UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DARYL L. KNOX JR.
United States Air Force

ACM 36477

9 February 2007

Sentence adjudged 19 July 2005 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Donald A. Plude (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall and Major David P. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, Major Carrie E. Wolf, and Major Jin-Hwa L. Frazier.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of three specifications of larceny, one specification of wrongfully and unlawfully uttering worthless checks, and one specification of presenting a fraudulent claim against the United States, in violation of Articles 121, 123a, and 132,

UCMJ, 10 U.S.C. §§ 921, 923a, 932.[1] A military judge sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, confinement for 15 months, and reduction to the grade of E-1. The convening authority approved the findings and the sentence, with the exception of the adjudged term of confinement which was reduced from 15 months to 14 months, in accordance with a pretrial agreement.

Pursuant to *United States v. Grostefon*,[2] the appellant asserts he was denied effective assistance of counsel during his court-martial. Specifically, the appellant contends the failure by his trial defense counsel to call Mr. William Aprill, a Board Certified Compulsive Gambling Counselor, as a defense witness during the presentencing phase of his trial deprived the military judge of additional evidence in mitigation and extenuation.

We examined the record of trial, the assignment of error, the declaration filed by the appellant, and the government's response (including the attachment thereto). Finding no error, we affirm.

Background

During April of 2004, the appellant was working at the Dragon Fitness Center at Keesler Air Force Base (AFB), Mississippi. During preparation for an upcoming inspection, the appellant pilfered from the fitness center a new CD/DVD player and two video monitors, all property of the Air Force, valued at nearly $2,500.00. He later sold the stolen property for "two to three hundred dollars." During the same time period, the appellant stole $2,900.00 from his bank. He did so by making a physical withdrawal of funds from his account before a check he had written of identical value was able to clear the same account. The following month, the appellant wrote a series of four worthless checks to the Keesler AFB Enlisted Club of an aggregate value of $650.00. Finally, after the Hurricane Ivan evacuation, the appellant submitted a fraudulent travel voucher in September of 2004 which resulted in an overpayment of $485.26. During the providency inquiry of the appellant's trial, the appellant steadfastly maintained he stole all of the above property for the singular purpose of supporting what he described as a compulsive gambling addiction.

[1] Nearly three years earlier, the appellant – then a Master Sergeant – was convicted at general court-martial of, *inter alia*, wrongfully and unlawfully making and uttering worthless checks of a value in excess of $18,000.00.
[2] 12 M.J. 431 (C.M.A. 1982).

In preparation for trial, the appellant's trial defense counsel, Captains EC and MH, consulted with Mr. William Aprill, a Board Certified Compulsive Gambling Counselor. Mr. Aprill interviewed the appellant and determined that the appellant was a pathological gambler with a severe and chronic condition. He concluded the appellant did not receive proper treatment for his gambling addiction in the wake of his previous court-martial conviction; that the Air Force should have transferred the appellant to a location away from the gambling-rich environment of the Mississippi Gulf Coast after his first court-martial; and that the appellant still required substantial treatment to overcome his gambling disorder. Trial defense counsel did not call Mr. Aprill as a witness at trial and the appellant now asserts this failure prejudiced him by depriving the military judge of evidence in mitigation and extenuation that had a reasonable probability of positively affecting his sentence.

Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). To successfully raise a claim of ineffective assistance of counsel, an appellant must overcome a strong presumption that the trial defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). The appellant must therefore prove the trial defense counsel's performance was deficient and this deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687. Our threshold determination then is whether the facts alleged by the appellant in making his claim are true. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001); *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

In support of his claim of ineffective assistance of counsel, the appellant submitted to this Court a post-trial affidavit in which he avers the following:

> During my court-martial, I asked my defense counsel to have Mr. William Aprill, a Board Certified Compulsive Gambling Counselor, testify on my behalf regarding my gambling addiction. I believe this testimony would have provided valuable evidence in mitigation and extenuation. . . . Regardless, my defense counsel failed to have Mr. Aprill

> testify. . . . I believe that this failure to call Mr. Aprill to the stand amounted to ineffective assistance of counsel.

In response, the government submitted an excerpt from a Memorandum for Record signed on 17 July 2005 by the appellant, Captain EC, and Captain MH. The excerpt reads as follows:

> We have also had you examined by an expert consultant for gambling addiction. We have concerns that any testimony from an expert in this area would again "open doors" and may show lack of rehabilitative potential. We are in the process of obtaining a letter from the expert to rebut any evidence the government may offer in this area. We have fully discussed why we do not think putting the expert on as a witness would be in your best interest and you have agreed.
>
> I have signed this document of my own free will with the full knowledge that I could change, add, or delete any matters contained in this memorandum. I have signed this document of my own free will and agree with the contents of this document.

In cases involving attacks on the trial defense counsel's trial tactics, the "appellant must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" *Quick*, 59 M.J. at 386 (quoting *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)). Far from highlighting a specific defect in trial defense counsels' performance, the excerpt of the 17 July 2005 Memorandum for Record, signed by the appellant, indicates he concurred in his counsels' recommendation to obtain a letter from their expert rather than call him as a witness during trial to present live testimony. By the appellant's own signature, he indicates he was aware that Mr. Aprill's testimony could potentially result in introduction of evidence more favorable to the government than to himself.

Rather than risk exposing their expert to potentially counter-productive cross-examination, the record of trial clearly indicates the appellant and his defense team adopted an alternate strategy to get the existence of the appellant's gambling addiction before the military judge. During the course of his providency inquiry and his unsworn statement to the court, the appellant called the military judge's attention to his gambling problem no less than nine separate times, referring to it as a "compulsive gambling problem," an "addiction," and a "sickness." In fact, in the

opening portion of his unsworn statement, the appellant introduced William Aprill by name, listed his professional credentials and gave a synopsis of the treatment recommendations Mr. Aprill included in a letter subsequently submitted by the appellant with his Rule for Courts-Martial 1105 clemency matters. Trial defense counsel too included this theme in his closing argument to the military judge, not mentioning Mr. Aprill by name, but making substantial reference to the appellant's gambling issues. The government offered no rebuttal evidence to counter the appellant's claims.

Applying the factors set forth in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we conclude we can resolve this assignment of error based on the record and the appellate filings. After examining the record and the appellate filings, we find trial defense counsels' performance was not deficient. We find the appellant failed to meet his burden of proving ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687.

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, 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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator