UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JASON M. MILES
United States Air Force

ACM 37096

20 October 2008

Sentence adjudged 06 August 2007 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Jennifer A. Whittier (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major Shannon A. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Lieutenant Colonel John P. Taitt.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of indecent acts with a child under the age of 16 and one specification of taking indecent liberties with a child under the age of 16, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a dishonorable discharge, confinement for four years, and reduction to E-1.[1]

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[1] Mandatory forfeitures were waived by the convening authority.

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the appellant received ineffective assistance of counsel when the defense counsel failed to request an inquiry into the appellant's mental capacity or mental responsibility under Rule for Courts-Martial 706 and failed to explore whether the appellant had an inability to control his impulses. We find that counsel was not ineffective, and affirm.

Background

The appellant providently pled guilty to sexually abusing the six-year old daughter of a co-worker by inserting his finger into her vagina, placing his mouth upon her breast, and exposing his penis to her. The appellant explained his actions to the military judge and stated that there was no legal or medical justification for his actions. Further, the appellant stated his counsel was competent, he was satisfied with their representation, and that no one had forced him to plead guilty. In his submission of clemency matters, the appellant accepted "sole responsibility for [his] present confinement" and stated he was aware his "crimes were very serious, and that [he] truly believe[s] that [he] deserve[s] to be punished for them."

In his affidavit submitted on appeal, the appellant claims he requested that his counsel look into whether his mental illness and inability to control his impulses could be used as a defense. He alleges that his defense counsel never told him about the option of requesting a sanity board. The appellant believes, based upon his diagnosis of Attention Deficit Disorder (ADD), he suffered from such a severe mental disease or defect at the time of his offenses that he was unable to appreciate the nature and quality or wrongfulness of his actions. One thing the appellant fails to mention in his affidavit is that at the request of the defense counsel, Dr. Rex Frank, a noted forensic psychologist, was appointed as an expert consultant.[2]

Ineffective Assistance of Counsel

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 (1984). Counsel are presumed to be competent, and the appellate courts will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993). Where a lapse in judgment or performance is alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United*

[2] Affidavits were submitted by both of the trial defense counsel.

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). Because the appellant raised this issue by submitting a post-trial affidavit, we resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Clearly, the counsel in this case were not ineffective. They obtained and used the services of an expert forensic psychologist as a confidential consultant. Dr. Frank spent time evaluating the appellant prior to trial. This evaluation included reviewing the appellant's records, reviewing a forensic history questionnaire completed by the appellant, and personally interviewing the appellant. Dr. Frank never raised any issues as to the appellant's competence. Further, the appellant specifically told the military judge there was no medical justification or reason for his actions. He acted to gratify his own sexual desires; his actions were intentional and voluntary. This issue is meritless and the appellant has failed to meet his burden.

Conclusion

The approved findings and the 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.

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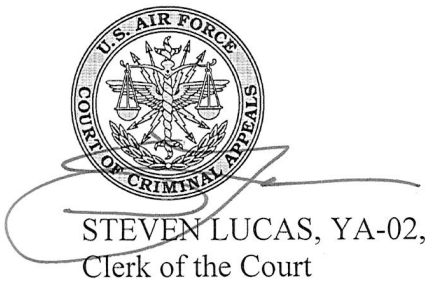

STEVEN LUCAS, YA-02, DAF
Clerk of the Court