UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MICHAEL P. GRAFMULLER
United States Air Force

ACM 37524

30 March 2011

Sentence adjudged 01 June 2009 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major David P. Bennett, and Captain Michael S. Kerr.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of five specifications of maltreatment of subordinates, two specifications of indecent assault, and two specifications of using indecent language in

violation of Articles 93 and 134, UCMJ, 10 U.S.C. §§ 893, 934.[1] The court-martial sentenced him to a dishonorable discharge, confinement for two years, and reduction to E-1. The convening authority approved the sentence adjudged. The appellant assigns six errors: (1) Whether his pleas were improvident based on mental incompetence, (2) Whether his counsel were ineffective, (3) Whether two specifications of indecent language should be dismissed because each was the subject of civilian prosecution, (4) Whether ex parte communications deprived him of a fair investigation under Article 32, UCMJ, 10 U.S.C. § 832, (5) Whether the command improperly influenced potential witnesses, and (6) Whether his sentence is inappropriately severe.[2] Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

In 2006 and 2007, the appellant maltreated five subordinate Airmen by making inappropriate sexual comments to them. During the maltreatment of one, Airman First Class (A1C) EJ, he made inappropriate physical contact while making inappropriate sexual comments. The appellant also indecently assaulted two subordinate Airmen in 2006. A1C TF, who was also a victim of maltreatment, was indecently assaulted by the appellant when he called her into his office to discuss computer training. The other victim, A1C AL, had just reported to the unit when the appellant indecently assaulted her while helping her move into the dormitory.

In March 2008, the appellant contacted a prostitute with whom he was acquainted for the purpose of arranging a sexual encounter with her 14-year-old cousin. Unknown to the appellant, the prostitute had become an informant for the Hampton Police Department, Hampton, Virginia, and the alleged 14-year-old cousin was actually an undercover police officer. In a recorded telephone call with the prostitute, the appellant used certain indecent language concerning the planned sexual encounter with the 14-year-old girl. The appellant also used indecent language with the undercover officer both by telephone and at the prostitute's home before his arrest.

The use of indecent language on these two occasions is the basis for the two indecent language specifications. The Commonwealth of Virginia retained jurisdiction on other offenses and indicted the appellant on charges of attempted carnal knowledge, indecent liberties, pornography, and solicitation, in violation of Sections 18.2-63, 18.2-370, 18.2-374.3, and 18.2-29 of the Code of Virginia. After entering findings of guilty on each offense, the Circuit Court for the City of Hampton, Virginia, sentenced him to 35 years in prison with a minimum of 10 years to serve on 18 May 2009.

[1] Some minor language was excepted and substituted in the findings on the two indecent assault specifications under Charge II: (1) "shorts" instead of "underwear" in Specification 1 and (2) "leaning his body on her" instead of "jumping on top of her" in Specification 2. The government did not attempt to prove the excepted language.

[2] Except for the issue concerning dismissal of the two indecent language specifications, all issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Providence of Guilty Pleas

In statements submitted to support his Assignment of Errors, the appellant challenges the providence of his pleas of guilty based on mental incompetence at the time of trial. To support this claimed mental incompetence, he lists a variety of physical and mental infirmities, to include: posttraumatic stress disorder, depression, "signs of" co-dependency, immune system damage, visual field defects, sleep disorder, joint pain, skin rash, digestive problems, and an emergency appendectomy shortly before trial. The appellant presented none of this either in the plea inquiry, in his unsworn statement, or even in clemency where, in a contrite statement made more than a month after his court-martial, he reaffirms his guilt and asks for mercy: "I know that my actions have disgraced the Air Force, my unit, my family and my friends, as well as myself. . . . I take sole responsibility for my present confinement. . . . I know I made very poor decisions that lead to my court-martial." As is not uncommon, on appeal his attitude has changed—but the validity of his pleas has not.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). "Pleas of guilty should not be set aside on appeal unless there is 'a "substantial basis" in law and fact for questioning the guilty plea.'" *Id*. (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "If an accused 'sets up matter inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ, 10 U.S.C. § 845(a)); Rule for Courts-Martial (R.C.M.) 910(h)(2). "Once the military judge has accepted a plea as provident and has entered findings based on it, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record." *Garcia*, 44 M.J. at 498. "A 'mere possibility' of such a conflict is not a sufficient basis to overturn the trial results." *Id*. (quoting *Prater*, 32 M.J. at 436)). Moreover, we will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts the express admissions of the appellant. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

In *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007), the appellant asserted that his pleas of guilty should be set aside because the military judge failed to inquire into mental health issues raised during an unsworn statement. Rejecting the appellant's claim, the Court held that a military judge may rely on the presumption that an accused is sane and that counsel has conducted a reasonable investigation of a possible mental responsibility defense, especially where the matter raised does not by itself indicate a possible defense. That presumption gains particular strength in this case because, in response to trial counsel's motion for in camera review of the appellant's mental health

records, defense counsel informed the military judge that, based on discussions with their appointed forensic psychologist, the defense would not be raising any mental responsibility issues. The appellant presented nothing to the military judge, or the convening authority for that matter, that refutes this presumption.

