UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class HECTOR R. GONZALEZ JR.
United States Air Force

ACM 34691 (f rev)

17 August 2004

Sentence adjudged 31 May 2001 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Kirk R. Granier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 148 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

STONE, GENT, and MOODY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

STONE, Senior Judge:

On 28 February 2003, after considering six assignments of error raised pursuant to Article 66, UCMJ, 10 U.S.C. § 866, this Court affirmed the findings and sentence in the case sub judice. The appellant appealed our decision, and on 9 October 2003, our

superior court set it aside and remanded the case, specifying the following issue for our consideration:

> IN VIEW OF THE CONCLUSION OF THE AIR FORCE COURT OF CRIMINAL APPEALS THAT TRIAL DEFENSE COUNSEL DID NOT EXERCISE REASONABLE DILIGENCE IN DISCOVERING THE ERRONEOUS TEST REPORT,[1] WHETHER APPELLANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

United States v. Gonzalez, 59 M.J. 159 (C.A.A.F. 2003).

As the result of an administrative oversight by the Air Force appellate records division, the parties were not notified of the remand until 9 March 2004. To date, this Court has not received any additional briefs or motions related to the specified issue. The 9 June 2004 deadline for the parties to file briefs having expired, we may now consider the specified issue. *See* Joint Courts of Criminal Appeals Rules of Practice and Procedure, Rule 15(b) (1 Sep 2000).

Background

In May 2001, the appellant pled guilty to and was convicted of one specification of possessing marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The parties litigated the two remaining specifications—wrongful use of methylenedioxymethamphetamine (ecstasy), also a violation of Article 112a, UCMJ, and carrying a concealed deadly weapon, a violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting alone convicted the appellant on all charges and sentenced the appellant to a bad-conduct discharge, confinement for 148 days, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The specified issue deals with the appellant's one-time use of ecstasy. This use came to light when the appellant's supervisor detected drug paraphernalia in the appellant's work center. In the ensuing investigation, the appellant consented to a search of his bodily fluids, and a sample of his urine was collected for drug testing and analysis. The Air Force Drug Testing Laboratory at Brooks Air Force Base, Texas, tested the urine sample in late August and early September 2000, and reported a finding that the appellant's urine contained the metabolite of ecstasy at a concentration level of 4,131 nanograms per milliliter, considerably above the cut-off established by the Department of Defense for reporting a urine sample as "positive" for ecstasy use.

On appeal to this Court, the appellant complained that despite his requests for discovery of impeachment evidence relevant to the laboratory's drug-testing program, the

[1]For clarity, we refer to this document as the undisclosed laboratory "discrepancy report."

government failed to disclose a "discrepancy report." This undisclosed report documented an error in the testing of a blind quality control sample that went through the laboratory on or about 31 July 2000, one month before the appellant's urine sample was tested. The discrepancy report indicated laboratory personnel had failed to properly identify a quality control specimen as "negative" for the presence of the metabolites of cocaine. This was a "blind" quality control specimen, meaning laboratory personnel who handled a particular "batch" of specimens would be unable to tell whether it was a quality control sample or one provided by a military member. The error was not detected until the quality assurance review of the test results was completed. Upon detecting the error, laboratory personnel drafted the discrepancy report. Although the laboratory error did not directly involve the appellant's urine sample, this information could have served to impeach, to some degree, the overall quality of the drug laboratory's processes, equipment, and personnel practices.

Despite requests for discrepancy reports of any kind, the discrepancy report at issue was never provided to the appellant's counsel. In our 28 February 2003 opinion, this Court concluded that the government had nonetheless disclosed sufficient "information that would have led diligent counsel to the analytical data in question." *United States v. Gonzalez,* ACM 34691, unpub. op. at 5 (A.F. Ct. Crim. App. 28 Feb 2003). In drawing this conclusion, we noted the existence of certain annotations on a monthly "quality assurance report" that *had* been provided to the defense. *Id.* These annotations indicated a quality control sample as "Unacceptable" and involving "Technician Error." *Id.* We concluded these annotations on the monthly quality assurance report put counsel on notice that there was further impeachment evidence. *Id. See also United States v. Brozzo*, 57 M.J. 564, 567 (A.F. Ct. Crim. App. 2002), *rev. granted,* 59 M.J. 399 (C.A.A.F. 2004). We further found that the discrepancy report was not material to either guilt or punishment and that disclosure of the discrepancy report itself would not have put the whole case in such a different light that it would have undermined confidence in the verdict. *Gonzalez*, unpub. op. at 5.

Discussion

In raising ineffective assistance of counsel for the first time in his appeal to our superior court, the appellant cited extensively to *Strickland v. Washington*, 466 U.S. 668 (1984), the seminal case on this issue. Additionally, the appellant cited our superior court's precedents in this area of the law, to include *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). However, the appellant did not suggest that the trial defense counsel's performances were deficient in any other respect, nor did he provide any affidavits or additional arguments in support of the issue.

The appellant has the burden of establishing that the performance of his defense counsel was deficient and that the deficiencies were so serious as to deprive him of a fair trial. *Strickland*, 466 U.S. at 687; *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004).

