UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KENOSHA R. JOHNSON
United States Air Force

ACM 38193

24 December 2013

Sentence adjudged 28 June 2012 by GCM convened at Joint Base Pearl Harbor-Hickam, Hawaii. Military Judge: Mark L. Allred.

Approved Sentence: Bad-conduct discharge, confinement for 2 years, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Matthew T. King.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Terrence S. Dougherty; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Contrary to her pleas, a general court-martial composed of officer members convicted the appellant of one charge and specification of aggravated assault with a dangerous weapon, in violation of Article 128, UCMJ, 10 U.S.C. § 928.[1] The members sentenced the appellant to a bad-conduct discharge, confinement for 2 years, reduction to E-1, and a reprimand. The convening authority approved the adjudged sentence.

[1] The appellant was acquitted of one charge and specification of attempted murder, in violation of Article 80, UCMJ, 10 U.S.C. § 880.

Before this Court the appellant asserts (1) Her sentence is inappropriately severe;[2] and (2) She was denied her Sixth Amendment[3] right to effective assistance of counsel during presentencing. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

In March 2011, the appellant met Sergeant (SGT) AH, United States Army, through a social website called Tagged, shortly after SGT AH arrived at Wheeler Army Airfield on the island of Oahu, Hawaii. They started dating and their relationship quickly became sexual. Several weeks later, SGT AH admitted he was married. The appellant and SGT AH continued their sexual relationship until approximately 23 April 2011, when they decided just to be friends because SGT AH's wife was coming to Oahu. On 23 April 2011, the appellant invited SGT AH over to her residence to assist with a few items. When he arrived around 2000, the appellant was upset and crying due to some personal issues with her family. After staying for about an hour and a half, SGT AH decided to leave. The appellant was still emotional and wanted him to stay. As he was leaving, the appellant threatened SGT AH by saying, "[I]f you're going to leave, you'd better leave now. . . . [t]his is the type of stuff that makes me want to do harm to you."

While SGT AH was sitting in his pickup truck outside of the appellant's residence, looking at his phone and with his door slightly opened, the appellant threw a "meat cleaver" that struck him in the neck. His neck immediately started to bleed so he got out of his truck and lay on the ground. The appellant administered first aid and called 9-1-1. Emergency medical personnel responded and transported SGT AH to a local hospital. A subsequent medical examination revealed that the meat cleaver caused a 2.5 centimeter incision and penetrated the subcutaneous tissue below the skin and into the underlying layer of muscle. Fortunately for SGT AH, the meat cleaver missed his esophagus, trachea, and carotid artery. However, it did injure his jugular vein.

After the incident, the appellant made several admissions to the police and her leadership that she had thrown a knife at SGT AH, hitting and injuring his neck. Additionally, in June 2011, the appellant jokingly commented to her supervisor, "Girl, I threw a knife at his ass." Also, when the appellant's supervisor overheard her phone conversation with SGT AH and questioned her as to why she was talking to him, the appellant replied, "I'm just playing nice so he doesn't testify against me."

[2] The appellant erroneously states that her sentence included a dishonorable discharge.
[3] U.S. CONST. amend VI.

Sentencing Severity

The appellant asserts her sentence consisting of a bad-conduct discharge and confinement for two years is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). 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 offenses, 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. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In its presentencing case, the Government submitted several disciplinary actions the appellant had received: a letter of counseling, dated 24 April 2009, for failure to obey a lawful order and failure to go to her appointed place of duty; a record of individual counseling, dated 20 September 2010, for disrespect towards a superior commissioned officer; a letter of reprimand, dated 27 August 2011, for failure to obey a lawful order and failure to go to her appointed place of duty; and a letter of counseling, dated 9 September 2011, for dereliction of duty. These last two incidents occurred after the charged offense in this case. Additionally, in rebuttal, the Government called Chief Master Sergeant (Ret) OD, who had submitted a character letter on behalf of the appellant. CMSgt OD testified, "I recall she [the appellant] indicated she threw a plate or some dishes, the individual [SGT AH], it shattered against a wall or a door frame and ended up inflicting some damage on him, cut or something." CMSgt OD was certain that the appellant did not say she threw a meat cleaver at SGT AH.

