UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GEORGE W. GATTO
United States Air Force

ACM 37246

22 October 2010

Sentence adjudged 24 April 2008 by GCM convened at Dover Air Force Base, Delaware. Military Judge: Christopher Santoro (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Lance J. Wood, Major Patrick E. Neighbors, Captain Phillip T. Korman, and Philip D. Cave, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen, Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, Major G. Matt Osborn, Major Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

Charged before general court-martial with multiple acts of forcible sodomy and indecent assault in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934, the appellant elected trial by military judge alone and entered pleas of guilty to all charges

and specifications.[1] The military judge found him guilty in accordance with his pleas and sentenced him to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence adjudged.[2]

Background

The appellant admitted at trial that he forcibly sodomized three victims and indecently assaulted these three victims as well as ten others, some on multiple occasions. The appellant and his victims resided in a base dormitory, where he invited his fellow airmen "to party" with alcohol and cough medicine, telling them that the cough medicine would heighten the effects of the alcohol. When the airmen fell asleep or passed out after consuming the mixture, the appellant assaulted them. The description of the assaults of Mr. BWE is typical of the appellant's modus operandi:

> Sir, there were several times that were similar. We drank a lot in the dorms and used Coricidin often. It was usually in [Mr. BWE's] room. He would pass out. I would remove his clothes and take pictures. On several occasions, I sodomized him by taking his penis in my mouth and also forcing my penis into his anus.

The photographs seized from the appellant and admitted at trial document his crimes. For example, regarding Mr. BWE, the military judge and the appellant discussed some of the photographic evidence submitted with the stipulation of fact:

> MJ: Prosecution Exhibit 8 shows you indecently assaulting and sodomizing [Mr. BWE]. In the images, you sat near him, he was unconscious, you placed his hand on your penis. You then pulled down his shorts and boxers to expose his genitals and buttocks. You spread his buttocks to expose his anus. You digitally penetrated and forced your penis into his anus, and there were a total of 454 duplicates of these images on your computer categorized into different folders. Is all of that accurate?

[1] The military judge arraigned the appellant on the following charges and specifications: Charge I alleges forcible sodomy of Mr. BWE (Specification 1) and Airman First Class (A1C) BEP (Specification 2); Charge II alleges indecent assault of Mr. BWE (Specification 1), Mr. CJC (Specification 2), A1C BEP (Specification 3), Senior Airman (SrA) DC (Specification 4), Mr. CBC (Specification 5), SrA RSD (Specification 6), A1C JSK (Specification 7), and A1C PV (Specification 8); Additional Charge I alleges forcible sodomy of Mr. LJR; and Additional Charge II alleges indecent assault of Mr. LJR (Specification 1), SrA JVG (Specification 2), A1C MEP (Specification 3), SrA GTK (Specification 4), and A1C AD (Specification 5).

[2] A pretrial agreement between the convening authority and the appellant capped confinement at 45 years.

ACC: Yes, sir.

The appellant's computer hard drive contained 2,336 unique images of his acts of forcible sodomy and indecent assault of his victims. A compact disc containing additional images of the assaults of Mr. BWE was recovered after the appellant asked another airman to retrieve it from a hidden location.

The appellant now attacks the effectiveness of his trial defense counsel, claiming that his pleas to several of the charges and specifications were coerced as a result of ineffective assistance of counsel. In his post-trial declarations, the appellant asserts five specific allegations concerning his counsel: (1) his counsel had a conflict of interest that may have impacted their representation of him, (2) his counsel exaggerated their qualifications and discouraged him from hiring a civilian attorney, (3) his counsel failed to fully investigate the charges, (4) his counsel coerced him into pleading guilty to some of the charges, and (5) his counsel failed to properly address his alcohol abuse as a possible matter in mitigation. Though phrased as speculative questions rather than assertions of material fact, the appellate defense counsel adds to the list by questioning why an expert, Doctor (Dr.) RF, was not used. In a second assignment of error, the appellant claims that his trial defense counsel failed to cooperate with his appellate counsel in the preparation of his appeal.[3] Pursuant to court order, the trial defense counsel submitted responsive affidavits rebutting the appellant's claims.

