UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Colonel SAMUEL LOFTON III
United States Air Force

ACM 37317

19 April 2010

Sentence adjudged 26 June 2008 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: William M. Burd.

Approved sentence: Dismissal, confinement for 9 years, forfeiture of all pay and allowances, fine of $14,000.00, and confinement for 1 year if the fine is not paid.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Lance J. Wood, Major Patrick E. Neighbors, Captain Nicholas W. McCue, and Mary T. Hall, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

Pursuant to the appellant's pleas, a military judge convicted the appellant of one specification of divers willful dereliction of duty, one specification of divers violation of a lawful general regulation, seventeen specifications of larceny of money from the United States Air Force, and eleven specifications of absenting himself from his place of duty, in violation of Articles 92, 121, and 86, UCMJ, 10 U.S.C. §§ 892, 921, 886. Contrary to his

pleas, a panel of officers sitting as a general court-martial convicted the appellant of two specifications of conduct unbecoming an officer and two specifications of indecent assault, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934. The adjudged and approved sentence consists of a dismissal, nine years of confinement, forfeiture of all pay and allowances, a $14,000 fine, and an additional year of confinement if the appellant fails to pay the fine.[1]

On appeal, the appellant asks this Court to set aside his indecent assault and conduct unbecoming an officer convictions, to direct a sentencing rehearing, to approve no confinement in excess of eighteen months, and to reassess the sentence. As the basis for his request, he opines that: (1) the evidence is legally and factually insufficient to support his findings of guilt on the indecent assault and conduct unbecoming an officer charges and specifications; (2) the general court-martial convening authority (GCMCA) abused his discretion by denying the appellant's motion for a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session after it was discovered that one of the alleged victim's family members disclosed the substance of the in-court testimony to the sequestered alleged victim; (3) his sentence, which includes a dismissal, nine years of confinement, and one year of contingent confinement, is inappropriately severe; and (4) he was denied effective assistance of counsel.[2] We disagree and, finding no prejudicial error, we affirm the approved findings and the sentence.

Background

Over an approximately two and one-half year period, the appellant, who was then the commander of the 82d Training Group, Sheppard Air Force Base, Texas, created false travel vouchers for trips to locations at which he did not have official business or to which he did not actually travel. On these travels, the appellant also used his government travel card for personal reasons. The appellant's scheme unraveled when a financial services employee noticed a discrepancy between his government travel card charges and

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[1] The convening authority also suspended and remitted three months of the adjudged forfeitures and waived three months of the mandatory forfeitures for the benefit of the appellant's dependants.

[2] More specifically, he alleges ineffective assistance of counsel because his defense team failed to: (1) submit alibi evidence for the dates of the alleged indecent assaults; (2) demonstrate that DM's behavior was characteristic of stalking; (3) introduce relevant telephone records that showed DM telephoned the appellant more than she had claimed; (4) obtain full documentation of DM's civilian personnel complaint; (5) adequately argue that it was physically impossible for him to indecently assault DM given the height difference between them; (6) introduce evidence that DM claimed to have been assaulted in every failed relationship she entered and evidence that her prescription medications impaired her ability to grasp reality; (7) object during sentencing to the trial counsel's mischaracterization of evidence; (8) elicit that his former administrative assistant, who testified against him, had been fired for insubordination and inappropriate conduct; and (9) contact him after his court-martial and left clemency matters solely to the junior member of the defense team. His last assertion is levied against his lead trial defense counsel. We summarily dispense with this last assertion of ineffective assistance of counsel because the record makes it abundantly clear that the appellant's lead trial defense counsel was not responsible for assisting the appellant with his post-trial matters—those responsibilities fell on the junior member of the defense team and there has been no showing of prejudice with respect to post-trial representation. The appellant's ineffective assistance of counsel assertion is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

his travel vouchers. The employee reviewed the appellant's entire travel history and identified discrepancies in numerous travel vouchers.[3]

