UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant LEON GREENWOOD
United States Air Force

ACM 36461

6 November 2007

Sentence adjudged 20 July 2005 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Mary Boone and Glenn L. Spitzer (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, the appellant was convicted in a general court-martial of willful disobedience of an order, assault consummated by a battery, aggravated assault, kidnapping, obstruction of justice, breaking restriction, and communicating a threat in violation of Articles 90, 128, and 134, UCMJ, 10 U.S.C. §§ 890, 928, 934. On 20 Jul 05 the military judge sentenced the appellant to a dishonorable discharge, confinement for 6 years, total forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged except he did not approve the forfeitures.

On appeal, the appellant asserts five errors. Four of the errors center on issues related to the sentencing phase of trial and the ultimate sentence received by the appellant. The final error is a broad claim of ineffective assistance of counsel that is raised for the first time on appeal in the form of a recent affidavit from the appellant. In addressing all of these issues this Court has considered the affidavit submitted by the appellant, the briefs of both parties, and an affidavit submitted by trial defense counsel in response to the claim of ineffective assistance. We look first to the claim of ineffective assistance.

Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Servicemembers 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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002); *see also 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). Counsel is presumed to be competent. *Key*, 57 M.J. at 249. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). Finally, it is important to note that in guilty plea cases, post-trial affidavits will not be used to contradict the guilty plea appearing to be regular on its face. *United States v. Wilson*, 44 M.J. 223, 225 (C.A.A.F. 1996); *see also United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant's claims of ineffective assistance are outlined in an affidavit submitted before this Court in conjunction with his assignment of errors. In sum, he contends three basic shortcomings of his trial defense counsel. First, he alleges that there was no evidence to support the charges except for his admissions. Second, his trial defense counsel failed to present appropriate evidence in extenuation and mitigation during the sentencing phase of trial because they did not adequately investigate the case and they were unprepared. Finally, the appellant alleges that he was coerced into pleading guilty by his trial defense counsel because they did not advise him of the results of their interview with his estranged wife prior to his decision to enter a pre-trial agreement to plead to the charges.

In analyzing the appellant's affidavit and the government's response thereto, this Court relied upon the guidance in *Ginn*, 47 M.J. at 248. In *Ginn*, our superior court provided six principles to apply in deciding if this Court is permitted to rely upon the

affidavits or is required to order a *Dubay*[1] hearing to obtain more facts in order to resolve the underlying substantive issue. For the reasons set forth below, we conclude that we do not need to order a *DuBay* hearing and that we may rely upon the affidavits in resolving the claim of ineffective assistance from the appellant.

The appellant's first affidavit allegation, of a lack of evidence except his plea, can be resolved based on the fifth principle in *Ginn.* It provides,

> when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Id. The appellant's allegation that the advice of counsel was deficient because there "was no evidence to support these charges except for my confession in court" is squarely contradicted by the evidence presented at trial. In addition to his sworn *Care*[2] inquiry statements, the prosecution presented live testimony and stipulations of testimony in sentencing clearly establishing a factual basis for the appellant's guilt to the charges and specifications. The appellant's guilt is clearly established with or without the plea. There being no rational explanation alleged for this contradiction, we need not order a *DuBay* hearing to investigate the allegation but instead can rely upon the record in our later resolution of the ineffective assistance claim on this contention.

Next the appellant alleges trial defense counsel failed to present appropriate evidence in extenuation and mitigation during the sentencing phase of trial because they did not adequately investigate the case and they were unprepared. We rely on the third principle outlined in *Ginn* in permitting reliance solely on the affidavits to resolve the claim.[3] The third principle states that "if the affidavit is factually adequate on its face to state a claim of legal error and the Government . . . offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts." *Id.* The trial defense counsel does not dispute that they did not call the witnesses the appellant now asserts should have been called in sentencing. The dispute between the appellant and the trial defense counsel squarely centers on the wisdom and merits of calling these witnesses. The appellant argues that direct evidence

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[1] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).
[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).
[3] We consider the general allegation that the trial defense counsel did not adequately investigate his case and they were unprepared to be speculative and conclusory observations that can be rejected outright under the second principal of *Ginn.* Thus, we considered them only to the extent that they relate to the specified claim that defense failed to present appropriate extenuation and mitigation evidence.

that his wife was having an affair would have been mitigating and potential explanation for his crimes and thus should have been presented. Trial defense counsel does not dispute the purported testimony of the witnesses cited by the appellant but simply responds that for a variety of tactical reasons the trial defense team choose not to call these witnesses. There being no material disagreement with the appellant's assertion we need not order a *DuBay* hearing to investigate the allegation but instead can rely upon the affidavits in our later resolution of the ineffective assistance claim.

