UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman XAVIER M. HARRIS
United States Air Force

ACM 37141

15 January 2009

Sentence adjudged 02 November 2007 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Maura T. McGowan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Major Brendon K. Tukey.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

HELGET, Judge:

The appellant was tried at Lackland Air Force Base (AFB), Texas, by a general court-martial composed of a military judge sitting alone. In accordance with his pleas, he was found guilty of one specification each of wrongfully distributing marijuana, wrongfully distributing cocaine, wrongfully using marijuana, and wrongfully possessing marijuana, one specification of larceny, and one specification of receipt of stolen property, in violation of Articles 112a, 121, and 134, UCMJ, 10 U.S.C. §§ 912a, 921, 934. The approved sentence consists of a bad-conduct discharge, confinement for 15 months, and reduction to E-1.[1]

[1] The appellant was credited with four days of pretrial confinement.

The appellant asserts three errors. First, he asserts it was plain error for the trial counsel to elicit testimony during sentencing that was not directly related to the charged offenses, was not proper opinion testimony of rehabilitative potential, and which tainted the proceedings with evidence of uncharged misconduct. Second, he asserts he was denied his Sixth Amendment right to effective assistance of counsel due to the trial defense counsel's failure to object to testimony during sentencing that was not directly related to the charged offenses, was not proper opinion testimony of rehabilitative potential, and which tainted the proceedings with evidence of uncharged misconduct. Finally, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), he asserts that the portion of the sentence which provides for confinement for 15 months is inappropriately severe.

Background

On 3 February 2007, Airman (Amn) AJ contacted the appellant and asked if the appellant still planned to sell him marijuana and cocaine. The appellant knew a civilian dealer named "Teddy" who had access to both cocaine and marijuana. Amn AJ requested an "eight-ball" of cocaine and $20 worth of marijuana. That same night, Amn AJ met with the appellant at a La Quinta Inn in San Antonio, Texas, to make the exchange. Teddy's girlfriend drove the appellant to the La Quinta Inn and provided him with approximately three grams of cocaine and six grams of marijuana. Amn AJ paid the appellant $140 for the drugs. Unbeknownst to the appellant, Amn AJ was working undercover for the Air Force Office of Special Investigations (AFOSI), and the entire transaction was videotaped by AFOSI.

From mid-January 2007 through 12 February 2007, the appellant used marijuana on two to three separate occasions at Teddy's house in San Antonio, Texas. On each occasion, Teddy would prepare, light, and smoke a cigar containing marijuana and then share it with the appellant, who would likewise smoke the marijuana cigar.

During the late evening hours of 17 February and early morning hours of 18 February 2007, AFOSI, with the assistance of the San Antonio Police Department, conducted a traffic stop on a vehicle containing the appellant and three other airmen, including Amn AJ. The vehicle was stopped at a local gas station and the appellant was in possession of the marijuana in the back seat of the vehicle. AFOSI apprehended the airmen after they discovered marijuana in the vehicle. The appellant and Amn AJ each spent $10 to purchase 5.6 grams of marijuana from a friend.

The larceny charge arose from the appellant's use of stolen checks. In July 2007, the appellant stole checks belonging to Amn TG and used them to withdraw money from Amn TG's Bank of America bank account and deposit it into his own account. The appellant wrote checks for a total of $707.

The receipt of stolen property charge arose from the appellant's purchase of stolen computer speakers from Amn AJ for $25 between January and February 2007. At the time he purchased the computer speakers, the appellant knew they had been stolen and rightfully belonged to another airman. The appellant used the speakers for only one day before discarding them.

Sentencing

During sentencing, the government provided evidence of the following disciplinary actions from the appellant's personnel records: (1) a nonjudicial punishment action pursuant to Article 15, UCMJ, 10 U.S.C. § 815, dated 1 May 2007, for stealing a $48.99 Bluetooth headset from the Base Exchange; (2) a letter of reprimand, dated 15 August 2007, for kicking two holes in the wall of a government facility; (3) a second letter of reprimand, also dated 15 August 2007, for assaulting another airman; and (4) a third letter of reprimand, dated 25 October 2007, for failing to obey a lawful order.

The government then called Technical Sergeant (TSgt) JY, the Flight Chief for the Transition Flight[2] at Lackland AFB. The appellant was entered into Transition Flight in April 2007 and remained there until his trial. The direct examination included the following exchange:

> Q. Have you been able to observe the accused's duty performance during that time?
>
> A. Yes, ma'am.
>
> Q. What is his duty performance?
>
> A. Poor. Very poor.
>
> Q. How about his attitude towards his duty performance?
>
> A. He has a very bad attitude, very disrespectful.
>
> Q. All right. Have you had an opportunity to make any observations about his attitude towards his pending court-martial?
>
> A. Oh, yes ma'am. Can you elaborate on what you need to know as far as --

[2] Transition Flight, or "T-Flight," is the detail at Lackland AFB to which airmen who were facing court-martial, disciplinary actions, and involuntary separation from the Air Force are assigned.

Q. Specifically, has he made any comments to you or any of the individuals that you supervise concerning his thoughts towards his pending court-martial?

A. Normally, you know, the -- I've gone through several in the time that I've been there -- been at Transition Flight through court-martials and testifying. Normally, the airmen are -- about a month out, start, you know, towing [sic] the line and are very, you know, eager to comply with the rules and regulations of [Transition Flight]. With [the appellant], it's been pretty much the opposite. He's still getting in trouble, still the same attitude. You know, you'd hope that they would start, you know, towing [sic] the line and showing you good order and discipline, but not in this case.

. . . .

