UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BENNIE C. MELSON
United States Air Force

ACM 36523

14 September 2007

Sentence adjudged 01 September 2005 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

WISE, BECHTOLD, and HEIMANN
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of cocaine, one specification of assault, one specification of bigamy, one specification of possession of drug paraphernalia,[1] in violation of Articles 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 912a, 928, 934 respectively. He was also convicted, contrary to his pleas, of one specification of attempted voluntary manslaughter,[2] signing a false official record, an additional charge of assault,[3] and disorderly conduct, in violation of

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[1] The appellant pled guilty to possession of drug paraphernalia by exceptions. He was convicted of all but one of the excepted items.
[2] The appellant was charged with attempted murder.
[3] Although charged with pointing a firearm as part of the assault, that language was excepted in findings.

Articles 80, 107, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 907, 928, 934 respectively. The sentence adjudged and approved consists of a dishonorable discharge, confinement for 12 years, and reduction to E-1.

Discussion

On appeal, the appellant asserts 4 errors. Specifically, the appellant contends: (1) the military judge abused his discretion when he determined that the convening authority did not violate Articles 25 and 37, UCMJ, 10 U.S.C. § 825, 837 respectively, when detailing certain panel members to appellant's court-martial; (2) that a state's application for a marriage license is not an "official statement" within the meaning of Article 107, UCMJ; (3) the evidence was factually and legally insufficient to convict the appellant of attempted voluntary manslaughter; and (4) the appellant received ineffective assistance of counsel when trial defense counsel failed to request relief for illegal pretrial confinement. We do not concur with the appellant on the first and third issues. However, we do find that he is entitled to relief under the second and fourth issues.

Panel Selection

At trial, the defense moved to dismiss the charges and specifications, alleging that the convening authority improperly selected the court members. The motion was based on the fact that the convening authority intentionally selected senior members to serve. Five of the ten members selected were colonels. Additionally, the convening authority also chose members from his headquarters staff, although the case was tried at a different base. The convening authority testified at trial regarding his selection. His testimony indicated that he wanted to pick members whom he knew had the best judgment and experience. He also stated that this was the most serious case he had ever handled.

Whether a court-martial panel was improperly selected is a question of law reviewed de novo. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). A court-martial conviction should be set aside if it appears that panel members have been "hand-picked" by the government. *United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960). The appellant has the burden of establishing that panel members were improperly selected. *United States v. Townsend*, 12 M.J. 861, 862 (A.F.C.M.R. 1981), *pet. denied*, 13 M.J. 389 (C.M.A. 1982). This Court is bound by the military judge's findings of fact unless they are clearly erroneous. *United States v. Benedict*, 55 M.J. 451, 454 (C.A.A.F. 2001).

The issue of member selection was exhaustively addressed at trial. There is ample evidence in the record to demonstrate that the convening authority used the appropriate criteria in determining the makeup of the panel. Although *Hedges* mentions "hand-picked" panels, the reality is that every panel is hand-picked by the convening authority. What is impermissible is for the convening authority to select members with a view toward influencing the outcome of the case. The convening authority must select

members using the criteria specified in Article 25, UCMJ. In this case, the convening authority stated that he wanted officers with the requisite maturity and experience. He further stated that he looked at the serious nature of the charges and that the accused was facing life in prison without the possibility of parole. The military judge found that the convening authority selected the best qualified panel members under Article 25, UCMJ. We agree. The convening authority obviously gave a great deal of time and consideration to panel selection. It is obvious from the record that he did so in an attempt to ensure justice, not subvert it. The appellant has failed to carry his burden in establishing that the panel members were improperly selected.

Official Statement

The facts giving rise to the false official statement charge also gave rise to the bigamy charge. The appellant married a woman while still married to another woman. In doing so, he gave information to a court clerk in order to complete a marriage license application in the state of Georgia. The government charged him with signing that application which stated that he was not married.

Determination of what is an official statement is reviewed de novo. Article 107, UCMJ, defines an "official record" as one made in the line of duty. A "direct relationship to Appellant's duties and status" is necessary to make a statement in the line of duty. *United States v. Teffeau*, 58 M.J. 62, 69 (C.A.A.F. 2003). A statement may also be official if the document is within the jurisdiction of a federal department or agency. *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988). Not every comment uttered or even written by a servicemember is within the line of duty. There must be a nexus between the servicemember's status and the statement. Although "line of duty" has not been specifically defined, in *Teffeau* our superior court held that the circumstances leading up to the statement, the circumstances surrounding the statement, whether there is a military interest in the subject matter, and whether there exists a clear and direct relationship to military duties are to be considered when determining whether a charged statement was within the "line of duty." 58 M.J. at 69. In the instant case, the facts indicate that the statement on the marriage license was not "official," as it was not in the line of duty. The statements were not made to someone within the command and there is not a clear or direct relationship to the appellant's military duties. Furthermore, the appellant never turned in the false document for further use, such as to update the Defense Eligibility and Enrollment Reporting System or to obtain on-base military housing. Marriage is a matter within the purview of and regulated by the State. There is nothing in this case which causes the act to fall within the federal government's or the military's scope of interest. Additional Charge I and its Specification must be set aside and the sentence reassessed.

