**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Major DANA C. MCCOMMON**
**United States Air Force**

**ACM 37305**

**03 September 2009**

Sentence adjudged 12 July 2008 by GCM convened at Travis Air Force Base, California. Military Judge: William M. Burd.

Approved sentence: Dismissal, confinement for 8 months, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges



PER CURIAM:

Contrary to the appellant's pleas, a panel of officers sitting as a general court-martial convicted him of one specification of violating a lawful general regulation on divers occasions, one specification of violating a lawful general regulation, one specification of willful dereliction of duty on divers occasions, one specification of fraternization on divers occasions, one specification of fraternization, one specification of committing an indecent act with another, one specification of committing adultery on divers occasions, and one specification of making a false official statement, in violation of Articles 92, 134, and 107, UCMJ, 10 U.S.C. §§ 892, 934, 907. The appellant's adjudged and approved sentence consists of a dismissal, eight months of confinement, and a reprimand.

On appeal the appellant asks this Court to: (1) disapprove the findings of guilt on the specifications of violating lawful general regulations, willful dereliction of duty, committing an indecent act, committing adultery, and making a false official statement; and (2) reassess his sentence. As the basis for his request, the appellant opines his trial defense counsel was ineffective.[*] Specifically, the appellant alleges his trial defense counsel was ineffective by failing to: (1) call the appellant's wife to contradict the testimony of Senior Airman (SrA) MS and SrA CP, airmen with whom the appellant fraternized; (2) call First Lieutenant (1st Lt) RB to contradict the testimony of SrA MS and SrA CP; (3) contact witnesses who would have rebutted testimony that the term "briefing" was used as a code word for "sex;" (4) call witnesses to testify about the appellant's good military character and introduce affidavits of his good military character; and (5) call the appellant's supervisor to rebut his commander's testimony that the appellant's actions affected squadron morale. We disagree with the appellant's allegation of ineffectiveness assistance of counsel. Finding no prejudicial error, we affirm.

*Background*

In May 2006, the appellant began flirting with SrA MS, a subordinate member assigned to his squadron. The flirting escalated into a sexual relationship and over the course of several months, the appellant and SrA MS engaged in oral sex and sexual intercourse. They continued to have sexual intercourse after the appellant was married and after he became SrA MS's commander. On one occasion, the appellant and SrA MS engaged in sexual intercourse in the presence of two other individuals in SrA MS's apartment. The appellant sent personal e-mails to SrA MS on his government computer, and regularly socialized and drank alcohol with SrA MS and SrA CP, another subordinate airman in his squadron. Additionally, the appellant and SrA CP attempted to engage in sexual intercourse.

In September 2006, Detective AG, Chief of Security Police Investigations at Travis Air Force Base, California, summoned the appellant to his office for an interview. After a proper rights advisement, the appellant waived his rights and agreed to answer questions about his involvement with SrA MS. He then prepared a written statement in which he denied having any unprofessional contact with SrA MS.

*Ineffective Assistance of Counsel*

Without a doubt, service members have a fundamental right to 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

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

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel are presumed to be competent and we will not second-guess the trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the heavy burden of establishing 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). Where there is a lapse in judgment or performance alleged, we ask whether trial defense counsel's conduct was in fact deficient and, if so, whether counsel's 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).

In response to the appellant's ineffective assistance of counsel assertions, the government submitted a post-trial affidavit from Captain (Capt) MH, the appellant's trial defense counsel. The trial defense counsel asserts he made a tactical and strategic decision not to call the appellant's wife to testify because her testimony would have been of little assistance to the defense, and allowing her to testify would have given the government additional evidence to support the fraternization specifications. He also states he did not call 1st Lt RB to rebut SrA MS's and SrA CP's testimony because 1st Lt RB would not have provided rebuttal, and calling him to testify would have "opened the door" to a potential obstruction of justice charge for the appellant.

With respect to his failure to admit good military character evidence, Capt MH explains he advised the appellant that admitting such evidence would "open the door" to the potential obstruction of justice charge and after receiving this advice, the appellant concurred with Capt MH's decision not to admit good military character evidence. Capt MH further explains he did not call the appellant's supervisor to rebut the commander's testimony because the supervisor had limited interaction with the appellant and calling the supervisor to testify would have undermined the favorable statement the supervisor had written on the appellant's behalf. Lastly, Capt MH asserts he contacted all of the potential witnesses the appellant provided to rebut SrA MS's testimony on the "briefing" issue but a majority of the witnesses failed to respond. Those who did respond were not aware of the term "briefing" being used as a code word.

Concerning all but Capt MH's last assertion, we find he made tactical and strategic decisions not to call the appellant's wife, 1st Lt RB, character witnesses, and the appellant's supervisor at trial. We also find he made a tactical and strategic decision not to admit the good military character affidavits. Accordingly, we will not second-guess these tactical and strategic decisions. *Morgan*, 37 M.J. at 410.

Capt MH's assertion that he contacted witnesses to rebut SrA MS's testimony on the "briefing" issue contradicts the appellant's assertion that Capt MH did not contact these witnesses. When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing.

*United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, we can resolve such disputes without a post-trial fact finding hearing when, inter alia, the appellant's affidavit alleges an error that would not result in relief even if the factual dispute were resolved in the appellant's favor. *Id*. at 248. Such is the case here. Assuming arguendo that proffered witnesses were called to testify that they understood the term "briefing" to mean after work drinks, such testimony would not necessarily undermine SrA MS's testimony that she and the appellant used the term to mean "sex."

In the final analysis, Capt MH's conduct was not deficient. Moreover, even assuming his conduct were deficient, 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 errors the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. 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. 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


STEVEN LUCAS, YA-02, DAF
Clerk of the Court