UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KERMIT E. MITCHELL
United States Air Force

ACM 36310

22 October 2007

Sentence adjudged 2 December 2004 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Bruce T. Smith (sitting alone) and Joseph Tock (*DuBay* Hearing).

Approved sentence: Dishonorable discharge, confinement for 12 years, forfeiture of all pay and allowances, fine of $1,000.00, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Griffin S. Dunham, Captain Kimberly A. Quedensley, and Joseph W. Kastl, esq.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Steven R. Kaufman, Major Michelle M. Lindo-McCluer, and Captain Jefferson E. McBride.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIUM:

In accordance with his pleas, the appellant was found guilty of attempted larceny, conspiracy to commit the crime of housebreaking, two specifications of possessing marijuana, larceny of military property, nine specifications of larceny of non-military property, and nine specifications of unlawfully entering dwellings with the intent to commit larceny, in violation of Articles 80, 81, 112a, 121, and 130, UCMJ, 10 U.S.C. §§ 880, 881, 912a, 921, 930. The military judge, sitting alone as a general court-martial, sentenced the appellant to a dishonorable discharge, confinement for 13 years, total

forfeitures of all pay and allowances, a fine of $1000.00, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority reduced the confinement to 12 years, but approved the remainder of the sentence. On appeal, the appellant raises five assignments of error.[1] Essentially he argues he was denied effective assistance of counsel, his sentence is inappropriately severe, the military judge erred by considering, in sentencing, a newspaper account of the crimes, and he was prejudiced by being "forced" to wear an improper, "slovenly" uniform that did not display his correct ribbons. Finding no merit in any of the assigned errors, we approve the findings and sentence.

Background

According to the stipulation of fact, the appellant was pending administrative discharge in the summer of 2004 as a result of a command-directed positive urinalysis. While awaiting discharge, the appellant had been removed from his normal duties as a security forces member and assigned to work in the supply section of the security forces squadron. While working there, he stole numerous items, including body armor vests, ballistic inserts for protective vests (designed to stop higher caliber rounds than body armor vests), an advanced combat helmet, a police baton, and gortex parkas and pants. The combined value of the property stolen was over $14,000. According to two sentencing witnesses, the appellant was interested in selling the protective vests to local drug dealers, but never got the chance prior to being apprehended.

Also during the summer of 2004, the appellant met Mr. P, a civilian who was dating Airman First Class (A1C) R, an airman assigned to Seymour Johnson Air Force Base. Because of his relationship with A1C R, Mr. P regularly gained access to the base. Mr. P, according to the stipulation of fact, was "experienced in larcenous criminal activity," and told the appellant there was money to be made in breaking into houses, stealing items, and reselling them. The two then conspired to do just that, and their short-lived crime spree began in earnest.

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[1] The appellant's specific assignments of error are as follows:

> I. Whether appellant's conviction and sentence should be set aside because he was denied effective assistance of counsel guaranteed by the Sixth Amendment and Article 27, UCMJ, 10 U.S.C. § 827. [This issue filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).]
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> II. Whether appellant's sentence is inappropriately severe given the fact that this was a first offense and the disparity of the sentence received by a co-actor.
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> III. Whether appellant's sentence is overly harsh in comparison to published precedent.
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> IV. Whether the military judge impermissibly considered adverse publicity arising from the civilian community.
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> V. Whether the appellant was prejudiced by being forced to appear in an improper, slovenly uniform and without his correct ribbons.

Throughout the month of July, 2004, the partners broke into nine civilian homes in three North Carolina counties, making off with thousands of dollars worth of jewelry, guns, computers, stereo equipment, and a variety of other items. During some of the break-ins, the appellant would act as the driver and lookout. At other times he would join Mr. P in the house and participate in selecting items and carrying them out to the getaway vehicle. The break-ins occurred during the day when the co-conspirators believed the occupants would not be home.[2] During eight of the nine break-ins, this proved to be the case. During their first break-in, however, four children ranging in age from 6 to 15 years of age were present in the home at the time Mr. P kicked in the back door. The children locked themselves in the laundry room of the home when they realized what was happening but Mr. P, wondering what was behind the locked door, kicked it open, too. Upon seeing the children he fled without most of the booty he had assembled and told the appellant what had happened. Despite this close encounter with presumably terrified children, the co-conspirators broke into eight more houses over the next several weeks.

The partners were finally caught when a relative of their final victims noticed their presence near the home, ordered them to leave, and noted the getaway truck's license plate number. The truck had been borrowed from Mr. P's girlfriend, A1C R. When local authorities went to her home they found Mr. P, who implicated the appellant. The appellant was soon apprehended. He had a small amount of marijuana in his possession. Agreeing to cooperate with authorities, he signed a written statement detailing his criminal conduct and consented to searches of his dorm room on base and an off-base storage unit he was renting. Stolen items from both the security forces supply section and the private homes were found during the two searches. Authorities also found a plastic bag containing approximately 70 grams of marijuana in the storage unit. The appellant was subsequently ordered into pretrial confinement where he stayed until his court-martial.

Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2005). In doing so, we employ the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the appellant must demonstrate that his counsel's performance was so deficient that she was not functioning as counsel within the meaning of the Sixth Amendment. Second, the appellant must show that the deficient performance prejudiced his defense. *Id.* Our superior court has adopted the *Strickland* test to military practice, turning it into the following three-part analysis:

[2] The appellant requested and was granted leave from his military duties from Monday to Friday, 12-16 July 2004. Six of the nine break-ins occurred during this period.

1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?

2. If they are true, did the level of advocacy "fall [] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

3. If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).

Our superior court has also stated that it would not "second-guess the strategic or tactical decisions made at trial by defense counsel," *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)), but would inquire further when the logic behind a trial tactic is not so apparent. *See Rivas*, 3 M.J. at 289. As appellate defense counsel correctly points out, the obligation to provide competent representation begins in the pretrial stage and continues through the sentencing and post-trial stages of the court-martial. *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994).

The appellant, pursuant to his *Grostefon* claim of ineffective assistance of counsel, alleged deficiencies in his counsel's performance both prior to and during his court-martial. In his initial assignment of error, he arranged his claims into two broad categories, then provided specific instances of alleged ineffectiveness. His claims were supported by his personal affidavit. He alleged that 1) his trial defense counsel failed to fully and properly prepare for his court-martial to include failing to provide adequate advice to appellant regarding his full range of options; and 2) his trial defense counsel failed to object to both evidence admitted in error and to improper argument by government trial counsel. In response, the government submitted an affidavit from the appellant's trial defense counsel, Capt S, in which she addressed each allegation made by the appellant. Attached to the affidavit were several documents supporting her assertions that the decisions she made during the course of her representation of the appellant were deliberate strategic and tactical decisions made with the appellant's knowledge and understanding, if not his outright consent. Mindful of our superior court's decision in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we determined that a post-trial hearing in accordance with *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967), was necessary to resolve the issues.

Several witnesses testified at the *DuBay* hearing, including the appellant, his mother, the defense counsel who had represented the appellant at his pretrial confinement hearing, and Capt S. Both the appellant and Capt S, without objection from the opposing parties, adopted their previous affidavits as part of their testimony at the hearing. At the

conclusion of the hearing, the military judge made detailed findings of fact. When the hearing transcript was returned to this Court, we allowed both parties to submit additional written arguments.

We have carefully examined the record of trial, all arguments submitted by counsel, the *DuBay* hearing transcript, and the military judge's findings of fact and conclusions of law in regard to the hearing. As we explained in *United States v. Hammer*, 60 M.J. 810, 819 (A.F. Ct. Crim. App. 2004), *aff'd*, 62 M.J. 390 (C.A.A.F. 2005), we review the military judge's *DuBay* hearing findings of fact for clear error. We review de novo whether under those facts the appellant received effective assistance of counsel. *United States v. Burt*, 56 M.J. 261, 264 (C.A.A.F. 2002). In undertaking this task, we apply a strong presumption that counsel was effective. *United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995). Our review must be "highly deferential" so as not to interfere with defense counsel's constitutionally-protected independence. *Strickland*, 466 U.S. at 689. We find no clear error in the military judge's findings of fact regarding the *DuBay* hearing. We rely on his findings in conjunction with our own independent review of the entire record in examining the appellant's claims.

After a complete and careful review, we hold that the appellant did not receive ineffective assistance of counsel. In assessing the appellant's claims in accordance with the 3-part *Polk* analysis, we first find that many of the appellant's allegations are simply not true. *Polk*, 32 M.J. at 153 Of the allegations that are true, or at least have some basis in truth, we find that the trial defense counsel has supported her actions with logical strategic or tactical reasoning, which we, following the precedents set forth by our superior courts, are loathe to second guess. Further, we find no instance where the trial defense counsel's actions fell "measurably below the performance . . . [ordinarily expected] of fallible lawyers." *Id.*

Finally, even if the appellant had met his burden of showing ineffectiveness, we would find no prejudice. Prior to trial defense counsel's representation of the appellant for the crimes charged in his court-martial, the appellant had already completed his crime spree, confessed, and consented to searches that resulted in the recovery of many of the stolen goods. His co-conspirator had already implicated him and presumably would have testified against him during the findings phase of a court-martial (as he did during the sentencing phase). An eyewitness saw him at the final crime scene. Given the amount of evidence against him, we find it extremely likely that any competent attorney would have advised the appellant to seek a deal and plead guilty. Had he ignored that advice, absent gross negligence by the prosecutor, the appellant would have likely been convicted at trial. To paraphrase *Polk*, had the appellant met his burden of showing ineffectiveness, we would find no "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Polk*, 32 M.J. at 153.