Q. Do you have an opinion about the accused's rehabilitative potential?

A. Somewhat. I think as far as rehabilitative, that being in the Air Force --

DC: Objection, Your Honor. It hasn't been established if he has an opinion at this point. He said "somewhat" to this question, so --

A. Yes, I do have an opinion.

MJ: Overruled. Proceed.

Q. What is your opinion about his rehabilitation?

A. As far as rehabilitative, I think kind of in my words, maybe a knock on the head would help somebody out. You know, in cases I've seen before, you know, that the reality, you have to -- if you're not doing the job you're supposed to be doing and, you know, you're not doing things right, maybe time in --

DC: Objection, Your Honor. I mean, at this time trial counsel has asked, you know, does he have an opinion about rehab, and he stated yes, he does.

MJ: Sustained.

Q. You do have an opinion based on his rehabilitative potential?

A. Yes, ma'am.

Q. Has any training in [Transition Flight], or any disciplinary LORs, or Article 15s, aided in getting [the appellant] on the right track?

A. Yes, ma'am. Not -- we -- those are the tools that we do have. We've gone through several LORs, LOCs . . . but nothing has worked. It's continually one thing after the other. So, after so long, you're just, you know, you're at your wits end with somebody so you have to take it to the next level.

TC: I have nothing further, your honor.

The appellant's first assignment of error is that the military judge committed plain error by allowing TSgt JY to provide testimony that wasn't proper opinion testimony of rehabilitative potential under Rule for Courts-Martial (R.C.M.) 1001(b)(5).

Where, as here, the defense fails to object to the introduction of evidence, we generally grant relief only if the introduction of the evidence was plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citing *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). The appellant has the burden of persuading us that: "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to [the appellant's] substantial rights." *Hardison*, 64 M.J. at 281 (citing *Powell*, 49 M.J. at 463-65). Further, in military judge alone trials, "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

The Discussion of R.C.M. 1001(b)(5)(D) provides:

> On direct examination, a witness or deponent may respond affirmatively or negatively regarding whether the accused has rehabilitative potential. The witness or deponent may also opine succinctly regarding the magnitude or quality of the accused['s] rehabilitative potential; for example, the witness or deponent may opine that the accused has "great" or "little" rehabilitative potential. The witness or deponent, however, generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion.

In this case, TSgt JY testified on direct examination that the appellant's duty performance was poor and that the appellant had a poor attitude and was disrespectful. He further testified about specific acts of uncharged misconduct committed by the appellant. Arguably, he also gave his opinion about what sort of punishment the

appellant should face. None of this testimony was appropriate under R.C.M. 1001(b)(5). However, the appellant has not persuaded us that he was materially prejudiced by the alleged error. The appellant was tried by a military judge, who "[w]e must presume . . . disregarded any improper testimony that was not objected to by [the] appellant." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996). Accordingly, we find that this issue is without merit.

Ineffective Assistance of Counsel

The appellant's second assignment of error is that he was denied his right to effective assistance of counsel. He claims that his defense counsel should never have allowed the trial counsel to elicit all of the objectionable testimony from TSgt JY. The government responded by submitting a post-trial declaration from the appellant's trial defense counsel. She asserts that since the appellant had committed serious crimes and continued to engage in criminal activity while in Transition Flight, she attempted to show that the appellant continued to get into trouble as a result of pressure and hopelessness he experienced while in Transition Flight, as well as TSgt JY's failure to assist the appellant with his problems. During cross-examination of TSgt JY, the trial defense counsel elicited that when the appellant first entered Transition Flight in April of 2007, he was not permitted to leave the building without an escort, and he was surveilled by cameras in the common areas. The trial defense counsel also elicited testimony that suggested TSgt JY wasn't concerned with knowing the reasons for the appellant's problems. Consistent with this approach, in his unsworn statement, the appellant requested the military judge consider the unsavory conditions he experienced in Transition Flight as mitigating evidence.

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 Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent, and the appellate courts 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, 409-10 (C.M.A. 1993). Where a lapse in judgment or performance is 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; *see also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). 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) (citing *Strickland*, 466 U.S. at 687); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

The trial defense counsel was not ineffective in this case. Although she may have employed a questionable strategy, the appellant has not shown how he was prejudiced by

the inclusion of this evidence. Considering the serious nature of the offenses committed in this case, the appellant's record of numerous disciplinary actions, and the fact that the military judge is presumed to know the law, the inclusion of TSgt JY's questionable testimony did not negatively impact the appellant's sentence. Accordingly, the appellant has failed to meet his burden that his trial defense counsel was ineffective.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence which included 15 months confinement was inappropriately severe.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or 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 assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the 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). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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).

The maximum punishment in this case was a dishonorable discharge, confinement for 39 years and 6 months,[3] forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence is a bad-conduct discharge, confinement for 15 months, and reduction to E-1. Having given individualized consideration to this particular appellant, the nature of his offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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).

[3] Both the trial counsel and trial defense counsel calculated the maximum period of confinement to be 35 years. Under the circumstances of this case there was no harm to the appellant in this miscalculation.

Accordingly, the approved findings and sentence are

AFFIRMED.

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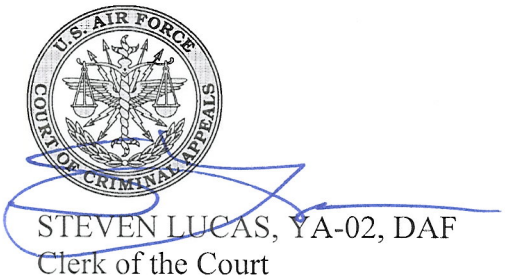

STEVEN LUCAS, YA-02, DAF
Clerk of the Court