UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JACOB D. MCAFEE
United States Air Force

ACM S30097

26 August 2003

Sentence adjudged 5 March 2002 by SPCM at Hurlburt Field, Florida. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of $737.00 for 1 month, and reduction to E-1.

Appellate Counsel for Appellant: Major Jeffrey A. Vires and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Peter J. Camp.

Before

VAN ORSDOL, PRATT, and MALLOY
Appellate Military Judges

OPINION OF THE COURT

PRATT, Senior Judge:

On 4 March 2002, the appellant was tried by a special court-martial composed of officer members at Hurlburt Field, Florida. Consistent with his pleas, he was found guilty of wrongfully possessing and using marijuana on divers occasions between April and November 2001. The court members sentenced the appellant to a bad-conduct discharge, confinement for 30 days, forfeiture of $737.00 pay per month for 1 month, and reduction to airman basic. The convening authority subsequently approved the sentence as adjudged.

On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant complains that trial counsel, during his sentencing argument, prejudiced him by arguing facts not in evidence. He asserts: (1) That he received ineffective assistance of counsel when his defense counsel failed to object to trial counsel's argument, and (2) That the military judge erred by failing to give, sua sponte, a limiting instruction to the members in order to counteract trial counsel's improper argument. The appellant claims that, in the absence of these errors, the members would not have adjudged a bad-conduct discharge. Accordingly, he seeks to have this Court disapprove that portion of his sentence. Finding no error prejudicial to the substantial rights of the appellant, we decline to grant the relief requested.

At issue here are remarks made by trial counsel during sentencing argument relating to a pipe found in the appellant's off-base residence during a lawful consent search by agents of the Air Force Office of Special Investigations (AFOSI). The pipe in question contained residue that later tested positive for tetrahydrocannabinol (THC), the active ingredient in marijuana. During argument, trial counsel noted that the appellant, after initially confessing his marijuana use and possession in September, was once again caught using and possessing marijuana in November. He said:

> So what does he do? He goes out and smokes more marijuana. . . . They search his house. They find that pipe right there, Prosecution Exhibit 3. Take that back with you into deliberations. Look at that. What does that tell you? That pipe. It's a homemade pipe. Basically, it's determination. It's innovation. He doesn't have a bong of his own or rolling papers or whatever, but he needs to smoke his marijuana, to break the law. **So, he looks around his house and he makes a pipe out of some household items.** That's innovation. Usually, something like that—a person being innovative is an asset to the Air Force, they're able to adapt and overcome. In this situation, all he did was adapt and overcome to be a better criminal.

(Emphasis added.)

The appellant does not contest the characterization of the pipe as "homemade," but asserts on appeal that it was not him, but rather a friend of his, who actually constructed the smoking device.[1] Thus, he contends that the trial counsel argued facts not in evidence, to his detriment.

[1] We note that the only assertions that the appellant did not construct the homemade pipe come from post-trial statements of his parents and assertions by appellate defense counsel on his behalf. We find no such assertion, as a matter of record, from the appellant himself. The well-meaning claims of loving parents, and the assertions of appellate counsel in their briefs, are not evidence. *United States v. Lewis*, 42 M.J. 1, 4 (1995). In the name of judicial economy, we will nevertheless accept these representations and address the issue raised.

Fair Inference

The initial question, of course, is whether trial counsel's argument was improper. It is well settled that prosecutors must limit their arguments to evidence of record and the fair inferences that can be drawn therefrom. *United States v. White*, 36 M.J. 306 (C.M.A. 1993); *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975). The government argues that trial counsel's remarks about the homemade pipe were fair inferences from statements made by the appellant during the providency inquiry. This would be worth considering if this were a trial before military judge alone who, having heard the testimony during the providency inquiry, could consider it during sentencing without the need for formal re-entry into evidence. *United States v. Holt*, 27 M.J. 57, 60 (C.M.A. 1988) ("We perceive no reason why it is necessary to have a transcript prepared of the sworn testimony that the military judge had heard[2]. . . in order for this evidence to be considered by the judge in sentencing or to be mentioned by trial counsel in an argument on sentence.") Yet, in a trial with members, counsel sometimes seem to forget that the members were not present during the providency inquiry and, thus, did not hear that testimony. If counsel wishes the members to consider evidence, which emerged during the providency inquiry, or wishes to argue such evidence, it must be presented to the members in some fashion.[3] *Id.* at 61. But trial counsel did not do so in this case. Thus, the government's reliance upon fair inference from the appellant's admissions during the providency inquiry is misplaced.

