UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RYAN D. LOGAN
United States Air Force

ACM S30354

8 December 2004

Sentence adjudged 26 March 2003 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $500.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Captain Jennifer K. Martwick.

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

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

In accordance with his pleas, the appellant was convicted of wrongfully using marijuana and methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts that his trial defense counsel was ineffective and, in a post-trial affidavit, lists eight items to support his assertion. We have examined the record of trial, documents submitted by the appellant, the assignment of errors, and the government's reply thereto. We find that

the assigned error is without merit. Two of the items raised by the appellant warrant brief discussion.

The test for ineffective assistance of counsel is whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). In determining whether this presumption of competence has been overcome, our superior court has established a three-pronged test:

> (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?"; and
>
> (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. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). We conclude that we can apply this test and resolve the assigned error without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) or *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant contends the first of three statements he made to the Air Force Office of Special Investigations (AFOSI) was tainted, in that he was "tricked" into confessing by the interviewing agents, who promised him that he would receive only nonjudicial punishment if he made a statement without a lawyer present. The appellant contends the issue should have been raised in the presentencing phase of his trial as a matter in mitigation, to show how he was "'led' to tell AFOSI what they wanted to know." He says he discussed the issue with his counsel, but was told it did not matter since he was pleading guilty. While characterizing the appellant's representation as a "self serving declaration," the government has not specifically contested the proffered facts or offered an affidavit from trial defense counsel. *See Ginn*, 47 M.J. at 248 (third principle).

The threshold question is whether the AFOSI agents made any promise at all to the appellant. There is no evidence in the record to support such an allegation; indeed,

during the AFOSI interview in question, the appellant signed an Air Force Form 1168, Statement of Suspect/Witness/Complainant, which included the representation that "[n]o promises, threats, or inducements of any kind have been made to me." *Id*. (fifth principle).

Assuming for purposes of analysis that the appellant's allegation is true, and that he did raise the matter with his counsel, two courses would have been available: (1) challenge the voluntariness of the confession or (2) not raise it at trial for tactical reasons. If the voluntariness of the confession were raised in presentencing to mitigate the offenses, it would have jeopardized the providency of the guilty plea, leading the military judge to further inquire about the affect of the promise on the confession. More importantly, it would have been inconsistent with the centerpiece of the appellant's mitigation case (his cooperation with the government and voluntary admissions of guilt). Thus, there were reasonable tactical decisions not to raise the issue. Even if the matter had been raised in presentencing, we conclude there was no reasonable probability of a different, more favorable result.[1]

As to findings, we have considered the implications of raising the alleged promise as a challenge to the confession. Even if the trial defense counsel was deficient in not raising the issue (again assuming a promise was made and the appellant raised the matter with his counsel), there is no reasonable probability the outcome would have been different. *Grigoruk*, 56 M.J. at 307. It is apparent that a number of other airmen implicated the appellant in marijuana use. (The appellant's affidavit invites our attention to the AFOSI report of investigation (ROI) by alleging a number of inconsistencies in the report. Without regard to the substance of any evidence against the appellant reflected in the ROI, but not introduced at trial, the ROI does confirm that a number of airmen who saw or used drugs with the appellant made statements about his involvement.) Even if the first confession was tainted, his subsequent confession over a month later to a further use of marijuana and the separate evidence of his methamphetamine use were removed from any arguable taint. The appellant does not contend that AFOSI reaffirmed the alleged forum promise during the re-interview, or that he asked them if it was still good. It would have been completely unreasonable for him to assume that such a promise was available to him regardless of continued drug use. Even assuming trial defense counsel was deficient, there was no probability of a different result, either as to guilt or sentence. *Ginn*, 47 M.J. at 248 (first principle).

In short, the facts asserted by the appellant fail to demonstrate deficient performance within the meaning of *Strickland*. We conclude that the appellant has not met his burden of showing specific defects in his counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Anderson,* 55 M.J.

[1] During the providence inquiry at trial, the appellant stated he was satisfied with his defense counsel and his counsel's advice.

198, 201 (C.A.A.F. 2001) (citing *Strickland*, 466 U.S. at 688-90). Even if he had met this burden, he has failed to demonstrate prejudice within the meaning of *Strickland.*

The appellant also points out that the staff judge advocate's recommendation incorrectly indicates the appellant had a positive urinalysis for marijuana use. The recommendation is in error. The appellant believes the error "could have possibly misled" the convening authority. If the convening authority was misled, it is of no consequence in this case. The appellant admitted at trial to using marijuana ten times over a three-month period, and the convening authority approved only four of the six months of confinement adjudged (contrary to the advice of his staff judge advocate). No post-trial corrective action is warranted.

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

ANGELA M. BRICE
Clerk of Court