The Applicable Standard

"A determination regarding the effectiveness of counsel is a mixed question of law and fact. We review findings of fact under a clearly erroneous standard, but the question of ineffective assistance of counsel flowing from those facts is a question of law we review de novo." *United States v. Baker*, 65 M.J. 691, 696 (Army Ct. Crim. App. 2007) (citations omitted), *aff'd*, 66 M.J. 468 (C.A.A.F. 2008). In assessing such claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984), *quoted in United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007).

To prevail, the appellant bears the burden of showing both: (1) that his counsel's performance fell measurably below an objective standard of reasonableness and (2) that any perceived deficiency operated to the prejudice of the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). With regard to the first prong, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. With regard to the second prong, an appellant "must show that there is a reasonable probability that,

[3] The appellant submits both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

"When challenging the performance of counsel, [an appellant] bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citing *Polk*, 32 M.J. at 153). As a general matter, reviewing courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977). Where the alleged deficient performance is used to challenge a guilty plea, the appellant must show, under the second prong of the *Strickland* test, a reasonable probability that he would have pleaded not guilty absent his counsel's deficient performance. *United States v. Ginn*, 47 M.J. 236, 246-47 (C.A.A.F. 1997) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Where an appellant has pleaded guilty to the charges at issue, we will consider the appellant's post-trial declarations on appeal in the context of the sworn admissions made by the appellant during the plea inquiry to determine whether a disputed matter has been raised which requires a post-trial evidentiary hearing. *Id*. at 244. Where the appellant's earlier statements during the plea inquiry clearly contradict the factual allegations supporting his claim and no reason is proffered for rejecting the appellant's earlier statements, we may decide the issue without resorting to an evidentiary hearing. *Id*. at 244-45.

Presciently anticipating the appellant's claims on appeal, the military judge conducted an exceptionally detailed inquiry at trial concerning the appellant's satisfaction with his attorneys and emphasized the importance of disclosing any concerns that he had:

> I need to be sure that what you're doing, you're doing comfortably and you're doing because you believe it's in your best interest and it's the right thing to do. Since you're telling me right now that you're comfortable with your defense attorneys, it's going to be very difficult for you to tell an appeals court later that you were dissatisfied with them. . . . I want to make sure right now that if there's anything you want to talk to me about, if you have any concerns, if you have any issues about anything that's led up to your decision to plead guilty, that we talk about those now. Is there any question you have for me or anything that you'd like to discuss with me?

The appellant replied, "No issues, sir."

Despite the appellant's expressed satisfaction with his counsel even after the military judge gave him every opportunity to voice any concerns with his representation and emphasized the need to do so at trial, the appellant now says otherwise. Under these circumstances, we look to the appellant's declarations to see what new information came to light after the trial that would explain the clear contradiction between the appellant's sworn statements at trial and the declarations submitted on appeal that would provide some basis for rejecting those earlier sworn statements. We find none.

The Alleged Conflict of Interest

The appellant first complains that Major (Maj) RA had a conflict of interest that "may have prejudiced him" in representing the appellant. However, the issue was fully explored at trial and the appellant waived any conflict. During the initial discussion of the appellant's rights to counsel at trial, Maj RA disclosed that he represented one of the victims, Mr. BWE, in an administrative discharge action. He stated that during his representation of Mr. BWE he received no information relevant to the appellant's case and nothing about his representation of Mr. BWE would create a conflict of interest in representing the appellant. Maj RA also noted that the prosecution had commented on an appointment that Maj RA allegedly had with another victim, Mr. CDC.[4] However, Maj RA stated he had searched his files and found nothing to indicate that he had ever represented Mr. CDC. After the military judge thoroughly discussed with the appellant his right to conflict-free counsel, the appellant affirmed that he wanted Maj RA to continue representing him.