The appellant's discussions with the military judge during the plea inquiry were clear, responsive, and considered. For example, during the inquiry concerning the maltreatment specifications, the military judge asked if anything led the appellant to believe that the victim consented; the appellant replied, "Nothing other than my hope—my unreasonable hope." Responding to the military judge's question of why the appellant thought the alleged acts of maltreatment constituted sexual harassment, the appellant explained, "Because no reasonable person would have made those comments and no NCO should have made those comments to any Airmen let alone one that he supervised." At the conclusion of the guilty plea inquiry, the appellant assured the military judge that he was pleading guilty voluntarily and of his own free will, that no one had made any threats or tried in any way to force him to plead guilty, and that he fully understood the meaning and effect of his guilty plea. Nothing in the plea inquiry even hinted that the appellant was not mentally competent.

Nor did any mental responsibility issues appear during sentencing. During his unsworn statement to the court, the appellant acknowledged that he alone was responsible for his actions and apologized to his victims and his family:

> I cannot articulate the pain I feel for hurting my wife over and over again—ripping our family apart. I was not thinking of my family when I committed these offenses, I was only thinking of myself, and my misplaced desires. . . . As I sit in confinement, I am left with my thoughts and I'm trying to understand how I got to this point in my life. I have no excuses and it is with my deepest regret that I stand before you today for my shameful acts that have embarrassed my organization and the Air Force, and for the disappointment that has been caused from all of this. I am whole-heartedly sorry.

He also explained that he elected not to present any professional awards or certificates from his deployments because "nothing makes up for my horrible personal choices."

The military judge did not abuse her discretion in accepting the appellant's plea and, indeed, had no basis for rejecting it; the record contains no substantial basis for questioning the appellant's plea and conclusively refutes his belated claim of incompetence. Having considered his appellate claims of incompetence in light of the entire record with particular attention to his sworn responses during the plea inquiry and his statements during sentencing, we are satisfied that the appellant was competent at the time of trial and that no post-trial hearing is necessary. Any mental health issues were

explored by the defense in consultation with their appointed forensic psychologist, and nothing in the record raises any legitimate question about the decision not to raise any such issues. *See United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) (where statements during plea inquiry clearly contradict allegations on appeal and no reason is proffered for rejecting the appellant's earlier statements, we may decide the issue without resort to an evidentiary hearing). Even more tenuous than the claims in *Shaw*, the appellant's claim that the military judge should have rejected his plea based on incompetence is without merit.

Effectiveness of Counsel

In a related but separate attack on his guilty pleas, the appellant claims that his counsel were ineffective by "pressuring" him to plead guilty, failing to challenge the evidence, and failing to investigate evidence that would impeach the victims. In lengthy statements submitted on appeal, the appellant makes sweeping accusations against his trial defense counsel, but he presents no information that was not available to him at the time of trial when he stated under oath that he was completely satisfied with his counsel and their advice. As with his claimed mental incompetence, the record conclusively refutes his allegations.

"A determination regarding the effectiveness of counsel is a mixed question of law and fact." *United States v. Baker*, 65 M.J. 691, 696 (Army Ct. Crim. App. 2007), *aff'd*, 66 M.J. 468 (C.A.A.F. 2008) (mem.). "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." *Id*. 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 687-88. 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, 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 *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). 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, absent counsel's deficient performance, he would have pleaded not guilty. *Ginn*, 47 M.J. at 246-47 (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)).

Where an appellant has pleaded guilty to the charges at issue on appeal, we will consider the appellant's post-trial declarations in the context of the sworn admissions made by the appellant during the plea inquiry to determine whether the disputed matter requires a post-trial evidentiary hearing to resolve. 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 resort to an evidentiary hearing. *Id.* at 244-45. Such is the case here.

The appellant alleges that his counsel "instructed [him] to read from a script and Plead Guilty," that they prohibited him from contacting his wife, that some of his victims were themselves engaged in "unprofessional sexual relations," that the telephone recordings of the appellant arranging sexual contact with someone he thought was a 14-year-old girl were obtained illegally, and that he provided his defense team with "numerous verifiable facts" to prove the statements against him were false. But the appellant himself refutes each of these allegations by his statements at trial.

As previously mentioned in part, he acknowledged under oath (1) that he was satisfied with his counsel, (2) that their advice was in his best interest, (3) that he was pleading guilty voluntarily and of his own free will, (4) that no one had threatened him or in any way tried to force him to plead guilty, (5) that he had a legal and moral right to plead not guilty, and (6) that he could withdraw his plea at any time before sentence was announced.

Concerning contact with his wife, the appellant himself drew the court's attention to her absence, stating "As you see my wife of nearly 11 years is not here today. To say she is disappointed with my life decisions is an understatement. My wife is devastated by my actions. I have emotionally and financially ruined her." Thus, contrary to his claims on appeal that his attorneys prohibited access to his wife, the record conclusively shows in the appellant's own words that his wife's absence from his life was entirely voluntary.

The appellant certainly did not challenge the veracity and legality of the evidence at trial, telling the military judge that he had reviewed the recorded conversations and that essentially "they are accurate." After the military judge discussed with him the context of the recorded conversations that lead to his arrest by civilian authorities for attempting to arrange a sexual encounter with a 14-year-old girl, the military judge confirmed with the appellant that the recordings were accurate:

> MJ: Again, you've had an opportunity to listen to the tapes and transcripts in your civilian trial and you're satisfied that, in fact, you made these statements?
>
> ACC: Yes, ma'am.
>
> MJ: Every one of them?
>
> ACC: Yes, ma'am.

The record conclusively demonstrates the veracity of the recordings through the appellant's own sworn admissions.

The appellant faults his counsel for not pursuing information that would impeach the credibility of his victims, but he himself told the military judge that their accusations were true. For example, concerning allegations of maltreatment of Airman MR, the appellant stated:

> I have read [the victim's] statement and I have heard her testify regarding how she felt about my talking to her this way. I agree my attempts to get her to talk about sexual topics with me resulted in feeling uncomfortable and caused her husband to become angry about the situation. I had no legal justification or excuse to talk to her this way.

The military judge raised with the appellant a possible mistake of fact as to consent defense, but the appellant stated that it did not apply: "My attorney's [sic] have explained reasonable defenses for mistake of fact and this doesn't qualify." Similar sworn admissions concerning his actions toward the other victims corroborate the post-trial declarations of his counsel who state that they investigated the alleged impeachment evidence prior to the Article 32, UCMJ, hearing, and found nothing.

In response to the appellant's complaint that his lawyers did not seek potentially exculpatory wiretap recordings from the State of Virginia, his lead counsel states that she reviewed the recordings and found nothing exculpatory; in fact, she states, the recordings "unfortunately confirmed that [the appellant] believed he was communicating with a child and was doing this for the purpose of attempting to have sexual contact with the child . . . ."

Having examined each of the appellant's post-trial allegations of ineffective assistance of counsel in the context of not only his post-trial assertions, but also his sworn statements at trial and the statements submitted by his counsel in response to his allegations, we find no reason for rejecting the appellant's earlier statements and find no reason to order an evidentiary hearing. *Ginn*, 47 M.J. at 244-45. The appellant expressed

satisfaction with his counsel at trial and gave no indication that his pleas were forced or pressured. The statements of his trial defense team are consistent with the appellant's statements at trial as well as the other matters in the record and demonstrate the soundness of their tactical decisions.

Dismissal of Indecent Language Specifications

The appellant moved to dismiss the two indecent language specifications on the basis that they were substantially similar to the charges for which the appellant was convicted in civilian criminal court. The military judge denied the motion on two bases. First, she determined that the charges were not substantially similar since not all of the charged indecent language supported the solicitation offense. The military judge next determined that even if the offenses were substantially the same, the appellant lacked standing to challenge a violation of nonjurisdictional policy. After the ruling on the motion, the appellant unconditionally pled guilty to these and all other charges. He now reasserts the issue on appeal, arguing that the convening authority could not refer the indecent language specifications without Secretary of the Air Force (SECAF) approval because he was convicted in state court of substantially the same act. The appellant's unconditional guilty plea waives the issue since it is procedural rather than jurisdictional and, assuming *arguendo* that waiver did not apply, the military judge did not abuse her discretion in denying the motion to dismiss.

Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 2.6.3 (21 December 2007), provides that if jeopardy has attached in state proceedings, UCMJ action may not be taken absent SECAF approval: "Only SECAF may approve *initiation* of court-martial . . . action against a member *previously tried* by a state or foreign court for *substantially the same act or omission*, regardless of the outcome." (Emphasis added.) This provision is a matter of policy rather than jurisdiction. *See United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996); *United States v. Jette*, 25 M.J. 16, 18 (C.M.A. 1987).[3] As such, "an unconditional guilty plea waives any non-jurisdictional defect in the proceedings to that point." *United States v. Lippoldt*, 34 M.J. 523, 525 (A.F.C.M.R. 1991).

Regarding a similar provision in the predecessor to AFI 51-201, Air Force Manual 111-1, *Military Justice Guide* (2 July 1973), we held that, assuming it was error to proceed with court-martial after the state had taken jurisdiction, the appellant's unconditional guilty plea waived the error since it was "neither jurisdictional nor a deprivation of due process." *United States v. Taylor*, 16 M.J. 882, 884 (A.F.C.M.R.

[3] The appellant argues that "the underlying purpose" of Air Force Instruction (AFI) 51-201, *Administration of Military Justice* (21 December 2007), is protection of "personal liberties and interests of Airmen," but we have previously held that the provision at issue confers no individually enforceable rights but is a matter of policy. *See United States v. Saxon*, ACM 35069 (A.F. Ct. Crim. App. 30 August 2004) (unpub. op.) (citing *United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996); *United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992)).

1983). Such is the case here: the asserted basis for dismissal is a nonjurisdictional matter subject to waiver by an unconditional guilty plea. R.C.M. 907(b)(2). Therefore, we find that the appellant's guilty plea constituted an "intentional relinquishment or abandonment of a known right" which waived any error that may have existed regarding this issue. *See United States v. Olano*, 507 U.S. 725, 733 (1993).

Assuming for the sake of argument that the issue is not waived by the plea, we find that the military judge correctly denied the appellant's motion to dismiss. The military judge first determined that "not all of the indecent language alleged would seem to support the solicitation offense, thereby suggesting different offenses." The record supports this conclusion. For example, in speaking with the prostitute about her cousin who the appellant thought was a 14-year-old girl, the appellant says such things as: "Do you know if she has ever had two guys at once? . . . So like you she started real young . . . So she knows what she likes . . . Is she the type, you think, that she might not ask to see it, but is she the type that she might reach over for it . . . ." Speaking to the undercover police officer while under the impression that she was 14, the appellant told her that they were both looking for "fun" that "ends in an orgasm" and that he did not want her to wear jeans so tight that he would need a "pry bar to get them off." Such examples persuade us that the military judge did not abuse her discretion in finding the solicitation offense charged under Virginia law separate from the indecent language offenses referred to trial by court-martial. Such language goes beyond that necessary to complete the solicitation offense and is, in the appellant's words, simply "shocking, filthy, disgusting in nature, had a tendency to incite lustful thoughts, was vulgar—totally uncalled for, inappropriate, and embarrassing to anyone that would listen to it." He also agreed that his use of the indecent language was prejudicial to good order and discipline by causing "issues at work" and was service discrediting.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, 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). Additionally, while we have a great deal of 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); *United States v. Arindain*, 65 M.J. 726, 732 (A.F. Ct. Crim. App. 2007).

The appellant argues that his sentence is inappropriately severe, citing his character and "stellar" service record. Concerning his character, the appellant himself described the personal choices he had made as "horrible." Concerning that stellar record, we observe that the appellant received nonjudicial punishment in 2006 for adultery and

indecent acts by "performing oral sex on [SS] in front of another." In his appeal of the punishment, the appellant discusses how he had contact with "these girls through an acquaintance whom I no longer associate with" at a time when his wife had left him and admits that "there was more than just kissing," but he assured his commander that he "will never again engage in activities of any type of sexual nature with any woman other than my wife as long as I am married." His guilty pleas show otherwise.

The appellant maltreated and indecently assaulted several subordinate Airmen, one of whom had only been on base for a couple of hours when, as the appellant helped her move into the dormitory, he pushed her down on the bed and forced his mouth onto hers. Furthermore, as the appellant conceded during his guilty plea, his indecent language to a known prostitute concerning his desire to have sex with her 14-year-old cousin would be "shocking and would definitely cause issues in the work place." Likewise, he conceded that his indecent language toward the undercover police officer whom he believed to be a 14-year-old girl was "shocking, filthy, disgusting" and brought discredit to the service by the public knowledge that an Air Force member was involved in such activity. Having given individualized consideration to this particular appellant, the nature of the offenses, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

Remaining Assignments of Error

In his remaining two assignments of error, the appellant first claims unlawful command influence prohibited "over thirty potential witnesses" from testifying on his behalf, but he provides nothing to support this allegation. We note that the appellant himself told the military judge that he chose not to submit certain favorable matters in sentencing because "nothing makes up for [his] horrible personal choices." Later, in clemency, he submitted 10 character letters including several from civilian members of his squadron's command staff. None mention any improper command influence concerning their support of the appellant, and neither the appellant nor his counsel mention any improper command influence in their clemency petitions to the convening authority. In the last remaining assignment of error, the appellant claims that certain ex parte communications between the investigating officer, trial judge, prosecutor, and witnesses deprived him of a fair Article 32, UCMJ, hearing and trial. The appellant raised neither of the issues at trial, declined to challenge or even question the military judge, elected trial by military judge alone, and cites no new information that would explain the contradiction between his actions at trial and his accusations on appeal. *See Ginn*. Having considered these remaining assignments of error, we find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The approved findings and the 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court