UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ROYAN F. HARRIS
United States Air Force

ACM 36805

25 June 2008

Sentence adjudged 17 June 2006 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Jennifer A. Whittier.

Approved sentence: Dishonorable discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Darla G. Orndorff, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Brendon K. Tukey, and Captain Jefferson E. McBride.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his plea, the appellant was convicted of one specification of knowingly presenting nonimmigrant visa applications containing false statements, contrary to 18 USC §1546, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a dishonorable discharge, confinement for 12 months, and reduction to E-1.[1]

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[1] Mandatory forfeitures were waived by the convening authority.

Background

The appellant, a Jamaican national, was in Jamaica on leave in March 2005. On or about 16 March 2005, he accompanied some Jamaican nationals to the American Embassy. Documents were presented that indicated the nationals were going to attend Alcohol and Drug Abuse Prevention Treatment training at Pope Air Force Base, North Carolina, the appellant's duty station. After some investigation, the appellant was arrested by the Jamaican authorities for presenting applications that contained false information. He spent four days in a local Jamaican confinement facility.

On appeal, the appellant raises three issues: 1) whether the convening authority erred when he failed to give the appellant credit for illegal pretrial confinement in his action; 2) whether the convening authority erred when he denied the appellant's request for a new trial[2]; and 3) whether the appellant received ineffective assistance of counsel when the trial defense counsel failed to help the appellant procure exculpatory evidence.[3]

Illegal Pretrial Confinement

"When the military judge has directed that the accused receive credit under Rule for Courts-Martial (R.C.M.) 305 (k), the convening authority shall so direct in the action." R.C.M. 1107(f)(4)(F). R.C.M. 305 (k) states the remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. R.C.M. 305(f) is the 72-hour review requirement; (h) is the requirement for a 24-hour report to the commander; (i) concerns the 48-hour probable cause determination and the 7-day review of pretrial confinement; and (j) is the review by the military judge which states the military judge shall order credit under subsection (k) for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of R.C.M. 305.

The trial defense counsel made a motion for illegal pretrial confinement credit. Two of the days the appellant spent in pretrial confinement were at the request of an American Embassy employee, and two were at the Jamaican officials' discretion. The military judge found that there was no Air Force involvement in directing the pretrial confinement. Further, she found that there was no requirement under the law to award credit; however, she awarded the appellant two days of extra credit (in addition to four days of day for day credit under *United States v. Allen,* 17 M.J. 126 (C.M.A. 1984)) for the time spent in jail at the behest of the Jamaican officials. Although, the appellate government counsel concedes there was illegal pretrial confinement, the Court declines to find such under these circumstances. The appellant will get the benefit of the total credit

[2] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)
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awarded by the military judge, but because the credit was not for illegal pretrial confinement, it does not have to be included in the action.

Assuming arguendo it was illegal pretrial confinement, we will order appropriate credit. *See United States v. Ruppel*, 45 M.J. 578, 588 (A.F. Ct. Crim. App. 1997).

Convening Authority Erred When Denying Request for a New Trial

The appellant, through counsel, requested in his submission of clemency matters, that the convening authority order a new trial. His request was based upon the fact that two affidavits had been acquired which indicated the appellant was not involved in the presentation or procurement of the illegal applications[4].

A convening authority may, in the convening authority's sole discretion . . . set aside a finding of guilty and dismiss the specification and, if appropriate, the charge, or direct a rehearing. R.C.M. 1107(c)(2). The convening authority declined to do so in this case. This is raised as an error on appeal and not as a separate request to this Court for a new trial in accordance with R.C.M. 1210. This issue has no merit. A convening authority's sole discretion is just that.

Ineffective Assistance of Counsel

The appellant, through his affidavit, states that his counsel were ineffective in that they failed to make a timely request for exculpatory witnesses, and they failed to present evidence that the appellant was under the influence of voodoo. Trial defense counsel provided an affidavit explaining these issues[5].

Service members 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 United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent. 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 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. *Washington*, 466 U.S. at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The

[4] The affidavits were strikingly similar, were attested to with an unreadable signature, and were provided by the appellant to his counsel. Additionally, one was purportedly signed by an individual named in the specification of which the appellant was acquitted.

[5] Additionally, trial defense counsel and both appellate counsel address an issue of a video camera, or lack thereof, which was not mentioned by the appellant and is of no consequence in this case.

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). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Whether we find the appellant has failed to meet his burden using the *Ginn* standards, or we assume arguendo the trial defense counsel was deficient, this issue is without merit. Counsel was not deficient but even if they were, there is absolutely no evidence of any prejudice to the appellant.

Conclusion

We order the appellant receive six days credit against his sentence to confinement. The 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court