The appellant now speculates on the possible consequences of the alleged conflict which he knowingly waived at trial. Specifically, he claims that the alleged conflict precluded an effective investigation and cross-examination of Mr. BWE that could have exposed a consensual relationship between them. In her post-trial declaration, the senior defense counsel, Maj AJ, responded that she explored whether any of the charged acts with Mr. BWE were consensual, but the appellant admitted "that not all of the sexual acts with [Mr. BWE] were consensual." The assistant defense counsel responded similarly. Given this apparent though not explicit factual conflict concerning whether a consensual relationship with Mr. BWE would provide a basis for contesting the charges pertaining to Mr. BWE, we turn to the record to determine whether this matter was explored at trial.

[4] No evidence supports this claim other than a statement in the brief that Major (Maj) RA was initially listed as counsel on an administrative discharge notification memorandum for Mr. CDC. Although we denied the appellant's motion to attach an unsigned copy of this memorandum, Maj RA nevertheless responded to the allegation in his post-trial declaration, unequivocally stating that Mr. CDC was not his client and explaining that it was common practice in administrative discharge processing to simply list the installation's area defense counsel on the notification memorandum without verifying who would actually represent the respondent. Therefore, no material factual dispute exists regarding this second alleged conflict.

The appellant admitted to the military judge that he forcibly sodomized Mr. BWE on about six occasions. His modus operandi was the same each time: After Mr. BWE passed out from drinking, the appellant removed his clothes, took photographs, and sodomized him. During the plea inquiry, the military judge specifically questioned whether Mr. BWE had ever said or done anything to indicate that he consented to being sodomized by the appellant while he was unconscious, and the appellant replied that he had not. Further, the appellant stipulated as fact that while he was assaulting and sodomizing the unconscious Mr. BWE, he took multiple digital photographs of his crimes—photographs that were later recovered and admitted at trial. Finally, even in his post-conviction clemency submission to the convening authority, the appellant said nothing about a defense of consent and made no complaint about his lawyers. In fact, he reaffirmed his remorse for his conduct: "Words alone will never do justice to the remorse and guilt I feel for what I've done. . . . I accept full responsibility for my actions, but I'm asking for a chance to redeem myself before it's too late." Although he now claims that he "was calling [Mr. BWE] a liar" and speculates on how the alleged conflict could have impacted his case, the record clearly contradicts the appellant's self-serving declarations and compellingly demonstrates the accuracy of his counsels' declarations.

The appellant offers no valid reason to reject his sworn judicial admissions and the evidence of record. Like the appellant in *Ginn* who claimed that his attorneys were ineffective by advising him to plead guilty without properly investigating information that might establish innocence, the appellant here claims that his attorney's alleged conflict precluded proper investigation of Mr. BWE, one of his many victims. *Id*. at 242. In *Ginn*, however, the appellant proffered a valid reason for rejecting his sworn statements at trial by stating that only after trial did he learn of the factual matter that supported his claim of ineffective assistance. *Id*. at 246. Here, the appellant offers no valid reason to reject his previously avowed satisfaction with his attorneys, his waiver of the alleged conflict, and his judicial admissions during the plea inquiry that undermine his post-trial claims of consent as a possible defense to the charges involving Mr. BWE, which he now claims were not investigated because of an alleged conflict of interest. His retrospective speculation on appeal is conclusively refuted by the record. The appellant has failed to carry his burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance.

Qualifications and Choice of Counsel

The appellant claims that his trial defense counsel exaggerated their qualifications and discouraged him from hiring a civilian attorney. In their post-trial declarations, the trial defense counsel responded that they neither exaggerated their qualifications nor dissuaded the appellant from hiring civilian counsel. The appellant offers no new information to support his allegation, and he raised none of these concerns at trial. In fact, in his third post-trial declaration, the appellant acknowledged that his counsel "never directly told [him] not to hire a civilian."

