UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BLAIR S. HOWARD, JR.
United States Air Force

ACM 37191

20 August 2009

Sentence adjudged 16 November 2007 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Bryan Watson.

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Marla J. Gillman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of violating a lawful general regulation on divers occasions, six specifications of the sale of military property without proper authority, and one specification of larceny, in violation of Articles 92, 108, and

121, UCMJ, 10 U.S.C. §§ 892, 908, 921. The approved sentence consists of a dishonorable discharge, confinement for one year and six months, and reduction to E-1.[1]

The appellant asserts four assignments of error before this Court:[2] (1) whether the findings of guilty to Charge III and its Specification are legally and factually insufficient; (2) whether the military judge erroneously denied the appellant's motion for appropriate relief pursuant to Article 13, UCMJ, 10 U.S.C. § 813; (3) whether the appellant's due process right to timely post-trial processing was violated when it took 130 days from the date of trial until the convening authority acted; and (4) whether the appellant was denied his Sixth Amendment[3] right to effective assistance of counsel when his counsel failed to properly prepare for sentencing.

Background

Sometime around February 2006, the appellant engaged in the business of selling PVS-14 Monocular Night Vision Devices, more commonly referred to as night vision goggles (NVGs), and bullet proof vests on eBay. In the summer of 2006, while conducting an investigation into eight missing NVGs from the 509th Security Forces Squadron (SFS), Whiteman Air Force Base (AFB), Missouri (MO), the Air Force Office of Special Investigations (AFOSI) noticed that someone from the local area was selling NVGs and bullet proof vests on eBay. The username of the person selling the NVGs was "Pittsburgh1983", which was later determined to belong to the appellant. On 3 August 2006, after obtaining records from eBay, AFOSI interviewed Mr. DD from Melrose, Iowa, who had purchased NVGs in May 2006 from the appellant for $2,000. Mr. DD agreed to work with AFOSI for a controlled buy of a bullet proof vest.

Mr. DD contacted the appellant at his Yahoo e-mail address, which he had previously used to correspond with the appellant for the May 2006 transaction. The appellant responded and agreed to meet Mr. DD at a truck stop near Whiteman AFB. This occurred on 30 August 2006. They met in the parking lot of a travel center. The appellant had two vests in the backseat of his vehicle. He found one that he thought would fit Mr. DD and sold it to him for $300. The appellant stated that he obtained the vests from his father who operated an Army-Navy surplus store. The entire transaction was tape-recorded by AFOSI. Sometime later, Mr. DD contacted the appellant and told him that AFOSI had taken his NVGs and he wanted his money back. The appellant replied that he obtained the NVGs from someone else and would have to speak with that individual.

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[1] Pursuant to Articles 57(a)(2) and 58b(a)(1), UCMJ, 10 U.S.C. §§ 857, 858b, the convening authority deferred the adjudged and mandatory forfeitures until the date of action, and pursuant to Article 58b(b), UCMJ, the convening authority waived the mandatory forfeitures for a period of six months.

[2] The first three issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] U.S. CONST. amend. VI.

Throughout the course of its investigation, AFOSI obtained NVGs from three other individuals who had purchased them from the appellant. The government purchased the NVGs in January and April 2005 at a unit price of $3,090, and the appellant sold most of them for around $2,000.

In addition to the bullet proof vest sold to Mr. DD, AFOSI also obtained a bullet proof vest that the appellant had sold to Mr. TB on 25 August 2006 for $222. Further, AFOSI found three bullet proof vests during a search of the appellant's residence conducted on 2 September 2006. As a member of the SFS, the appellant was only authorized one bullet proof vest. The appellant had worked in the armory section of his squadron, which provided him access to the NVGs and bullet proof vests. The government also called Mr. MH from Point Blank Body Armor, the manufacturer of the bullet proof vests. By matching serial numbers, he identified the vests found in the appellant's residence and the two vests from Mr. TB and Mr. DD as being manufactured for the military by Point Blank Body Armor. The vests cost the government $225 each. The government also submitted some of the appellant's eBay auction postings, which showed that the appellant had the intent to permanently deprive the government of the bullet proof vests as he was attempting to sell them on eBay.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain the conviction for the larceny of the three bullet proof vests alleged under the Specification of Charge III. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

To obtain a conviction for larceny under Article 121, UCMJ, the prosecution must prove:

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;
(b) That the property belonged to a certain person;
(c) That the property was of a certain value, or of some value; . . .
(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner[; and] . . .
(e) That the property was military property.

Manual for Courts-Martial, United States, Part IV, ¶ 46(b)(1) (2008 ed.).

The appellant asserts that the government failed to prove that he wrongfully obtained the bullet proof vests, relying on the testimony of his wife that he obtained the vests from an unknown civilian at a truck stop.[4] However, the evidence shows that the appellant stole the three bullet proof vests with the intent to permanently deprive the military of the use and benefit of the vests. The appellant was a member of the 509th SFS to which the vests were sold. The appellant worked in the armory section and had access to the vests. Mr. MH from Point Blank Body Armor, the manufacturer of the bullet proof vests for the military, identified the vests found in the appellant's residence and the two vests from Mr. TB and Mr. DD as having been sold to the 509th SFS.

Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant stole the three bullet proof vests. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced that the appellant is guilty beyond a reasonable doubt.

Illegal Pretrial Punishment

The appellant asserts that the military judge erroneously denied his motion for appropriate relief pursuant to Article 13, UCMJ.

At trial, the appellant filed a motion for appropriate relief requesting illegal pretrial punishment credit under Article 13, UCMJ. When the leadership of the 509th SFS learned that the appellant was under investigation for selling military property, the appellant was relieved of his regular duties and assigned to the Foxtrot Flight. The Foxtrot Flight, which later evolved into the Facility Improvement Team, consisted of

[4] The appellant's wife testified that in February 2006, while on their way to a casino in Kansas City, Missouri, the appellant met an unnamed individual at a gas station who sold him three sets of night vision goggles (NVGs) for $200. A couple of weeks later, the appellant's wife went back to the same gas station and purchased three more sets of NVGs from the same individual. However, she did not learn his name or any contact information. She also claimed that the appellant purchased bullet proof vests from this individual.

airmen relieved of duty for medical and disciplinary reasons. Some of the duties performed included sweeping the halls of the SFS building, pulling weeds, and washing SFS vehicles.

For two weeks between 5 July and 7 December 2006, Master Sergeant (MSgt) MM assumed supervision of the Foxtrot Flight. The appellant testified that when MSgt MM was in charge, the members of the flight were required to do push-ups when walking through any doorway in the SFS building, they were required to march in formation to and from the dining facility, they all had to march to another member's appointment and wait until the member's appointment concluded, and they had to march around the SFS building in order to inspect the completion of work. The appellant also claimed that he was ordered to pick up another SFS member from the airport in Kansas City, MO, using his own personal vehicle. However, he was reimbursed for that trip. The appellant was not restricted to base, was allowed to live with his family, and was allowed to work a second job off-base.

The government provided the testimony of MSgt MM who testified that the members of Foxtrot Flight could do push-ups before going through doorways, but it was not required. He indicated that they were required to march in formation to and from the dining facility for accountability and physical fitness purposes. MSgt MM also had the members of Foxtrot Flight march around the SFS building to inspect the airmen's completion of work to ensure nothing was missed. He did propose a policy requiring all members to march to another member's appointment but it was subsequently rescinded. He further testified that none of his actions were done with the intent to punish the appellant.

The military judge denied the motion, finding that the appellant's freedom of movement had not been "substantially burdened." He was allowed significant freedom of movement, including being permitted to return home when not at work and to secure a part-time job. Therefore, the military judge determined that the appellant was not being held for trial thus making Article 13, UCMJ, inapplicable. However, the military judge also held that even if the appellant was being held for trial, none of the complaints raised by the appellant were the result of any intent to punish.

Whether the appellant is entitled to confinement credit for illegal pretrial punishment is a mixed question of fact and law. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). A military judge's findings of fact, including a finding of no intent to punish, will not be overturned unless they are clearly erroneous. *Id.* "We will review de novo the ultimate question whether an appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id.* The appellant has the burden of showing he is entitled to relief under Article 13, UCMJ. *Id.*

Article 13, UCMJ, provides, "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline." "Thus, Article 13, UCMJ, prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial." *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006) (citing *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005)). "[F]or a military member to be 'held for trial,' he must, at a minimum, be pending trial and have his freedom of movement 'substantially burdened.'" *United States v. Starr*, 51 M.J. 528, 533 (A.F. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 380 (C.A.A.F. 2000).