Moreover, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Our superior court applies a slightly modified test to determine if the presumption of competence has been overcome. The performance prong of *Strickland* is broken into two separate inquiries such that we conduct a three-part test rather than a two-part test:

> (1) Are [the] allegations true; if so, "is there a reasonable explanation for counsel's actions?";
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance … [ordinarily expected] of fallible lawyers?" and
> (3) If defense counsel was ineffective, is there a "reasonable probability that absent the errors," there would have been a different result?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (citing *United States v. Polk*, 32 M.J. at 153).

Turning to the first prong of our superior court's test, we consider whether trial defense counsel negligently failed to pursue the leads raised by the annotations on the monthly quality assurance report. In our prior decision, we concluded that trial defense counsel could have found the discrepancy report through due diligence. Such a conclusion was not, *ipso facto*, a finding that the defense counsel failed to investigate the issue of inaccurate testing of blind quality control samples. Nor is such a conclusion, *ipso jure*, a finding of ineffective assistance of counsel. We therefore, rely on the record of trial to see if it sheds any light on the issue. It is noteworthy that trial defense counsel did cross-examine the government's expert witness concerning errors with blind quality control samples:

> Q. You talked about the tests that are used. And, you talked about blind blanks, correct? A blind aliquot that went through?
>
> A. Yes.
>
> Q. Isn't it true that about two percent of those blind aliquots that go through all the tests come back false positive or with wrong results?
>
> A. There are errors. And, that's been my experience in Army labs; is that occasionally blinds are missed, that's correct.

> Q. At a rate of about two percent, correct?
>
> A. Yes.
>
> Q. And, that's even with the gold standard test, correct?
>
> A. Blinds can go wrong on [gas chromatography/mass spectrometry testing] as well. I should say that that is expected. That's why we do the blinds. That tells you there was a problem with the analysis. So, that's why we do them.

This line of questioning suggests that defense counsel were aware of a larger problem with blind quality control specimens than the incident documented in the undisclosed discrepancy report.[2] But, in the final analysis, it sheds little light on whether they were aware of the specific annotations relating to the undisclosed discrepancy report and failed to further investigate.

Even if we were to conclude the appellant has met his burden of meeting the first prong of the test, he has not met his burden of establishing that his defense counsel's level of advocacy fell "measurably below the performance . . . [ordinarily expected] of fallible lawyers." *Grigoruk*, 56 M.J. at 307. In this regard, the Supreme Court has elaborated on this concept by stating:

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—*even if defense counsel may have made demonstrable errors*—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

United States v. Cronic, 466 U.S. 648, 656-57 (1984) (internal citations and punctuation omitted) (emphasis added). *See also Murray v. Carrier*, 477 U.S. 478, 488 (1986) (If the conduct of counsel arises from a tactical decision or from inadvertence, or from ignorance, it will not raise an ineffective assistance ground for reversal). *See also* 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 12.09 (3d ed. 1999). Failure to investigate a line of defense is grounds for a claim of ineffective assistance of counsel, but we evaluate such a claim "from counsel's perspective at the

[2] In this regard, no evidence suggests that the defense was "sandbagging" on this issue. We reach this conclusion based on the appellant's initial brief to this Court, which states the defense community was unaware of the discrepancy report until approximately July 2001, several weeks after the appellant's trial at the end of May 2001.

time," after "eliminat[ing] the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. *See also United States v. Briggs*, 42 M.J. 367, 371-72 (C.A.A.F. 1995).

Suffice it to say, the trial defense counsel aggressively represented their client throughout the proceedings, pursuing a sound trial strategy in attacking the urinalysis process. They very clearly were conversant and comfortable with the scientific principles and laboratory procedures involved in defending a drug case based largely, albeit not solely, on urinalysis testing. In particular, they: (1) vigorously cross-examined the expert witness, identifying several errors in procedures, (2) identified serious improprieties by laboratory personnel in documenting errors, (3) attacked the chain-of-custody evidence, and (4) entered numerous cogent and appropriate motions and objections to evidence and argument. Moreover, as to the specific allegation of failure to investigate, under the circumstances of this case, we conclude it would not be contrary to "prevailing professional norms" for a trial defense counsel to rely on the government's assurance that all relevant documents had been provided. To the extent this reliance on the government was error on the part of the defense team, we conclude it was not significant enough to overcome a presumption of competence.

In any event, even if we assumed there was a performance deficiency of constitutional magnitude, the appellant has failed to demonstrate prejudice. We hold that had the trial defense counsel investigated and presented this additional impeachment evidence, there is no reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Grigoruk*, 56 M.J. at 307. *But cf. United States v. Jackson*, 59 M.J. 330, 334-36 (C.A.A.F. 2004) (failure to disclose the identical discrepancy report at issue in the instant case was prejudicial under a "harmless beyond a reasonable doubt" standard as well as a standard of a "reasonable probability of a different result").

Conclusion

For all of these reasons, we find that the appellant has not overcome the presumption that his counsel were competent. We therefore hold that his counsel were not ineffective.

The 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator