UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman HERBERT L. GRAYBILL
United States Air Force

ACM 37005

28 October 2008

Sentence adjudged 13 April 2007 by GCM convened at Hill Air Force Base, Utah. Military Judge: Dixie Morrow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, fine of $2,500.00 with confinement for an additional 2 months if the fine is not paid, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

In accordance with his pleas, a military judge sitting as a general court-martial found the appellant guilty of two specifications of conspiracy to commit housebreaking, one specification of willfully damaging military property, one specification of willfully suffering the damage of military property, one specification of larceny of military property, one specification of larceny on non-military property, and two specifications of housebreaking, in violation of Articles 81, 108, 121, and 130, UCMJ, 10 U.S.C. §§ 881, 908, 921, 930, respectively. The adjudged and approved sentence consists of a bad-conduct discharge, ten months confinement, a $2500 fine with confinement for an

additional two months if the appellant does not pay the fine, and a reduction to the grade of E-1.[1]

On appeal the appellant asks this court to set aside the findings of guilty on all charges and specifications. The basis for his request is that he asserts that: (1) his plea to Specification 2 of Charge II is improvident because the military judge failed to establish a factual predicate that the appellant had a duty to safeguard the fire extinguisher; (2) trial defense counsel were ineffective when they failed to sufficiently address the appellant's concerns about the level of care provided to him for his bipolar disorder by the Hill Air Force Base Life Skills Support Center (LSSC); and (3) his pleas were improvident because at the time he committed the offenses he was under the influence of medication for treatment of a bipolar disorder.[2] Finding no error, we affirm.

Background

On 31 March 2006, the appellant conspired with two active duty airmen to break into and steal property from the appellant's squadron. On that same night, they broke into the appellant's squadron and stole laptop computers, portable data entry devices, a pocket personal computer, and a Panasonic Polaview Projector, all property belonging to the appellant's squadron. During the same break-in, the appellant smashed a window, smashed a printer/photocopier/fax machine, and discharged a fire extinguisher, all property belonging to his squadron.

On 11 May 2006, the three conspired to break into and steal property from a local animal shelter. That same day, the three went to the local animal shelter to determine what security measures were in place. The next night, the three broke into a local animal shelter and stole a digital camera and approximately $4,500.00 in cash and checks. Unbeknownst to them, they were seen on a surveillance video the day before and this video ultimately led to their arrest. When called in for questioning, the two other airmen implicated the appellant.

Providence of Plea to Specification 2 of Charge II

We will not set aside a guilty plea on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). "A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). If the "factual circumstances as revealed by the accused himself objectively support that plea[,]" the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F.

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise not to approve any confinement in excess of 21 months.
[2] Issues II and III are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

1996). We consider the entire record in conducting our review. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

In the case at hand, the factual predicate is established. Specifically, we note the appellant admitted: (1) the government had furnished the fire extinguisher to the Air Force so that the Air Force could use it in the way fire extinguishers are intended to be used; (2) to discharging the fire extinguisher; (3) that at the time he discharged the fire extinguisher, nothing was burning, smoking, or on fire; (4) he therefore had no authority to discharge the fire extinguisher; (5) that in so doing, he used the fire extinguisher for personal use in a reckless or unwarranted manner; and (6) he willfully caused damage to the fire extinguisher. Put simply, these combined facts highlight the appellant's understanding of his failure to use the fire extinguisher for its intended purpose – namely to extinguish fires – and establish the factual predicate to accept his guilty plea.

Ineffective Assistance of Counsel

Service members unquestionably have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel is presumed to be competent, and we will not play "Monday Morning Quarterback" and second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant submitted a post-trial affidavit wherein he states his trial defense counsel failed to sufficiently represent him by refusing to address his concerns about the level of care he was receiving from the LSSC. The government submitted two post-trial affidavits, one from each of the appellant's trial defense counsel. Both admitted that they did not explore the nature of the bipolar treatment the LSSC provided the appellant. They opine they did not explore the nature of the LSSC treatment either because the appellant was satisfied with the bipolar treatment he was receiving from his off-base counselor or because counsel was not retained to explore the nature of the LSSC's treatment. However, both explored the appellant's mental health issues and determined no issue regarding the lack of mental responsibility was present.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). However, in the case *sub judice*, the affidavits do not conflict. All agree that counsel did not address the appellant's concerns with the LSSC. What is in conflict is the appellant's position on this issue. At trial, he advised the military judge that he was satisfied with his trial defense counsels' treatment of the LSSC issue. It is only at this late date, having received the benefit of his pretrial agreement, that the appellant complains of his counsels' lack of response to the LSSC issue. Such contradictory responses undermine the appellant's credibility.

Additionally, under the facts of this case, trial defense counsels' failure to inquire into the LSSC issue does not amount to deficient conduct. Even accepting the appellant's assertion that he raised these concerns and his trial defense counsel did not address them, his counsel was not deficient. Contrary to the appellant's conclusory assertions in his post-trial affidavit, there is no evidence that addressing those concerns could have benefited the appellant in the military justice system.

Finally, even assuming trial defense counsels' conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. Here, the appellant offers only conjecture or speculation of prejudice rather than providing the Court with evidence of prejudice. Under the aforementioned facts, we find no prejudice.

Providence of Pleas

The appellant's argument that his pleas were improvident because he suffers from a bipolar disorder is wholly without merit. First, short of the appellant's assertions made during the *Care*[3] inquiry, the sentencing proceedings, and in his post-trial affidavit, there is little evidence that the appellant was under medication at the time he committed the offenses. Second, assuming *arguendo* the appellant was under medication at the time he committed the offenses, there is no evidence that this medication resulted in a lack of or diminished mental responsibility. On the contrary, trial defense counsel researched the medication the appellant ostensibly was taking and determined the medication had no affect on the appellant's ability to appreciate the wrongfulness of his actions.

Most importantly, during his *Care* inquiry the appellant admitted he "had full awareness [of what he was doing]," "knew what [he was] doing was wrong," and knew what he was doing was violating the law. There is no evidence of a lack of mental responsibility or diminished capacity, and the appellant, through his *Care* inquiry and stipulation of fact, provided the factual predicate for the acceptance of his guilty pleas.

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[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Conclusion

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(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, YA-02, DAF
Clerk of the Court