The maximum punishment authorized in this case was a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to E-1. The appellant claims the facts of her case do not merit a punitive discharge plus two years of confinement, which is close to the maximum authorized punishment. Though the meat cleaver did strike SGT AH, the appellant avers that when she threw it at his truck, there was only a slim chance the meat cleaver would actually make contact with SGT AH. Further, SGT AH testified on the appellant's behalf that he had no "hard feelings" towards the appellant and the incident had not affected him.

Considering all of the facts and circumstances of this case, we find the adjudged sentence was not inappropriately severe. Although SGT AH escaped from receiving

significant injuries, the appellant nevertheless committed a serious offense in throwing a meat cleaver at an unsuspecting human being. Further, she continued to engage in additional misconduct after the incident, joked about her misconduct, and, in an apparent effort to mitigate her actions, she lied about how SGT AH was injured.

Having examined the entire record of trial, we find the appellant's approved sentence appropriately reflects the gravity of her misconduct.

Ineffective Assistance of Counsel

We review de novo claims of ineffective assistance of counsel. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011).

The Sixth Amendment guarantees the appellant the right to effective assistance of counsel. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In evaluating the first prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688-89. The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 562 U.S. ___, ___, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). In order to show prejudice under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

We apply a three-part test to determine whether an appellant has overcome the presumption of competence:

1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?

2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

3. If defense counsel was ineffective, "is there a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)) (alteration in original).

The appellant contends that her trial defense counsel failed to provide effective assistance during the presentencing phase of the trial. Specifically, she claims that her presentencing package was not completed until the day of her sentencing and her counsel had to request additional time to complete it; her trial defense counsel neglected to contact and prepare CMSgt OD prior to trial which gave the appearance the appellant was untruthful; 10 of the character statements were unsigned; and her trial defense counsel failed to submit four of her character statements.

The appellant's claim that her presentencing package was not completed until the day of her sentencing and her counsel requested additional time to complete it is partially true. However, her trial defense counsel, Mr. JH and Captain AM, both indicate in their post-trial declarations that all of the documents had been obtained in time for sentencing, but they needed additional time to organize and bind the documents. Concerning the unsigned character statements, the trial defense counsel state that they were all authenticated through either e-mails or phone calls with the individuals, the Government did not object, and they were all admitted into evidence. Regarding the four character statements that were not offered, the appellant's trial defense counsel indicate that they made the strategic decision not to offer these exhibits. The letters were from the appellant's uncle, a former roommate, her cousin, and a cafeteria employee from her high school. According to her trial defense counsel, these statements were not as strong as the other character statements and could potentially deter from the more effective recommendations. Finally, with regard to CMSgt OD, the appellant contends that CMSgt OD could not remember the facts and guessed on the weapon that was used, which made it appear that the appellant had been untruthful. According to Mr. JH, CMSgt OD was clear in his testimony that the appellant informed him that the weapon she used was a dish or a plate. The appellant did not tell him she used a meat cleaver. Mr. JH states that he asked the appellant if she had lied to anyone, including CMSgt OD, about the facts of the case, and the appellant claimed that she had not.

Applying the standards set forth in *Strickland*, we find the appellant has failed to show either that her trial defense counsel were ineffective, or that any deficiency resulted in prejudice. Although there may have been a short delay in assembling the appellant's sentencing exhibits, they were eventually admitted and the members were not informed of the reason for the delay as it was essentially an extended lunch break. Concerning the unsigned character statements, most of which were written by the appellant's relatives, there is no indication that the lack of a signature impacted their effectiveness. Regarding the four character letters that the trial defense counsel elected not to offer, the appellant has failed to show that her trial defense counsel's rationale for excluding them was unreasonable or falls below what is expected of fallible lawyers. Further, although the

rebuttal evidence of CMSgt OD did make the appellant appear to be untruthful, this was due to her own dishonesty, not because her trial defense counsel had failed to vet CMSgt OD's statement. Finally, while there are factual differences between the appellant's and her counsels' declarations, we need not order an evidentiary hearing pursuant to *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) since this legal issue can be resolved based on the appellate filings and the record. Accordingly, the appellant has failed to establish she was denied her Sixth Amendment right to effective assistance of counsel.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court