Finally, we need to address the single factual material issue disputed in the affidavits. The appellant alleges that he was coerced into pleading guilty by his trial defense counsel because they did not advise him of the results of their interview with his estranged wife prior to his decision to enter a pre-trial agreement to plead to the charges. The trial defense counsel's affidavit directly contradicts this assertion. The question raised by this dispute is whether we can resolve this issue without directing a *DuBay* hearing. We believe we can, based upon the first principal of *Ginn*. This principal provides that if the "facts alleged in the [appellant's] affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Id.* The dispute between the appellant and his trial defense counsel is centered on whether or not the appellant was aware that his estranged wife claimed she was not raped when the defense interviewed her. He claims that if he knew the government's case on the rape charge was weak he would not have offered to plead guilty to the remaining charges in exchange for the prosecution agreeing to drop the rape charge. He further asserts that the decision to plead guilty resulted in him forfeiting many of his substantive rights.[4] Accepting that the appellant was not told that his wife denied to trial defense counsel she was raped on 1 January 2005, the question is, does that amount to ineffective assistance? Considering the record in this case, including the *Care* inquiry, advising the appellant to plead guilty to the remaining charges, even absent a rape charge, did not fall below acceptable level of legal representation. Thus, there being no possibility of relief even accepting the appellant's assertion we need not order a *DuBay* hearing to investigate the allegation but instead can rely upon the record in our resolution of the ineffective assistance claim.

Returning to the *Strickland* test for ineffective assistance of counsel, it is well established that the appellate court will not second-guess the strategic or tactical decisions made at the time of trial by the trial defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687. There are three questions to be answered when analyzing a claim of ineffective assistance of counsel. They are: 1) If the appellant's assertions are true, is there a reasonable

[4] One of the forfeited rights appellant contends he lost is the right to testify in a suppression hearing to exclude his 2 Jan 2005 statement. This contention is irrelevant because the statement was not admitted. The remaining rights he mentions are those the judge informed him of prior to his guilty plea inquiry.

explanation for counsel's actions; 2) Did the performance of the trial defense counsel fall "measurably below the performance [ordinarily expected] of fallible lawyers;" and 3) If counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? *Polk*, 32 M.J. at 153.

The appellant's allegations all center on strategic or tactical decisions made at the time of trial. The appellant's claims rest on the assumption that the decisions to plead guilty, to decline to call witnesses, and to fail to aggressively cross-examine witnesses resulted in prejudice in the form of a higher sentence. Looking at the appellant's assertions and the defense counsel's affidavits, it is clear that these decisions were tactical decisions made at the time of trial for which reasonable explanations follow. We find there is no evidence of deficient performance. Clearly, this appellant had the benefit of not one but two clearly competent and dedicated counsel who applied their best judgment at the time of trial. The appellant's claim of ineffective assistance of counsel is without merit.

Statement to Family Advocacy

During the sentencing phase of trial the prosecution offered notes, containing comments by the appellant, from the Family Advocacy record of the appellant as evidence of a lack of rehabilitation potential. The comments in the record contained a general admission to domestic battery and also noted the appellant's position that his wife's unfaithfulness was to blame. When provided the exhibit the trial defense counsel objected, claiming it had not been provided to them in advance of the trial as required by Military Rule of Evidence 304(d). Trial counsel conceded they had failed in this obligation but responded that they had only come into possession of the document during the course of the trial and they provided it to the defense at the first opportunity. Concerned about the lateness of the disclosure, the military judge questioned the appellant if he wanted relief from the pretrial agreement in order to make a motion to exclude the evidence. The accused advised the military judge that he was not seeking relief from the pretrial agreement and that he would not make a motion to exclude the statement. Ultimately, the defense did not object to the admission of the document when offered by the prosecution.

The appellant raises two assignments of error, on appeal, regarding this statement. In the first he alleges that his Due Process rights were violated by the prosecution's failure to disclose the Mil. R. Evid. 304 information prior to arraignment. Second, he alleges the military judge erred in failing to suppress his statement to Family Advocacy because he was not read his rights. The government responds that the appellant waived any right to object citing Mil. R. Evid. 304(d)(5).

Both the Military Rules of Evidence and the Rules for Courts-Martial are clear on this issue. The prosecution has an absolute duty to disclose prior to arraignment "all

statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces." Mil. R. Evid. 304(d)(1). Rule for Courts-Martial (R.C.M.) 701(a)(2)(B) directs the government to permit the defense to inspect any medical records that are in the possession of the government. Finally, R.C.M. 701(d) obligates all parties with a continuing duty to disclose information discovered during the trial itself.

In this case several violations occurred. First, the trial counsel failed in their duty under R.C.M. 701 to discover this information prior to trial.[5] *United States v. Figueroa*, 55 M.J. 525, 528 (A.F. Ct. Crim. App. 2001). Second, once discovered late the question is then governed by Mil. R. Evid. 304(d)(2)(B), which provides that when the prosecution seeks to offer a statement that it has not provided prior to arraignment and the defense objects then "the military judge may make such orders as are required in the interests of justice." Here the military judge's focus was limited to the question, would defense seek to suppress the statement, apparently for a lack of rights advisement under Mil. R. Evid. 305. After questioning from the military judge, the appellant knowingly and intelligently waived that right both at trial and on appeal. Unfortunately, the inquiry should have continued.

This is more than just a question of whether this was a motion that was forfeited because of the terms of the pretrial agreement. This was a breach of the obligation related to discovery. The military judge should have gone on to ask, under Mil. R. Evid. 304(d)(2)(B) what is required in the interest of justice.

While we find error in the judge's failure to conduct the balancing test required by MRE 304(d)(2)(B) we do not need to ask if there was error in admitting the document because we do not find any prejudice to the appellant. The admitted document contains two main points. First the appellant felt his actions were justified because his wife was committing adultery. Second the appellant told the counselor the scriptures require a wife to be submissive to the husband. These same points are contained in the appellant's own written statement offered by the defense in sentencing. Clearly the appellant was not prejudiced by the admission of the same statements to family advocacy when he offers the same comments in his statement to the judge.[6] Therefore, finding no prejudice we deny appellant's claims for relief for the admission of the Family Advocacy statement.

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[5] Having found a violation of the Rules for Courts-Martial, we need not address the question whether the statement was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The standard for relief is the same.

[6] Having concluded the appellant offered the same comments to the judge in his unsworn statement we need not evaluate the assertion the statement was obtained without proper rights advisement.

Remaining Issues

The appellant asserts that the military judge erred in admitting evidence of uncharged misconduct in sentencing. Specifically the appellant is concerned about testimony from the appellant's wife regarding the appellant getting angry about how she washed the dishes. In her testimony she said the appellant punched a hole in the wall and threw a phone at the wall in response to their arguments about how she washed dishes. The defense did not object to this testimony when it was presented. We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We find none. The evidence was nothing more than preliminary information related to the marriage prior to the charged offenses.

Finally, we turn to the assertion that the imposition of confinement for 6 years and a dishonorable discharge is inappropriately severe in this case. We may affirm only such part or amount of the sentence as we find correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We are to ensure "that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). The accused kidnapped his wife, assaulted her repeatedly while telling her he was going to kill her, and all of this was a near repeat of the events of two weeks prior. The sentence is appropriate.

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

AFFIRMED.

Judge BRAND did not participate.

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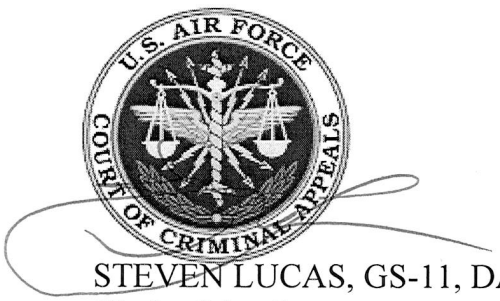

STEVEN LUCAS, GS-11, DAF
Clerk of the Court