At trial, the military judge merged the bigamy charge and the false official statement charge for the purposes of sentencing. In doing so, he used the greater

maximum punishment authorized under Article 107, UCMJ, of confinement for five years rather than the confinement for two years authorized under Article 134, UCMJ, for bigamy. As a result, the appellant was exposed to three more years of confinement due to the erroneous conviction under Article 107, UCMJ. Accordingly, his sentence must be reassessed. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that by disapproving any confinement in excess of 11 years and 4 months, we will have assessed a punishment clearly no greater than the sentence the military judge would have imposed in the absence of error. *See Doss*, 57 M.J. at 185. Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: dishonorable discharge, confinement for 11 years and 4 months, and reduction to E-1. Further, we find this sentence to be appropriate for the appellant and his crimes. *United States v. Peoples*, 29 M.J. 426, 427-28 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, as the prevailing party at trial, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. There is ample evidence in the record to support both the military judge's determination and our own independent determination that the appellant attempted to commit voluntary manslaughter. Although the evidence was not completely consistent as to who stood where, how many shots were fired, and all the little details that get confused when everyone's adrenaline is pumping, the evidence is clear that the appellant shot at his victim several times with a 12 gauge shotgun. The fact that the shell was loaded with birdshot is not persuasive. The evidence was clear that birdshot can be lethal to more than just birds. The appellant shot from a range likely to hit his intended target. Although his victim was also armed and returned fire, there is insufficient evidence to support a claim of self-defense. There is sufficient evidence to support that the appellant intended to inflict great bodily harm. He did so while upset over the victim criticizing the appellant's assault on a mutual friend. We find the evidence factually and legally sufficient to support a finding of guilty to attempted voluntary manslaughter.

Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). 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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Counsel is presumed to be competent. *Id.* Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency 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 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). Vague or general intimations about the particular nature of materials the appellant would or could have submitted to support a clemency request are insufficient to show prejudice. *Key*, 57 M.J. at 249 (citing *United States v. Pierce*, 40 M.J. 149, 151 (C.M.A. 1994)).

At the heart of this issue is a claim by the appellant of illegal pretrial punishment. This Court has the first opportunity to consider the appellant's claim because it was not raised at trial. Normally, this issue would be waived on appeal absent plain error. *United States v. Inong*, 58 M.J. 460, 461 (C.A.A.F. 2003). However, since the issue forms the basis of the ineffective assistance of counsel claim, it is necessary to examine the claim to the extent necessary to resolve the assigned error.

The appellant's assigned error is that his trial defense counsel was ineffective in that she failed to raise the issue of illegal pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. This Article prohibits the government from: (1) punishing an accused before guilt is established at trial, and (2) imposing pretrial confinement that is more rigorous than circumstances require to ensure an accused's presence at trial. *See United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006); *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *Inong*, 58 M.J. at 463; *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000) If an appellant can establish that either prohibition was violated, she is entitled to sentence relief. Rules for Courts-Martial 305(d), 905(c)(2), and 906(c)(2); *Inong*, 58 M.J. at 463 (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)).

In a declaration submitted to this Court, the appellant asserts that he was subjected to "conditions that made my life humiliating and embarrassing, physically painful, extremely frustrating, and left me unable to get in touch with people in the military that could help me out." Specifically, appellant states that he was repeatedly harassed by a

guard, subjected to extreme temperatures both in the summer (in excess of 100 degrees) and in the winter (due to "terribly poor" heating units) in a jail with broken windows, provided only thin suits to wear, and refused access to socks and any undergarments. The appellant also states that he was not allowed to change into "non-prisoner" clothes when he was taken to base for appointments. The appellant adds that he had a back injury and requested to see a doctor on several occasions, but his request was never processed by jail personnel. Finally, the appellant states that he was not given any access to legal resources. In his declaration, the appellant asserts that he informed his trial defense counsel about all these conditions at the first opportunity, but was told "there wasn't anything that could be done about it." She never asked for any detail of the conditions or whether the appellant was being punished. When the military judge inquired at trial about any Article 13 punishment, only trial defense counsel responded and in the negative.

In response to this declaration, the Government argues that the conditions of the appellant's pretrial confinement are unsubstantiated and even if they did exist, the conditions do not constitute illegal pretrial confinement. The government provided no additional information, but merely argued in its brief why counsel believes the appellant's assertions are not credible.

In analyzing the appellant's claims and the government's response thereto, this Court relied upon the guidance in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), which outlines the principles to be applied in most instances in which an appellant files an affidavit in support of a claim of ineffective assistance of counsel. In that case, our superior court provided six principles to apply.

The first and second principles state that this Court may reject a claim if the facts as alleged, if true, would not result in relief or if the claim is not factual, but is merely speculative or conclusory. *Id.* That is not the case here. If the conditions the appellant experienced were true as alleged, they violated Article 13, UCMJ, and the appellant would have been entitled to relief. In support of his claim, the appellant actually provided facts supporting his conclusion that his treatment was "humiliating and embarrassing, physically painful . . . ."