We concur with the military judge that the appellant was not being "held for trial" within the meaning of Article 13, UCMJ. The appellant was not restricted to base, was free to be at home with his family when not at work, and was allowed to secure a part-time job. Additionally, even if the appellant was being "held for trial," we find that the actions of MSgt MM were not done with the intent to punish the appellant. Accordingly, the appellant was not subjected to illegal pretrial punishment.

Post-Trial Delay

The appellant asserts that his due process right to timely post-trial processing was violated when it took 130 days from the date of trial until the convening authority acted.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In conducting this review, we follow our superior court's guidance in using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). We apply a presumption of unreasonable delay when the convening authority's action is not completed within 120 days of the sentence, thereby triggering the *Barker* four-factor analysis. *Id.* at 142.

When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The appellant's court-martial concluded

on 16 November 2007, and the convening authority took action 130 days later on 24 March 2008. The 1,128-page record of trial (ROT) was completed on 25 January 2008, 70 days after the court-martial concluded and was sent to the trial counsel for review. On 8 February 2008, after completion of the trial counsel's changes, the ROT was sent to the trial defense counsel for review. Due primarily to the separation of the trial defense counsel, the ROT was not returned to the court reporter until three weeks later, on 27 February 2008. The military judge authenticated the ROT on 6 March 2008, and the convening authority took action on 24 March 2008. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal due to the 10-day delay was harmless beyond a reasonable doubt. Accordingly, no relief is warranted.

Ineffective Assistance of Counsel

The appellant's final assignment of error is that he was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to properly prepare for sentencing. In sentencing, the defense offered a character letter from Ms. CR. She had known the appellant for approximately a year as they worked together at the appellant's off-duty employment. The government called her as a witness in rebuttal during sentencing. She testified that at the time she wrote the letter for the appellant, she was unaware that he was facing criminal charges and thought that he was being deployed. She did not learn that the appellant was facing court-martial charges until the date she testified.

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. 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; *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); *United States v. McConnell*, 55 M.J. 479, 481 (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, 244 (C.A.A.F. 1997).

The appellant asserts that his trial defense counsel fell short in their pretrial preparation for sentencing because, based on Ms. CR's testimony, it is apparent that no member of the defense team had spoken with her prior to the commencement of trial to ascertain the validity of the letter and to explain why the appellant needed the letter.

Absent the trial defense counsel's error, the appellant's sentence arguably would have been lighter, especially since the trial counsel in his sentencing argument used Ms. CR's letter and testimony to show that the appellant lacked integrity.

Ms. CR testified on cross-examination:

> Well, Airman Howard has been held in very high regard by those that he works with, the ambulance service because he does have the qualities that I described in my letter and I can understand that, you know, he probably realizes that he made a mistake and in doing so it would've probably have been very hard for him to have told all of us what he was doing and what he was going through and so leaving was probably easier to explain to us by just saying that he was deploying. So, I totally understand why he said the things that he did.

According to a post-trial declaration submitted by the appellant's lead trial defense counsel, Mr. PS, someone from the defense team did contact Ms. CR and they learned that the appellant had not been honest with her regarding the purpose for the letter. Mr. PS further stated:

> Based upon the strength of the letter, her understanding as to why he may not have been candid with her when he asked her for it; and, her steadfast opinion as to his character, performance and potential, we made the decision to submit Ms. [CR's] letter to the jury regardless. Knowing that the government would most likely call her, it was a decision of strategy as to whether the potential impeachment outweighed the exceptionally strong letter and the continued support of Ms. [CR]. It's further my recollection that we discussed this issue specifically with [the appellant] and he agreed to that decision.

In a post-trial declaration submitted by the appellant's detailed trial defense counsel, Captain (Capt) DJ, he confirmed that the defense team contacted Ms. CR prior to submitting her character statement and that it was a strategic decision by the defense to include her letter in the sentencing package knowing that she would likely be called by the government as a witness. According to Capt DJ, the defense felt the government would look unreasonable by attempting to attack Ms. CR, who still had a high opinion of the appellant.

When attacking trial tactics, an appellant must show specific defects in counsel's tactical decisions that were "unreasonable under prevailing professional norms." *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (citations omitted). In addition, the appellant must show prejudice. *Strickland*, 466 U.S. at 687. Considering our review of the proceedings, the appellant has neither shown that his trial defense counsel's decision

to introduce the character statement of Ms. CR was unreasonable nor has he shown how he was prejudiced by the decision. Accordingly, the appellant has failed to meet his burden to show that his trial defense counsel were ineffective.

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.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court