UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DAVID S. HAIL
United States Air Force

ACM 36283

17 November 2006

Sentence adjudged 16 February 2005 by GCM convened at Aviano Air Base, Italy. Military Judge: William M. Burd and Adam Oler.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Captain Daniel J. Breen, and Captain Jefferson E. McBride.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge

The appellant was convicted of one specification each of possessing and manufacturing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A general court-martial composed of officer and enlisted members sentenced the appellant to a dishonorable discharge, confinement for 6 years, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

The appellant does not challenge the findings of his court-martial. Instead, he contends that: (1) he received ineffective assistance of counsel; and (2) that his

sentence is inappropriately severe. Finding error as to the first issue, we do not address the second.

Background

During the sentencing proceedings, the assistant trial counsel argued to the members that an appropriate punishment for the appellant was a dishonorable discharge, reduction to E-1, and confinement for five years. As noted, however, the members returned a sentence that included confinement for six years. In a clemency petition to the convening authority, dated 3 April 2005, the trial defense counsel requested that the appellant's confinement time be reduced to five years, as trial counsel had suggested as being appropriate. While the focus of the trial defense counsel's clemency petition was on reducing the amount of confinement, in it he made the following remarks concerning the sentence the convening authority should approve:

> At the close of the presentation of evidence both sides were allowed to argue to the court members for an appropriate sentence. The prosecutor's argument . . . specifically states that **"[t]he only reasonable, appropriate punishment that you can possibly walk away from today is that he receives a dishonorable discharge, that he be reduced to E-1, and that he be confined for 5 years."** Sir, in this request for clemency we are specifically asking for you to adjudge the exact punishment that the prosecutor argued was "appropriate" for this case. . . . We only ask that you adjudge the punishment that your legal experts recommended as "appropriate" for the offenses. (emphasis in original).
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> . . . .
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> Sir, as the prosecutor stated in his last words to the members . . . a **"[d]ishonorable discharge, 5 years confinement, and a reduction to E-1 is the appropriate punishment."** (emphasis in original).

The appellant also submitted a letter to the convening authority, dated 5 April 2005, in which he asked to have his discharge upgraded and his sentence shortened to five years.

Ineffective Assistance of Counsel

The appellant asserts he was denied effective assistance of counsel because his counsel, without obtaining appellant's authorization, argued to the convening authority that an appropriate sentence included a dishonorable discharge.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, appellant must show: (1) that counsel's performance was deficient; and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong of *Strickland* requires that appellant show counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id* at 688. There is a "strong presumption" that counsel was competent. *Id.* at 689. The prejudice prong requires that appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385-86 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687).

Because the appellant raised this issue by submitting a post-trial affidavit, we will resolve the issue in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). In *Ginn*, our superior court announced six principles to be applied by courts of criminal appeals in disposing of post-trial, collateral, affidavit-based claims. We believe this Court may decide the appellant's claim of ineffective assistance without ordering a factfinding hearing as authorized by *United States v. Dubay*, 17 USCMA 147, 37 CMR 441 (1967), under the third *Ginn* principle, which states:

> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or 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. *Ginn*, 47 M.J. at 248.

While the affidavit submitted by the government does not state that it "expressly agrees" with the facts asserted by the appellant, it does not contradict the relevant assertions made by the appellant and thus the affidavits are not in conflict.

The appellant claims in his affidavit that his trial defense counsel, Capt C, submitted the clemency memorandum to the convening authority without giving

the appellant an opportunity to review it. The appellant says that if he had seen the clemency memorandum he would have objected to it, because in it, Capt C states that an appropriate sentence for the convening authority to approve included a dishonorable discharge. Appellant states that on the one occasion that he did speak with Capt C about his clemency, he expressed his desire to try to save his retirement. The appellant further claims in his affidavit, that the punitive discharge was one of the portions of his sentence he most wanted relief from, as he had served 19 years and 11 months at the time of his court-martial.

In his post-trial affidavit, Capt C does not state that he had any authority from the appellant to concede the appropriateness of a punitive discharge. Furthermore, Capt C specifically states in the post-trial affidavit, "it was not my intent to concede the appropriateness of a punitive discharge." Capt C states he discussed with the appellant the plan for "achieving some measure of clemency and the implications of various discharges and potential retirement." He claims he discussed with the appellant the fact that even if the discharge was "upgraded," the appellant still would not have had 20 good years of service, but that the appellant "misunderstood the sentence" as taking away his retirement. Capt C also states he advised the appellant it did not appear the convening authority would disapprove the punitive discharge and that the "best plan for some relief would be to focus on reducing [appellant's] sentence."

Although the trial defense counsel did not intend to concede the appropriateness of a punitive discharge, we find that he did so. While he attempted to focus his petition for clemency on reducing the length of confinement, the language Capt C used explicitly asks the convening authority to approve the "exact punishment" the trial counsel argued for, which included the punitive discharge. It was error for Capt C to concede, even inadvertently, the appropriateness of the punitive discharge without appellant's consent. *United States v. Dresen*, 40 M.J. 462, 465 (C.M.A. 1994).

Having found the post-trial representation to be deficient, we now examine whether the appellant was prejudiced. The appellant in the present case was in a similar situation to the accused in *Dresen*, given his lengthy service, and a relationship with the Air Force that would have been severed, short of retirement, even in the absence of a punitive discharge. It is not inconceivable that the convening authority might have disapproved the punitive discharge based on forceful and persuasive pleas for clemency. The reasoning behind *Dresen* applies here, and we find the appellant was prejudiced by his counsel's actions. *Id*.

Conclusion

Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the action and for new post-trial processing consistent with this opinion. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

Senior Judge ORR participated prior to his reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court