UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN M. MCINTYRE
United States Air Force

ACM S31286

26 September 2008

Sentence adjudged 12 January 2007 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Tiaundra D. Sorrell (argued), Major Shannon A. Bennett (on brief), Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Captain G. Matt Osborn (argued), Colonel Gerald R. Bruce (on brief), and Major Jeremy S. Weber.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to his pleas, a panel of officers sitting as a special court-martial found the appellant guilty of one specification of failure to go and two specifications of wrongful use of cocaine, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912.[1] The adjudged and approved sentence consists of a bad-conduct discharge, three months confinement, and a reduction to the grade of E-1.

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[1] The members found the appellant not guilty of another wrongful use of cocaine specification.

On appeal the appellant asks this court to set aside the action, set aside the findings on Charge I and its specification, and grant meaningful relief. The basis for his request is that he asserts that: (1) the military judge erred when he failed to award additional credit for violations of Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* (7 Apr 2004); (2) the military judge erred when he failed to award additional credit for violations of Article 13, UCMJ, 10 U.S.C. § 813;[2] (3) the trial defense counsel were ineffective when they failed to submit clemency matters; and (4) the appellant's conviction for failure to go is legally and factually insufficient.[3] Finding no error, we affirm.

Background

The appellant's base of assignment, McGuire Air Force Base, New Jersey, does not have a confinement facility and houses pre-trial and post-trial confinees in local confinement facilities. In October and December 2006, the appellant was escorted to a local civilian detention facility in Burlington County, New Jersey. The Air Force had an established Memorandum of Understanding (MOU) with the Burlington County Detention Facility (BCDF) governing the confinement of military inmates. The MOU provided that military confinees will be treated in the same manner as county inmates.

At the time of trial, the appellant had spent a total of 33 days in pre-trial confinement at the facility. Within the detention facility, the appellant was housed in a dormitory with pre-trial and post-trial inmates. For safety reasons, all, including the appellant, wore the same orange jumpsuit. The dormitory had an open, common area with desks and chairs for activities and individual 9 x 12 foot cells, which were occupied by two to three inmates. During the appellant's stay, his cell was occupied by at least one other individual and occasionally by two other individuals. One of the individuals that occupied the appellant's cell was a post-trial inmate.

During the appellant's stay, he also was allowed: (1) to spend six to eight hours a day outside of his cell; (2) one hour of exercise a day; (3) access to medical care; (4) access to dining and recreational facilities; (5) to receive visitors; and (6) on one occasion, to return to his military dormitory room. At no time during the appellant's stay was he required to perform physical labor.

Credit for AFI 31-205 Violation

Axiomatically, "a government agency must abide by its own regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007) (quoting *United States v.*

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[2] The Court heard oral argument on Issues I and II on 18 September 2008.
[3] Issue IV is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Dillard, 8 M.J. 213, 213 (C.M.A. 1980)). "AFI 31-205 reflects a decision by the Air Force to ensure that servicemembers who are housed in civilian jails are treated in a manner that recognizes the presumption of innocence." *Id.* However, confinement in violation of AFI 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. *Id.* at 23-24.

"[U]nder [Rule for Courts-Martial (R.C.M.)] 305(k), a servicemember may identify abuses of discretion by pretrial confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit." *Id.* at 24. "A military judge's decision in response to this *request* is reviewed, on appeal, for abuse of discretion." *Id.* (citing *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999)) (emphasis added).

At trial, the appellant did not request additional confinement credit for a violation of AFI 31-205. Specifically he did not ask for R.C.M. 305(k) credit for "pretrial confinement that involves an abuse of discretion or unduly harsh circumstances." R.C.M. 305(k). Rather, he made mention of the requirements in AFI 31-205 in his motion for additional credit for an alleged Article 13, UCMJ, violation. Since the appellant did not request additional confinement credit for a violation of AFI 31-205, the military judge was not obliged to consider the issue and his failure to grant the appellant additional credit, in response to a non-existent request, hardly qualifies as an abuse of discretion.

Assuming *arguendo* the appellant requested R.C.M. 305(k) credit for a violation of AFI 31-205, the military judge did not abuse his discretion in denying the appellant additional confinement credit. The award of additional confinement credit was clearly a matter within the sound discretion of the military judge. *Adcock*, 65 M.J. at 23-24.

In connection with the motion for Article 13, UCMJ, credit, the military judge made detailed findings of fact and conclusions of law. While he noted technical non-compliance with AFI 31-205, e.g. the appellant's cell was smaller than that required by AFI 31-205, the military judge found: (1) no intent on the part of anyone to punish the appellant; (2) deviations from the AFI 31-205 were made to protect the appellant's safety or to meet other legitimate objectives; and (3) that any discomfort the appellant experienced by residing in a small cell was attenuated by the significant number of hours the appellant was allowed outside of his cell. Put simply, the military judge's findings of fact are not clearly erroneous, his conclusions of law are correct, and thus he did not abuse his discretion in refusing to award additional confinement credit.