The third principle is more problematic. That principle states that "if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts." *Id.* In this case, the government contests the facts, but only by argument. The fact that the government's counsel does not personally believe the appellant is an insufficient basis to reject the appellant's claim without further inquiry. The fourth principle provides that, "if the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts, the Court

may discount those factual assertions and decide the legal issue." *Id.* In this case, some of the appellant's assertions are corroborated and some are contradicted in the clemency submissions. The appellant first brought up the issue of illegal pretrial confinement in his 22 November 2005 clemency letter to the convening authority. In the letter, the appellant states that he did not have confidential access to his attorney or a law library, was deprived of recreation time, was housed with convicted felons, was made to wear "prison stripes," was transported to meals and appointments in "prison stripes," was delayed medical treatment, and lived in unsanitary conditions. In trial defense counsel's submission dated the same date, counsel does not comment on the issue of illegal pretrial confinement but rather demurs to appellant's letter. Trial defense counsel does state in her letter that the civilian facilities that the appellant was restrained in "do not compare to military confinement facilities." Between appellant's declaration and clemency request and his trial defense counsel's abbreviated reference to the conditions in the Lowndes County jail, there is sufficient information to conduct an Article 13, UCMJ, analysis.

In resolving the issue of whether the appellant has suffered a violation of Article 13, UCMJ, we must first determine whether the appellant has met the minimal requirements for raising the issue. To raise the issue, the burden is on the appellant to present evidence to support his claim of illegal pretrial punishment. As we have noted, the appellant has met that burden. Once an appellant successfully does that, the burden then shifts to the Government to present evidence to rebut the allegation "beyond the point of . . . inconclusiveness." *United States v. Cordova*, 42 C.M.R. 466, 468 (A.C.M.R. 1970). Here, the government has failed to meet that burden. It is possible that the government could have met the burden at trial if the trial defense counsel had raised the issue in that forum. Both sides could have presented evidence in support of their respective positions. However, it was not raised at trial and only the appellant has submitted information in support of his claim to this Court. It is, of course, possible that no evidence was presented at trial because trial defense counsel appropriately determined that the issue had no merit. However, that would merely be speculation on our part. Trial defense counsel is as silent on the issue before this Court as she was at trial. Although the government's argument attacking the appellant's credibility has some merit, it is, by itself, insufficient to prevail. The facts alleged may have resulted in relief for the appellant if they had been brought up during trial.

The Air Force instruction in existence at the relevant time provided guidance on the treatment of pretrial confinees. Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, (7 Apr 2004). Specifically, pretrial confinees were to wear the Battle Dress Uniform (BDU). *Id.* at ¶ 7.1.1. Although prison garb may have been acceptable within the confines of the confinement facility, the appellant should have been provided BDUs while attending appointments and eating in the dining facility on base. The Air Force instruction also provided that pretrial confinees were not to be housed with convicted confinees and were to be housed in facilities maintaining moderate temperatures for the locale. *Id.* at ¶¶ 5.8.1.2., 4.4.4.2. The conditions experienced by the

appellant did not meet those standards and were unduly rigorous. Additional credit may be given for illegal pretrial confinement. *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985).

Returning to the *Strickland* test for ineffective assistance of counsel, failure to raise illegal pretrial punishment appears to be a lapse in performance. Since the trial defense counsel's lapse prevented appellant from receiving additional credit against the adjudged sentence, the deficiency prejudiced the appellant. The appellant has requested that we award him 3-for-1 credit for each day in pretrial confinement or 1,190 days. This far exceeds the degree of suffering experienced by the appellant. We note that the appellant wisely did not assert that he was subjected to temperature extremes every day he was in jail in Georgia from January through August. Additionally, there is no evidence that he was taken to base wearing prisoner clothing on a frequent basis. In fact, the entire record indicates that the appellant was left in the county jail for long periods of time. The conditions experienced by the appellant entitle him to a minimum level of *Suzuki* credit. Accordingly, we credit the appellant with 142 days of illegal pretrial confinement credit.

Conclusion

The findings, with the exception of Additional Charge I, are correct in law and fact and no error prejudicial to the substantial rights of the appellant was committed. Additional Charge I and its Specification are set aside. The sentence, as reassessed to a dishonorable discharge, confinement for 11 years and 4 months, and reduction to E-1, is appropriate. Additionally, the appellant should receive 142 days of credit against his sentence to confinement. The approved findings, as modified, and the sentence, as reassessed, 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 findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

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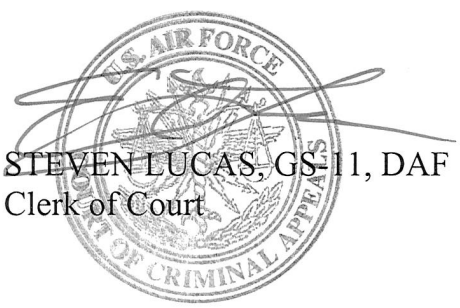

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