The military judge thoroughly covered the appellant's rights to both military and civilian counsel. The appellant acknowledged understanding those rights and elected to be represented by Maj AJ and Maj RA. The defense counsel then announced their qualifications on the record. Despite the military judge's exceptionally detailed caution to the appellant urging him to disclose any concerns he had with his counsel, the appellant offered none and made no mention whatsoever of wanting to hire a civilian attorney. Under these circumstances, we find no reason to relieve him from his express concession at trial that he was satisfied with his counsel and wanted no other representation. The record conclusively refutes his retrospective allegations and shows his post-trial claim to be "inherently incredible." *Id*. (citing *United States v. Giardino*, 797 F.2d 30, 32 (1st Cir. 1986)).

Pretrial Preparation

As mentioned in his conflict of interest claim, the appellant asserts that his counsel failed to properly investigate his case: "*As far as I knew* then, [Maj RA] and Maj [AJ] were doing all they could. Looking back, I realize I was neglected as a client." (Emphasis added.) In support of this post-trial claim, he cites no new information; instead, he discusses what he perceives as a lack of contact from his attorneys during the pretrial stage and, concerning Maj AJ, states "*as far as I know*, she didn't do anything but read the investigation reports during our 2 days of meeting." (Emphasis added.) The appellant's post-trial speculation concerning the pretrial efforts of his counsel does not raise a factual dispute—he himself acknowledges as much by prefacing his allegations with the qualifier "as far as I know."

To address the appellant's speculation and fill in what he does not know, the declarations of Maj RA and Maj AJ detail their pretrial preparation efforts on his behalf. Maj AJ explained that, as senior defense counsel, she frequently conferred with her on-scene assistant defense counsel about their cases well before the Article 32, UCMJ, 10 U.S.C. § 832, hearing. She had a copy of the discovery provided by the government. While attending an annual trial advocacy conference, Maj RA and Maj AJ spent several hours together reviewing the evidence and evaluating the highly inculpatory photographs. Maj AJ spent considerable time researching a way to suppress evidence seized from the appellant's dorm, to include the photographs and a journal in which the appellant chronicled his crimes; however, she found nothing to support a credible suppression motion.

Maj RA likewise detailed extensive work on the case, including days spent sorting through the thousands of images seized from the appellant, and he confirmed that he and Maj AJ had numerous pretrial discussions both in person and via telephone about the appellant's case. The defense counsel interviewed each victim and fully considered the appellant's initial claims that the sexual contact with some of the victims was consensual.

Ultimately, the appellant himself admitted to them that the sexual contact with unconscious victims was not consensual. This is the same thing that the appellant freely told the military judge under oath at trial.

The declarations show extensive pretrial preparation in the face of what counsel describe, and what the record shows, as "overwhelming" evidence of guilt. The declarations do not raise a material factual dispute because the counsels' declarations fill in what the appellant acknowledges that he does not know. Taken together with the appellant's expressed satisfaction with his attorneys on the record, the appellant's allegation is, again, nothing more than retrospective speculation that fails to carry his burden of establishing the truth of the factual allegations that would provide the basis for finding any deficient performance.

The Pretrial Agreement and Guilty Plea

The appellant asserts that he was coerced into a pretrial agreement and guilty plea: "Looking back, it seems that I was pushed to accept a PTA from the start. . . . Despite my desire to refute some of the charges, I was coerced into pleading guilty to everything because my lawyers were lazy and mislead [sic] me." He cites no new information to support this claim, and the declarations of his attorneys completely rebut his allegations. Under these circumstances, any material factual dispute between the appellant's declaration and those of his counsel is resolved by reference to the record, which reveals that the appellant freely admitted his guilt, his willing assent to the pretrial agreement, and his satisfaction with his attorneys. The detailed colloquy between the appellant and the military judge on each of these subjects as well as the extensive evidence admitted during the plea inquiry conclusively refute the appellant's claims.

Maj AJ stated that the appellant was "very concerned" about getting a pretrial agreement, particularly in light of the "overwhelming evidence" against him. Beyond the evidence supporting the charges, the photographs seized from the appellant showed the appellant assaulting men who had not yet been identified. Only a pretrial agreement could protect the appellant from further prosecution, and this was a key concern for the appellant and his counsel. The agreement entered at trial confirms this posture of the case: In exchange for pleas of guilty to charges involving 13 known victims, the convening authority agreed not to refer any additional charges based on evidence seized from the appellant.

As he did with the appellant's pleas of guilty, the military judge conducted an extensive inquiry with the appellant concerning his pretrial agreement. The appellant acknowledged his understanding and agreed to each provision in his pretrial agreement. Of particular relevance to his post-trial allegations are the following provisions found in the third paragraph of his Offer for Pretrial Agreement:

> I am satisfied with the defense counsel who advised me with respect to this offer and consider him competent to represent me in this court-martial . . .
>
> This offer to plead guilty originated with my counsel and me, and *no person or persons made any attempt to force or coerce me into making this offer or to plead guilty*.

(Emphasis added.) The military judge confirmed with the appellant that, in fact, "no one has made any attempts to force you or coerce you into making this offer." In response, the appellant stated that he was satisfied with his counsel, had received the full benefit of their advice, and was freely entering into the agreement because he believed it was in his best interest to do so. Finally, he stated that he was pleading guilty not only because he hoped to receive a lighter sentence but also because he was convinced that he was guilty.

The appellant offers no reason in his post-trial declarations to reject his earlier sworn statements in the record. Having considered the appellant's allegations in light of the record, we find, as with his other claims, that the record conclusively refutes the appellant's allegations of a coerced plea and obviates the need for any post-trial evidentiary hearing. *Id*. at 244-45 (finding that "[i]f a post-trial allegation of fact covers a matter within the record of the earlier plea and no reason is proffered for rejecting the earlier contrary assertion by appellant, the allegation can be summarily rejected as inherently incredible, and no hearing need be ordered"). The appellant has failed to carry his burden of establishing the truth of the factual allegations that would provide the basis for finding any deficient performance.

Alcohol Abuse as Mitigation

In his second post-trial declaration, the appellant asserts that his alcohol abuse "was not addressed properly in [his] trial," particularly as a "mitigating factor." In his third affidavit, the appellant renews this assertion, adding that during the plea inquiry he "certainly never claimed to have been aware of what [he] was doing." The trial defense counsel stated that the appellant's alcohol consumption was fully addressed during the guilty plea inquiry in this judge alone trial, making it unnecessary to present such evidence again during the sentencing phase. Once again, the record conclusively refutes the appellant's post-trial allegation and confirms the trial defense counsels' recollection of events.

The appellant's sworn statements during the guilty plea inquiry directly contradict his newly minted post-trial claim that he "certainly never claimed to be aware of what [he] was doing." The colloquy between the military judge and the appellant regarding the appellant's assault on Senior Airman (SrA) RSD is typical of the questioning on the impact of alcohol consumption:

> MJ: You had some alcohol in your system that night, of course, and you know the questions that are coming next, which is, tell me how that alcohol affected you or didn't affect you.
>
> ACC: I was aware of the situation. I knew what I was doing.

Similar discussions took place regarding each offense. For example, concerning the appellant's indecent assault of SrA JVG, the military judge asked how the appellant would describe his state of sobriety when he was manipulating and touching the genitals of SrA JVG. The appellant replied, "I was aware of what was going on at that point, sir." Again, concerning the appellant's assault on Mr. CBC, the military judge asked how the appellant would describe his condition after consuming alcohol and cough syrup. The appellant replied, "I knew what was going on, sir." Regarding the assault on SrA GTK and the appellant's alcohol consumption, the appellant stated, "I wasn't -- maybe still feeling the effects of the alcohol a little bit, but not anything that would affect my judgment." The appellant made similar statements regarding the effects of alcohol during his sexual assaults on the other victims—nowhere does he state that he was *unaware* of what he was doing.

