UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JASON E. NEAL
United States Air Force

ACM 37195

12 March 2009

Sentence adjudged 06 February 2008 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: Christopher A. Santoro (sitting alone).

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

Appellate Counsel for the Appellant: Lieutenant Colonel Frank R. Levi and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

PER CURIAM:

The appellant was tried at RAF Mildenhall, United Kingdom before a military judge alone. Consistent with his pleas he was convicted of use of marijuana on divers occasions, possession of marijuana and drug paraphernalia, and obstruction of justice, in violation of the UCMJ, Articles 112a and 134, 10 U.S.C. §§ 912a, 934. The approved sentence consisted of a bad-conduct discharge, confinement for five months, and reduction to E-1.

On appeal the appellant claims his two trial defense counsel were ineffective. The appellant's claims are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.

1982). Having reviewed the appellant's brief, his declaration to this Court, and the other documents provided to the Court, we find the claim of ineffective assistance to be completely without merit and grant no relief.

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. It is well established that the appellate court 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 there is a lapse in judgment or performance alleged, we ask first whether the conduct of the 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) (citing *United States v. McGillis*, 27 M.J. 462 (C.M.A. 1988)). 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).

The appellant and his trial defense counsel have submitted affidavits on this issue and therefore we will decide this issue under the guidance of *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). *Ginn* provides, in particular, that when a claim of "ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id.* at 248. The appellant has failed to do so. In his affidavit the appellant contends he is innocent of the charges and his trial defense counsel forced him into agreeing to a pretrial agreement (PTA) and a false stipulation of fact. He also alleges his trial defense counsel withheld "numerous key pieces of information and documentation which if provided would have resulted in Appellant pleading not guilty."

The appellant's record of trial is replete with evidence contradicting his new claims of innocence. During the trial, the appellant repeatedly made assurances to the judge, under oath, that he was in fact guilty of the offenses and that he voluntarily entered into his PTA and the stipulation of fact. Even today, he does not dispute that his urinalysis was positive for marijuana or that both drug paraphernalia and a small quantity of marijuana were found in his bedroom. He simply attempts, through his submission, to litigate the weaknesses in the government's search warrant. It was these very weaknesses

that his counsel used to obtain a PTA which included a provision to drop the drug distribution charge, clearly an important win for the appellant and his counsel.

Finally, the appellant claims he was denied key pieces of information, specifically, that the search warrant and affidavit were not provided to him in a timely manner. However, the record indicates that the appellant had this information prior to his Article 32 hearing and three months prior to trial. The appellant's attempts to suggest this affected his plea are simply without merit. Considering all of the above, we find the appellant has failed to meet his burden with regards to his claim of ineffective assistance of counsel.

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, 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.

Judge THOMPSON did not participate.

OFFICIAL

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