Sentence appropriateness

In these assignments of error the appellant essentially argues, in two different ways, that his sentence is inappropriately severe. First, he compares his sentence to that of a "co-actor" (A1C R) who, he claims, received 30 days of confinement and an administrative discharge for her complicity in the crimes. Second, he appends to his brief a list of 19 cases, one more than a half-century old, and argues that these are "representative cases" of proper sentences for crimes similar to those committed by him.

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our superior court, however, has recognized that our sentence review function is highly discretionary, and has not required us to engage in sentence comparison with specific cases "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). The appellant "bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" *Lacy*, 50 M.J. at 288. Finally, our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *Id.* at 287; *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1986).

We have examined the cases purported by the appellant to be "representative" and find that the appellant has not met his burden of showing that they are either closely related or highly disparate. We have also examined the claim that A1C R was a co-actor in the housebreaking scheme but, beyond the appellant's bare assertions, we find no evidence in the record to support the theory that she was "wholly involved with the crimes." She was not present at any of the break-ins and had no involvement with the appellant's decision to steal military property. The record indicates that Mr. P borrowed her truck and used it in commission of the crimes, but there is no indication that she was aware of how her truck was being used. In short, we find that A1C R's offenses, if any, were not similar to those of the appellant, and that A1C R's case was not "closely related" to that of the appellant, at least for the purpose of comparing sentences. After carefully examining the submissions of counsel and taking into account all the facts and circumstances surrounding the crimes to which the appellant pled guilty, we certainly do not find the appellant's sentence inappropriately severe. *Snelling*, 14 M.J. at 268.

The Military Judge's Consideration of the Newspaper Article.

We review a military judge's evidentiary rulings in presentencing proceedings under an abuse of discretion standard. *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001). Military judges have broad discretion to determine whether to admit sentencing evidence under Rule for Courts-Martial 1001. *United States v. Key*, 55 M.J. 537, 539 (A.F. Ct. Crim. App. 2001). Failure to object waives the issue on appeal, absent plain error. *United States v. Craze*, 56 M.J. 777, 778 (A.F. Ct. Crim. App. 2002).

We find no error, plain or otherwise, in the military judge's decision to admit a descriptive newspaper article describing the arrests of the appellant and Mr. P. The short article from a local civilian newspaper briefly described the crimes and announced the arrests of the two suspects. We find nothing overly inflammatory about the article and find it to be proper evidence in aggravation. We further note that according to trial defense counsel's declaration, which was incorporated into her testimony at the *DuBay* hearing, the decision to not object to the admission of the newspaper article was a tactical one. Trial defense counsel states that she and the appellant agreed not to object to the article in exchange for trial counsel's agreement to forego live testimony by six local witnesses. Additionally, as this was a judge alone trial, we presume the military judge considered the article only for its proper purposes in sentencing and was not improperly inflamed by its content. *See United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994) (military judges are presumed to know the law and to act according to it). Thus, even assuming *arguendo* the decision to admit the article was erroneous, we would find no material prejudice to a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

The Appellant's Appearance at Trial

In his final assignment of error, the appellant claims that he was prejudiced by "being forced to appear in an improper, slovenly uniform and without his correct ribbons." The record reflects some disagreement over the exact appearance of the appellant's uniform at trial and the ribbons that he was entitled to wear. The military judge took note of the uniform problem, ascertained the trial defense counsel exercised due diligence in attempting to correct it, and then stated for the record that he would not hold the uniform deficiencies against the appellant. A remedy fashioned by a military judge is reviewed for an abuse of discretion. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

We find the military judge's remedy in this case – a clear statement that he would not hold the uniform deficiencies against the appellant – to be a remedy within his discretion and see no reason to doubt that the military judge was true to his word. Further, we find the appellant did not object to this remedy at trial and, there being no plain error, waived the issue. Finally, we reject the appellant's apparent attempt to

absolve himself of all responsibility in regard to procuring and maintaining his own uniform. While we are sympathetic to the difficulties presented to a pretrial confinee and his trial defense counsel in assembling a uniform for court-martial, we note that all Air Force members are responsible for procuring and maintaining their own uniforms.[3] The appellant's apparent attempt to place the entire burden of purchasing uniform items and paying for dry cleaning upon his unit and his trial defense counsel is contrary to the applicable Air Force Instruction and not supported by case-law. An appellant's unit, especially in the case of preparing pretrial detainees for courts-martial, must make every reasonable effort to ensure those detainees are properly attired for trial, but the military members themselves, usually long before accusations arise, bear the initial responsibility of procuring the proper accouterments and maintaining the uniform in a presentable condition.

Conclusion

The 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, GS-11, DAF
Clerk of the Court

[3] Air Force Instruction 36-2903, *Dress and Appearance of Air Force Personnel* (29 Sep 2002) instructs airmen to procure and maintain their uniforms at Chapter 1, Table 1.2.