Article 13, UCMJ, Credit

This Court's determination of whether the appellant suffered from unlawful pretrial punishment involves constitutional and statutory considerations. *See Bell v.*

Wolfish, 441 U.S. 520, 535-36 (1979); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). We will defer to the findings of fact by the military judge unless they are clearly erroneous; "[h]owever, our application of those facts to the constitutional and statutory considerations, as well as any determination of whether [this appellant] is entitled to credit for unlawful pretrial punishment involve independent, de novo review [by this Court]." *King*, 61 M.J. at 227 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)).

The appellant bears the burden of establishing his entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *King,* 61 M.J. at 227; *see also* R.C.M. 905(c)(2). More specifically, "[b]ecause the conditions of [an accused's] confinement relate to both ensuring his presence for trial and the security needs of the confinement facility, and because [an appellate court is] reluctant to second-guess the security determinations of confinement officials, [the accused] bears the burden of showing that the conditions were unreasonable or arbitrary in relation to both purposes." *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006).

On this issue, the military judge's findings of fact are amply supported by the evidence presented. His findings of fact, including his findings of no intent to punish and no unduly rigorous conditions, are not clearly erroneous. Moreover we conclude, as a matter of law, that under these circumstances, the appellant: (1) suffered no illegal pretrial punishment; (2) suffered no unduly rigorous conditions; and (3) is thus not entitled to Article 13, UCMJ, credit.

Ineffective Assistance of Counsel

Prior to taking final action, the convening authority must consider matters submitted by the accused under R.C.M. 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). An appellant may waive his right to submit clemency matters. R.C.M. 1105(d). We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)).

Unquestionably, 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). Counsel are presumed to be competent and we will not play "Monday Morning Quarterback" and second guess trial defense counsel's strategic or tactical decisions. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the 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). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) 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).

The appellant submitted a post-trial affidavit wherein he states he does not recall his attorneys speaking to him about clemency submissions. The appellant then asserts his trial defense counsel were ineffective because they failed to submit matters in clemency. The government submitted two post-trial affidavits, one from each of the appellant's trial defense counsel. Of particular note is the affidavit from Major KP wherein she avers: (1) based on the appellant's concern with ensuring his daughter was provided for financially, she and the appellant made the decision to focus their efforts on waiving automatic forfeitures, and (2) the appellant, in recognition of his concern, waived his right to submit clemency.

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, 248 (C.A.A.F. 1997). However, in the case *sub judice*, the affidavits do not conflict. In his affidavit, the appellant does not state that his defense counsel never advised him on his right to submit clemency matters. Rather, he states he does not recall his counsel speaking to him about clemency submissions. A lack of memory is not synonymous with saying a discussion never occurred.

Major KP's affidavit makes clear that she discussed clemency matters with the appellant. The appellant's written post-trial rights advisement, one which the appellant and Major KP signed, supports Major KP's claim that she advised the appellant of his right to submit clemency matters. Moreover, the appellant advised the military judge that he had been advised of his post-trial and appellate rights and had no questions about his post-trial and appellate rights. Finally, Major KP's request to waive automatic forfeitures adds credence to her assertion that the appellant waived his right to submit clemency in an effort to financially provide for his daughter.[4]

In short, we find that: (1) Major KP made a tactical and strategic decision to advise the appellant to waive his right to submit clemency matters; (2) the appellant, following the advice of counsel, knowingly and intelligently waived his right to submit clemency matters; and (3) therefore, the failure of the appellant's trial defense counsel to submit clemency matters does not amount to ineffectiveness of counsel. Moreover,

[4] The Court recognizes that the appellant could have submitted clemency matters in addition to requesting waiver of automatic forfeitures. However, it was a legitimate strategy to focus his request on the waiver of automatic forfeitures only.

assuming trial defense counsels' conduct was 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 687. Under the aforementioned facts we find no prejudice.

Factual and Legal Sufficiency

This issue is without merit. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), 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 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

In resolving questions of legal sufficiency, we are "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 limited 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 a reasonable fact finder could have found all of the essential elements of the specification beyond a reasonable doubt.

On this point we note that Technical Sergeant RB testified: (1) the appellant worked for him; (2) the appellant's work schedule during the charged time period was 0700-1500 hours, Monday-Friday; (3) he posted the appellant's shift schedule at the appellant's duty location and that he and others had advised the appellant of his duty schedule; (4) several times during the charged time period the appellant did not report to work at the scheduled time; and (5) he never gave the appellant permission to be late to work or not show up to work. Put simply, we find the appellant's conviction to be legally sufficient.

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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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; *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 find ourselves convinced beyond a reasonable doubt that the appellant is guilty of the aforementioned specification.

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; *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