UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANTHONY D. HEARD
United States Air Force

ACM S30262

26 January 2005

Sentence adjudged 4 November 2002 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months,[1] forfeiture of $737.00 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, Major Kyle R. Jacobson, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

STONE, Senior Judge:

Pursuant to his pleas of guilty, a military judge sitting as a general court-martial convicted the appellant of two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. Contrary to his pleas, the military judge found him guilty of a

[1] On 7 February 2003, the convening authority remitted any unserved portion of the appellant's sentence to confinement subsequent to 11 March 2003.

third specification of larceny. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 5 months, forfeiture of $737.00 pay per month for 5 months, and reduction to E-1. As noted above, the convening authority subsequently remitted any unserved portion of the appellant's sentence to confinement subsequent to 11 March 2003.

The appellant claims his trial defense counsel were ineffective because they failed to offer any evidence in sentencing that he might have kleptomania, an impulse control disorder.[2] The appellant has not submitted an affidavit in support of his complaint. In the brief he filed before this Court, however, he expresses a belief that if evidence of his kleptomania had been presented to the military judge, he would have received a more lenient sentence. His appellate brief further avers that he discussed this matter with his trial defense counsel, but based upon their advice, this evidence was never presented to the military judge.

Background

The appellant lived in a dormitory on Ramstein Air Base, Germany. During a five-month period in 2002, he stole electronic equipment (stereo speakers, a laptop computer, a wireless internet card, a video game player, and five games) from the dormitory rooms of three of his fellow airmen. These thefts form the basis of the charges and specifications. Furthermore, during the pre-sentencing proceedings, the military judge admitted a prosecution exhibit indicating the appellant had received a letter of reprimand for a fourth larceny involving the theft of a cable modem.

The appellant's post-trial clemency submissions suggest the appellant believed he had a serious problem with stealing. He advised the convening authority that he had sought help from base mental health providers, but was "pushed away and received no help whatsoever." Attached to his clemency package is what appears to be a January 2002 excerpt from his medical records. This one-page document includes an entry indicating, "I have a chronic tendency to steal things which aren't mine. I also am suffering with depression." This document reflects a comment from the medical staff stating, "Pt [patient] related he has been taking thing[s] from other people." The comments further indicate the appellant was referred to the Area Defense Counsel and urged to return after getting legal advice.

Discussion

We conclude that we can resolve this issue without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). First, the appellant's assertion that he is a kleptomaniac is merely speculative and conclusory. *United States v.*

[2] The issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997) (Principle 2). Additionally, the appellate filings and record as a whole "compellingly demonstrate" it is highly improbable the appellant has kleptomania. *Id*. (Principle 4). *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, § 312.32, at 667-69 (4th ed. 2000).

Moreover, even if we assumed the appellant suffered from this mental disorder, he is not entitled to any relief. *Ginn*, 47 M.J. at 248 (Principle 1). To establish a claim of ineffective assistance of counsel, an appellant must show: (1) that counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). The appellant has the burden of overcoming the presumption that his trial defense counsel was competent. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). The appellant has not met this burden, nor has he demonstrated that he suffered sufficient prejudice.

Rather than focus on the appellant's misconduct, the defense strategy for sentencing was to focus on the appellant as a "total person" and highlight his accomplishments and numerous letters of support. His counsel also emphasized that he had accepted his guilt, taken responsibility for his actions, and offered "no excuses." We conclude this strategy was reasonable. Moreover, we are not convinced that evidence of kleptomania, under the circumstances of this case, is clearly mitigating. Indeed, such evidence would have highlighted uncharged misconduct, reflected adversely on the appellant's rehabilitation potential, and undermined the impact of the numerous character letters he submitted. *See United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993). A decision not to offer evidence concerning kleptomania was reasonable and led to no prejudice to the appellant. We decline to grant relief.

Conclusion

The 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator