fallible lawyers"; and (3) If ineffective assistance of counsel is determined to exist, whether there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt". *United States v. Sales*, 56 M.J. 255, 258 (2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

In addition, because we face conflicting post-trial affidavits regarding counsel's conduct, we must also determine if we can decide this matter without benefit of a factfinding hearing. *Id*. In deciding whether additional facts are needed, our superior court has given us six principles to consider. *United States v. Ginn*, 47 M.J. 236, 248 (1997), *cited in Sales*, 56 M.J. at 257-58. One of the principles set out in *Ginn* is to consider whether the record as a whole "compellingly demonstrates" the improbability of the appellant's factual statement. We believe that is the case here.

The record of trial reflects a very careful and deliberate performance by appellant's counsel. The record portrays a counsel who was prepared for all aspects of the trial and, in fact, made sure her client was prepared for the trial. Counsel also achieved a very favorable result for her client. Finally, along with her affidavit, counsel submitted an extensive pretrial handout that she provided to all her clients, including the appellant. We find it implausible that a defense counsel who worked this hard on a case would neglect to discuss the basic concepts of pretrial agreements and administrative discharges with the appellant. Therefore, we conclude the record provides adequate evidence of counsel's representation and no additional factfinding procedures are necessary in resolving this appeal.

Returning again to the three-part test set out in *Polk*, we hold that the appellant has failed to meet the first part of this test because he has not established that his allegations are true. Against the appellant's bare assertion of negligent counseling, we weigh the defense counsel's sworn affidavit that she counseled the appellant on all aspects of his case, including pretrial agreements and waivers in lieu of trial. The area defense counsel recalls discussing the practical problems associated with these options with the appellant. She remembers counseling the appellant that they would not be available unless the appellant could plead guilty to all charges. The appellant was not willing to do so, and in fact, plead not guilty to stealing government identification card covers, which supports counsel's recall of her pretrial assessment of the case.

In addition, the pretrial handout that counsel provided to the appellant addresses all aspects of a court-martial in easy-to-understand language, including the possibility of an administrative discharge in lieu of trial. The area defense counsel asserts that her practice was to discuss the information sheet with her clients. The appellant's affidavit does not dispute this. In fact, the existence of this handout, which is not required, supports the likelihood that counsel meticulously educated her client about the court-

martial process. A defense counsel who obviously stresses pretrial information does not "forget" to address fundamental options in lieu of trial or those that could lessen the severity of the sentence. All of these considerations weigh heavily against the appellant's bare assertion that his counsel's representation fell below acceptable standards. Therefore, we find that the appellant has failed to meet even the first part of his burden.

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

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court