

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Staff Sergeant BRANDON L. KEMP
United States Air Force**

ACM 35545

1 June 2005

Sentence adjudged 18 March 2003 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Rachel E. VanLandingham and Major Andrea M. Gormel.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel David N. Cooper.

Before

**MALLOY, ORR, and JOHNSON
Appellate Military Judges**

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's reply thereto. A court-martial composed of a military judge sitting alone found the appellant guilty, consistent with his pleas, of divers use and distribution of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, the appellant was found guilty of divers use and distribution of ecstasy, and distribution of marijuana, also in violation of Article 112a, UCMJ. The appellant was sentenced to a bad-conduct discharge, confinement for 16 months, and reduction to E-1. The convening authority approved the sentence as adjudged and the case is now before this Court for mandatory review under Article 66, UCMJ, 10 U.S.C. § 866.

On appeal the appellant claims that his civilian and military trial defense counsel were ineffective.¹ He submitted an affidavit outlining his complaints and believes the assertions made in the affidavit establish ineffective assistance of counsel. In brief, he complains that his trial defense counsel inadequately cross-examined prosecution witnesses and that he provided specific facts to counter government witness statements that his trial defense counsel did not use. Further, he alleges trial defense counsel provided ineffective assistance by failing to call certain witnesses to testify during the findings portion of the trial. The appellant requests this Court set aside the findings and sentence or provide other appropriate relief. We disagree and affirm.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). In addressing such claims, we apply the two-pronged test of *Strickland v. Washington* 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant must show that counsel's performance was deficient and that this deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." *Id.* at 697. The test for "prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004). On appellate review, there is a strong presumption that counsel is competent. *United States v. Grigoruk*, 56 M.J. 304, 306-07 (C.A.A.F. 2002).

The appellate filings from the appellant and his military defense counsel and the record of trial do not support the appellant's assertions of ineffective assistance of counsel. Our review of the record reveals the trial defense counsel vigorously represented the appellant at trial. We conclude the facts asserted by the appellant fail to meet his heavy burden of establishing either deficient performance or sufficient prejudice within the meaning of *Strickland*. Even if true, they would not warrant relief as to either findings or sentence. *United States v. Fagan*, 59 M.J. 238 (C.A.A.F. 2004).

¹ This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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

ANGELA M. BRICE
Clerk of Court