The military judge extensively covered the appellant's consumption of alcohol as a possible defense to each specification and he returned to the issue at the conclusion of the inquiry:

> MJ: . . . What I want to make sure you're comfortable saying and that I understand is that on every one of you [sic] occasions we've talked about, even though you had some alcohol in your system, are you telling me that no matter how much you had, you still knew what you were doing when you performed all these acts we talked about?
>
> ACC: Yes, Sir.
>
> MJ: And so what you're telling me is that even though it may have, for example, lowered your inhibitions or made you do things that maybe you might not otherwise have done, everything you did, you did voluntarily and of your own free will?
>
> ACC: Yes, Sir.

The military judge had abundant evidence of the appellant's alcohol consumption for consideration in determining an appropriate sentence. The record confirms the very

reasonable basis offered by the trial defense counsel for not submitting additional evidence of alcohol consumption in sentencing, a basis that shows no deficient performance as required by *Strickland*. 466 U.S. at 687.

Use of Expert Consultant

Though not raised by the appellant in his post-trial declarations, his civilian appellate counsel alludes to "potential prejudice" by the failure of the trial defense counsel to call their expert consultant as a witness in sentencing. However, he neglects to mention the substantial benefit obtained for his client by the trial defense counsel's negotiation of a pretrial agreement that prevented further prosecution of the appellant for acts that he committed against uncharged victims in exchange for not calling the expert in sentencing.

Maj AJ explains in her post-trial declaration that Dr. RF acted as a defense consultant for possible mitigation in sentencing, but, given the speculative value of his testimony at the time the pretrial agreement was negotiated and the posture of the case, she advised the appellant that foregoing his testimony to gain protection against further prosecution was the best decision for him. The appellant apparently agreed given his express assent to the pretrial agreement both in writing and on the record.

Developments after trial confirm the wisdom of Maj AJ's advice. She stated in her declaration that "at least" one more victim was identified after the court-martial and that without the protective agreement the appellant would likely have faced another trial. The trial defense counsels' decision to trade the relatively small value of their expert's testimony in sentencing for a protective pretrial agreement was both tactically and strategically sound.

Prejudice

Even if the trial defense counsels' performance was deficient—and we expressly find that it was not—the appellant must still satisfy the second prong of the *Strickland* analysis by showing that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Ginn*, 47 M.J. at 247 (quoting *Hill*, 474 U.S. at 59). Although the appellant now alleges that his attorneys never suggested fighting the charges, even he admits telling them that he would plead guilty to many of the charges. The only charge he expressly quibbles over regarding a plea is the forcible sodomy of Mr. BWE, stating that he asked his attorneys to look into the relationship he had with Mr. BWE to possibly show that the acts were consensual. He returns to this consensual theory in his third affidavit where he states: "I never once said that any of the sexual acts between [Mr. BWE] and myself were not consensual. In fact, that was the main charge I was so uncomfortable pleading guilty to." Again, however, the appellant's allegation is conclusively refuted by the record.

When asked by the military judge to explain why he thought he was guilty of forcibly sodomizing Mr. BWE, the appellant stated:

> Sir, there were several times that were similar. We drank a lot in the dorms and used Coricidin often. It was usually in [Mr. BWE's] room. He would pass out. I would remove his clothes and take pictures. On several occasions, I sodomized him by taking his penis into my mouth and also forcing my penis into his anus.

The military judge specifically asked whether consent was an issue:

> The occasions where you either put his penis in your mouth or you put your penis in his anus, on those specific days or leading up to those incidents, had he ever said anything to you that led you to believe he would welcome you doing that to him while he was unconscious?

