UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GEORGE L. MOORE
United States Air Force

ACM S31502 (rem)

21 July 2010

Sentence adjudged 22 May 2008 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Le T. Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Major Marla J. Gillman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Megan E. Middleton, Captain Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial found him guilty of a single use of alprazolam,[1] a Schedule IV controlled substance, divers uses of marijuana, and larceny of over $500 in cash from a fellow airman, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a, 921. The

[1] Alprazolam is an anti-anxiety medication sold under the brand name Xanax.

adjudged and approved sentence consists of a bad-conduct discharge, confinement for five months, and reduction to E-1.

This case is before our Court for the second time. During his original appeal, the only issue raised by the appellant was whether his trial defense counsel was ineffective when he failed to object to the admission of two prosecution sentencing exhibits and failed to present evidence of rehabilitative potential. In *United States v. Moore*, 67 M.J. 753 (A.F. Ct. Crim. App. 2009), this Court denied the appellant's claim of ineffective assistance, but found the military judge committed plain error in admitting two prosecution sentencing exhibits and reassessed the sentence. Our superior court granted review, found no plain error, reversed this Court's decision, and returned the record of trial to The Judge Advocate General for remand to this Court for a new review under Article 66, UCMJ, 10 U.S.C. § 866. *United States v. Moore*, 68 M.J. 491 (C.A.A.F. 2010).

No additional assignments of error have been filed by the appellant. Finding no prejudicial error, we affirm.

Background

During his guilty plea inquiry, the appellant admitted to using marijuana on three separate occasions between 28 December 2007 and 7 February 2008. These admissions were consistent with the charged offense that he used marijuana on divers occasions between 4 December 2007 and 8 February 2008.

After the findings were announced, the prosecution offered several sentencing exhibits under Rule for Courts-Martial (R.C.M.) 1001(b). The trial defense counsel objected to two of the exhibits, contending they did not amount to proper aggravation evidence under R.C.M. 1001(b)(4). Agreeing with the trial defense counsel's objection, the military judge excluded the two contested exhibits but admitted the uncontested exhibits. Included in the uncontested exhibits were two reports from the Dover Air Force Base Drug Demand Reduction Program, showing the appellant tested positive for marijuana based upon random urinalyses conducted on 18 March 2008 and 6 May 2008, after the charged period of drug use. In both cases, the introduced documents were the reports from the drug testing staff and were not accompanied by any disciplinary paperwork from the unit to suggest the appellant was ever made aware of the test results or to suggest they were a part of his personnel records.

Law and Analysis

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Servicemembers 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). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was deficient and, if so, (2) whether the 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 bears the heavy 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). The law presumes counsel to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *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)). To prevail on a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (internal citation omitted). The counsel's function is to make the adversarial process work in a particular case in accordance with prevailing professional norms. *Id*. "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

We reject the appellant's claim that his trial defense counsel was ineffective for failing to object to the two prosecution exhibits and for failing to present any evidence of his rehabilitative potential. As the trial defense counsel states in the affidavit he submitted, he considered whether the prosecution exhibits detailing additional drug use were admissible and determined they were admissible under a continued course of action. The appellant has failed to show that his defense counsel's reasoning and subsequent decision were deficient. Further, even if this was deficient conduct, the appellant has failed to show that he was prejudiced by it. On the issue of rehabilitative potential, we note the appellant still offers no evidence to suggest that he had rehabilitative potential. At the time of trial, he had just over one year of service, much of which was marred by the charged offenses. It is hardly unusual that his sentencing case was minimal. The appellant has the burden of showing his counsel's conduct was defective. *Garcia*, 59 M.J. at 450; *McConnell*, 55 M.J. at 482. He has not met this burden on his claim of an inadequate sentencing hearing.

Conclusion

Upon further review, the approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] 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.

JACKSON, Senior Judge, and THOMPSON, Judge, participated in the decision of this Court prior to their reassignment on 15 July 2010 and 11 June 2010, respectively.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[2] Although not affecting the legal sufficiency of the case, the promulgating order incorrectly identifies the military judge as Lieutenant Colonel (then Major) Thomas Dukes. We hereby order the promulgation of a corrected order.