During the same time period, the appellant attempted to develop a social relationship with and made veiled sexual comments to Chief Master Sergeant (CMSgt) RM, the wing's command chief. He also indecently assaulted DM, a civilian employee, on two occasions. At trial, the appellant pled guilty to all of the offenses except the conduct unbecoming an officer and indecent assault offenses. The military judge conducted a thorough *Care*[4] inquiry and the appellant's plea was provident. During the contested portion of trial, three of the alleged victims were sequestered before their testimony. After trial, the wing's sexual assault response coordinator (SARC) sent an e-mail to various base personnel and noted that relatives of one of the alleged victims provided a summary of the courtroom testimony to the alleged victim prior to her testimony. In his clemency request, the appellant moved for a post-trial Article 39(a), UCMJ, session to investigate the matter but the GCMCA did not order a post-trial hearing.

Sufficiency of the Conduct Unbecoming and Indecent Assault Findings

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, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

In resolving questions of legal sufficiency, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is restricted to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find that a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the conduct unbecoming an officer and indecent assault specifications.

We note that the following testimony by CMSgt RM is legally sufficient to support the appellant's conduct unbecoming an officer specifications: (1) she told the appellant and others of an embarrassing incident in which an airman unintentionally

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[3] For example, the appellant claimed he was on temporary duty to St. Louis, Missouri from 28-30 October 2005; yet, his government credit card records showed that he used his government credit card during the same time period in Allen, Texas.

[4] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

made a sexual double entendre to her;[5] (2) the appellant then asked her if she "needed help with that" and called her at home to continue the conversation; (3) the appellant asked her where she lived and whether she wanted him to visit her at home; and (4) on subsequent occasions, the appellant made several sexual double entendres to her.[6]

We find that the following testimony by DM is legally sufficient to support the appellant's indecent assault specifications: (1) in September 2006, the appellant went to her office, kissed her with his open mouth, and put his arm around her to pull her closer and (2) in November 2006, the appellant went to her office, grabbed her hand, and placed it on his penis.

Lastly, 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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the appellant is guilty of the conduct unbecoming an officer and indecent assault offenses.

GCMCA's Denial of the Post-Trial Article 39(a), UCMJ, Request

Rule for Courts-Martial (R.C.M.) 1102(b)(2) provides that "[a]n Article 39(a)[, UCMJ,] session under this rule may be called . . . for the purpose of inquiring into, and, when appropriate, resolving any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(d) provides that "[t]he convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority." We review a convening authority's decision not to order a post-trial Article 39(a), UCMJ, session for an abuse of discretion. *United States v. Ruiz*, 49 M.J. 340, 348 (C.A.A.F. 1998).

While the quantum of evidence needed to convene a post-trial Article 39(a), UCMJ, session is low, a convening authority is not required to order a post-trial Article 39(a), UCMJ, session based solely on unsworn, unsubstantiated assertions. *Ruiz*, 49 M.J. at 348. In this case, the SARC's e-mail allegation that relatives of one of the alleged victims disclosed in-court testimony to the alleged victim prior to her testimony is unsworn and unsubstantiated. As such, the GCMCA was not obliged to order a post-trial

[5] According to Chief Master Sergeant (CMSgt) RM, she had attended an Asian-Pacific breakfast where leis were distributed and her airman-escort told her that he needed to get her "lei'd" and to her table.

[6] CMSgt RM testified that the appellant told her at a staff meeting that his group is "better than everybody else," that "they can go all night," and they are "bigger than everyone else."

Article 39(a), UCMJ, session and he did not abuse his discretion in denying the appellant's request.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire 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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant severely compromised his standing as an officer and a military member. Moreover, the appellant's misconduct is aggravated by the fact that he abused his office and position of trust to commit his crimes. After carefully examining the submissions of counsel, the appellant's otherwise outstanding military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find that the appellant's sentence, one which includes a dismissal, nine years of confinement, and one year of contingent confinement, is inappropriately severe.

Ineffective Assistance of Counsel

Axiomatically, 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)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was in fact deficient and, if so, (2) whether his deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Thus, the appellant bears the heavy 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, 482 (C.A.A.F. 2001).