The appellant replied, "Not the incidents when he was unconscious, sir." Further, the appellant stipulated as fact that while he was assaulting and sodomizing the unconscious Mr. BWE he took multiple digital photographs of his crimes that were later recovered and admitted at trial. Thus, in direct opposition to the appellant's post-trial declaration, he stated under oath that many of the acts he perpetrated on Mr. BWE were nonconsensual. As with his other allegations, the appellant is bound by the admissions he made under oath at trial unless he provides a viable reason for rejecting them. *Id*. at 244. He provides no such reason, and the record conclusively refutes his post-trial claim that he wanted to fight the charges, specifically those involving Mr. BWE, based on consent or any other theory.[5] We find no errors by his counsel that would have created a reasonable probability that the appellant would have entered pleas of not guilty and insisted on going to trial. *See id*. at 247 (quoting *Hill*, 474 U.S. at 59).

Effective Assistance of Counsel on Appeal

The civilian attorney who acts as lead counsel for the appellant on appeal[6] requested that the trial defense counsel provide him with their respective case files and that they answer certain questions concerning their case preparation. Upon the appellant's motion, we ordered the trial defense counsel to provide the appellant's

[5] We again note that the appellant's clemency submissions also contradict his post-trial claims of wanting to fight the charges. In his letter to the convening authority, the appellant stated: "Words alone will never do justice to the remorse and guilt I feel for what I've done. . . . I accept full responsibility for my actions . . . ."

[6] In his Notice of Appearance, the civilian attorney expressly limited his representation of the appellant to the Air Force Court of Criminal Appeals.

counsel with complete copies of their respective case files. *See United States v. Dorman*, 58 M.J. 295, 298 (C.A.A.F. 2003) (finding that a trial defense counsel must supply the appellate defense counsel with the case file upon request and after written release from the client). The appellant's counsel complied with the order.

Concerning the appellate defense counsel's demand that the trial defense counsel answer his questions about their trial preparation and strategy, the trial defense counsel sought advice through their chain of command and elected not to respond since the questions were clearly aimed at making an ineffective assistance of counsel claim. We did not compel a response to the appellate defense counsel's questions. *See United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995) (holding that a trial defense counsel may voluntarily respond to allegations of ineffective assistance but should not be compelled to do so until an appellate court reviews the specific allegations and determines that a response is necessary). After the appellant asserted his claims in his assignments of error, we ordered that both trial defense counsel provide responsive affidavits. The counsel complied with the order, and their affidavits fully address the claims of ineffective assistance raised by the appellate counsel.

We reject the appellant's claim that a perceived lack of cooperation by his trial defense counsel with his appellate defense counsel equates to ineffective assistance of counsel on appeal.[7] The trial defense counsel provided their existing case files to the appellant's counsel. After the appellant asserted his claims of ineffective assistance through both of his assignments of error and his personal declarations, the attorney-client privilege was waived to the extent necessary to respond to those claims. *United States v. Dupas*, 14 M.J. 28, 30 (C.M.A. 1982). The trial defense counsel then addressed in detailed affidavits the issues raised by the appellate defense counsel, and their affidavits comply with this limited waiver of the privilege. The appellant fails to show any prejudice from his perceived lack of cooperation by the trial defense counsel in making his ineffective assistance of counsel claims.

Conclusion

Applying the *Strickland* standard to each of the appellant's post-trial claims as well as evaluating those claims against his sworn admissions at trial under the guidance of *Ginn*, we find that the trial defense counsels' performance was not deficient. Facing multiple victims and overwhelming evidence of guilt, the trial defense counsel effectively negotiated a pretrial agreement that protected the appellant against further prosecution for yet unidentified victims and reduced his confinement exposure from confinement for life without parole to a term of years. The approved findings and sentence are correct in law

[7] We recognize, as the appellate defense counsel notes, that informal discussions prior to submission of an assignment of error may resolve some issues and obviate the need for later formal affidavits in response; however, a trial defense counsel's decision not to engage in such discussions does not alone equate to ineffective assistance of counsel.

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
Clerk of the Court