This does not dispose of the issue, however, inasmuch as we must still examine whether trial counsel's remarks were the product of fair inference from other evidence that was properly before the members, i.e., the pipe itself and the locus of its discovery. The pipe's appearance clearly indicates that it qualifies for the descriptor "homemade." Further, the stipulation of fact, entered into by the appellant in conjunction with his guilty pleas, establishes that this 12-inch pipe was discovered during a search of the appellant's off-base residence. In the absence of any indication to the contrary, we find it a fair inference that items located in a person's home belong to that person, particularly where, as here, there is no indication that other persons lived in the house with the appellant and no claim by the appellant, during the AFOSI investigation or at trial, that either the pipe or any of the other incriminating items found during two separate searches of his house

[2] The actual language in the opinion is "[T]hat the military judge had heard ***during the sentencing proceedings*** in order for this evidence to be considered . . . ." (Emphasis added.) Yet it is clear, in context, that the Court was referring to (and undoubtedly meant to say) "during the providency inquiry." *See Holt*, 27 M.J. at 60.

[3] In *Holt*, the Court suggested that such admissions by the accused could be provided by an authenticated transcript of the pertinent portion of the providency inquiry or by testimony of someone who heard the admissions in that proceeding. *Id.* at 61. In a subsequent case, trial counsel was allowed to play an audio tape of the accused's admissions made in the course of the providency inquiry. *United States v. Irwin*, 42 M.J. 479 (1995).

belonged to someone else.[4] So, the question becomes: In the absence of any indication to the contrary, when a homemade marijuana pipe is discovered in the appellant's possession, is it a fair inference, and therefore fair comment during sentencing argument, that the appellant is the one who constructed it? We think so, and accordingly, find no error on the part of trial counsel for arguing as he did, nor on the part of the military judge for not, sua sponte, issuing a corrective instruction to the court members.[5]

Ineffective Assistance of Counsel

The question remains, however, whether the appellant received ineffective assistance of counsel by defense counsel's failure to object to this aspect of trial counsel's sentencing argument. Although we have found trial counsel's argument to be the permissible product of fair inference, we also must recognize the possibility that the inference, although fair, was not accurate. In that case, a defense objection could have been appropriate.

While it is well settled that an accused is entitled to effective assistance of counsel, *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970); *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991), it is equally well established that the Sixth Amendment does not guarantee a perfect trial. *United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985) (citing *United States v. Hasting*, 461 U.S. 499, 508 (1983)). The two-pronged test established by the Supreme Court requires the appellant to show: (1) That his counsel's performance was deficient, and (2) That the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Our examination of this record leads us to conclude that neither prong of this test has been met.

As to the first prong—deficient performance—a threshold ingredient is missing. As with the issue of who actually constructed the pipe, we have no evidence of record that the appellant's defense counsel had knowledge that the inferential fact being argued by the trial counsel was not accurate. Assuming, arguendo, that she had such knowledge, we nevertheless find that her lack of objection falls well short of establishing deficient performance.

It is impossible, inherently unfair, and judicially unhealthy to second-guess defense counsel for each of the many decisions they must make during the course of a trial. Many things a defense counsel elects to do or say (or not do or say) could be

[4] The stipulation of fact indicates that, during the initial consent search of appellant's residence in September 2001, AFOSI agents found a green leafy substance (later determined to be marijuana) and two marijuana cigarettes. In November 2001, AFOSI agents conducted a second consent search of his residence during which they discovered the homemade pipe.

[5] Since we find no error in trial counsel's argument, or in the military judge's inaction, we need not rely on waiver or forfeiture by failure to object or conduct "plain error" analysis. Even if we did, however, we would readily conclude that the appellant does not qualify for relief. *United States v. Ramos*, 42 M.J. 392 (1995); Rule for Courts-Martial 1001(g); *United States v. Powell*, 49 M.J. 460 (1998); Article 59(a), UCMJ, 10 U.S.C. § 859(a).

products of situational strategy or tactics involving factors unseen by others at the trial level and, most certainly, at the appellate level. Thus, while counsel are not completely free of such scrutiny, the Supreme Court has emphasized a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id*. at 689; *United States v. Cronic*, 466 U.S. 648 (1984). The Court explained that a finding of deficient performance required a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

In the present case, again assuming defense counsel knew that trial counsel's inference concerning the pipe was inaccurate, perhaps she chose not to object because she felt it would be seen by the court members as "splitting hairs," or perhaps she worried that the members would reach even more damaging conclusions as to the manner in which the appellant came into possession of the pipe. Our review of the record as a whole indicates that appellant's counsel provided vigorous and effective representation throughout the trial. Clearly, her assistance did not fall "measurably below the performance ordinarily expected of fallible lawyers." *Polk*, 32 M.J. at 153; *United States v. DiCupe*, 21 M.J. 440 (C.M.A. 1986), *cert. denied*, 479 U.S. 826 (1986).

Having found the first prong of the *Strickland* test wanting, we need not address the second prong. *United States v. Gibson*, 46 M.J. 77 (1997). Suffice it to say, however, that it is extremely difficult to accept the appellant's assertion that the adjudged punitive discharge was the result of trial counsel's remarks concerning the homemade pipe. By his own admissions, the appellant used marijuana 25 to 40 times over a 7-month period, and some of these uses occurred *after* his initial detection and confession. It was these latter facts, and not the homemade pipe, which formed the thrust of trial counsel's sentencing argument and which, undoubtedly, influenced the members' ultimate decision to adjudge a punitive discharge.

The findings 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 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court