The appellant raised a laundry list of ways in which he opines that his trial defense counsel were ineffective. In response to the appellant's ineffective assistance of counsel assertion, the government submitted a joint post-trial affidavit from the appellant's trial

defense counsel, Major EP, Major ME, and Captain CG. Concerning the failure to admit alibi evidence, the appellant's trial defense counsel assert that they investigated the dates of the alleged indecent assaults, found no alibi evidence, and thus did not introduce any alibi evidence. With respect to the failure to portray DM as a stalker and to introduce evidence that showed DM called the appellant more times than she had claimed, the appellant's trial defense counsel assert that there was no evidence DM was a stalker[7] and that the telephone records supported DM's testimony. Regarding the failure to elicit evidence that his former administrative assistant had been fired for insubordination and inappropriate conduct, the appellant's own affidavit belies this allegation; as he (and his trial defense counsel) note that the appellant's former administrative assistant was not fired but was reassigned. Thus, evidence that she was fired did not exist.[8] A failure to admit evidence which does not exist, whether it is alibi evidence, stalking evidence, impeachment evidence, or evidence of a firing, is not deficient conduct.

The appellant's trial defense counsel assert that they conducted a full investigation and consulted with their forensic psychologists before they made tactical decisions not to present evidence of DM's past sexual assault allegations and DM's inability to grasp reality because such evidence did not further the defense's theory of the case. They also assert that they did not object to the trial counsel's sentencing argument for tactical reasons because the remark at issue was a fair comment on the evidence,[9] any objection would have been overruled, and any objection would have further emphasized the trial counsel's sentencing argument to the members. As previously stated, counsel are presumed to be competent and we will not second-guess the trial defense counsel's strategic or tactical decisions in this case. *See Morgan*, 37 M.J. at 410. Rather, we give due deference to the trial defense counsel's reasoning and find that the appellant has failed to demonstrate that his counsel's decisions were unreasonable under prevailing professional norms. *See McConnell*, 55 M.J. at 482.

The affidavits in the case at hand conflict in only two aspects—whether the appellant's trial defense counsel obtained full documentation of DM's civilian personnel complaint and whether the trial defense counsel failed to argue physical impossibility. When conflicting affidavits create a factual dispute, we cannot resolve it by relying on

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[7] Even, assuming, arguendo, there was evidence that DM stalked the appellant, it would not be a defense to the indecent assault charges and would be of little, if any, relevance.

[8] Even if such evidence did exist it would be of limited relevance in that the appellant pled to and was found guilty of the financial offenses, which were the offenses that he claimed others used to portray his former administrative assistant as a victim.

[9] Our standard of review for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). The appellant contends that the trial counsel's remark that the appellant "stuck his tongue down [DM's] throat" was a mischaracterization of the evidence. After reviewing this remark in the context of the entire record, we find that it was a fair comment on the evidence.

the affidavits alone and must resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the record as a whole compellingly demonstrates the improbability of the asserted facts or when the affidavit alleges an error that would not result in relief even if the factual dispute was resolved in the appellant's favor. *Id.*

Such is the case here. The appellant's assertions are without merit because the record shows that his trial defense counsel not only questioned DM at trial regarding the personnel complaint but also admitted documentation of this personnel complaint at trial. Additionally, while we find that the trial defense counsel failed to raise physical impossibility as a defense, such a failure does not amount to deficient conduct because even if the facts were as the appellant alleges, it would not be a defense to indecent assault.

Lastly, even assuming deficient conduct, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that but for counsel's unprofessional error the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Here, the appellant has failed to sufficiently show how any of the alleged deficient conduct prejudiced his case. Under the aforementioned facts, we find no prejudice.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[10] 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

[10] This Court notes that Specification 14 of Charge III of the Court-Martial Order (CMO), dated 29 September 2008, is incorrect as it references an offense that was withdrawn before trial. Specification 14 of Charge III should read "Did within the continental United States, between on or about 27 April 2007 and on or about 3 May 2007, steal money of a value in excess of $500, military property of the United States Air Force. Plea: G. Finding: G." This Court orders the promulgation of a corrected CMO.