UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class FARDERAKA P. NEAL
United States Air Force

ACM 37334

10 July 2009

Sentence adjudged 12 October 2007 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with her pleas, a military judge sitting as a general court-martial convicted the appellant of one specification of aggravated assault in which grievous bodily harm is intentionally inflicted, one specification of conspiracy to commit an aggravated assault with a dangerous weapon, one specification of making a false official statement, three specifications of obstruction of justice, and one specification of reckless endangerment, in violation of Articles 128, 81, 107, and 134, UCMJ, 10 U.S.C. §§ 928, 881, 907, 934. The military judge sentenced the appellant to a dishonorable discharge, 17 years confinement, total forfeiture of pay and allowances, and a reduction to the grade of

E-1. The convening authority approved the dishonorable discharge, 10 years confinement, the total forfeitures, and the reduction to the grade of E-1.[1]

On appeal, the appellant asks the court to set aside the sentence and order a rehearing, reduce her confinement, or grant other appropriate relief. The basis for her request is that she opines: (1) she was denied effective assistance of counsel by her trial defense counsel's failure to allow her the opportunity to view, and failure to admit during the sentencing portion of trial, surveillance tapes of the incident which contained potentially mitigating evidence; and (2) her sentence to 17 years confinement, when compared to that received by her co-actor, is inappropriately severe.[2] Finding no prejudicial error, we affirm the findings and the sentence.

Background

On 28 May 2007, the appellant drove a friend to confront an individual who had accused the friend of having an affair with the individual's fiancée. While enroute to the individual's apartment, the appellant picked up Airman (Amn) TA, a friend who had expressed concern for the appellant's safety. Amn TA loaded a 9 millimeter handgun after entering the appellant's vehicle, and they proceeded to the individual's apartment. As the appellant approached the individual's apartment, Amn TA spotted Senior Airman (SrA) TM, an individual he disliked. Amn TA told the appellant that he was going to shoot SrA TM and asked the appellant to drive toward SrA TM. The appellant complied and as they approached SrA TM, Amn TA fired six shots, one of which struck SrA TM in the leg.

The appellant sped off and dropped Amn TA near his apartment. She then called another friend and hid her vehicle at the friend's apartment. The local police initiated an investigation into the shooting and determined that the appellant's vehicle was used in the shooting. The appellant's supervisor called the appellant, inquired about her whereabouts, and asked the appellant if she was driving her vehicle. The appellant lied and informed her supervisor that she had a flat tire while out of town, had left her vehicle, and had not returned to retrieve it. Her supervisor directed her to return to base. Upon her arrival, agents with the Air Force Office of Special Investigations apprehended the appellant and turned her over to local authorities. The local authorities transported the appellant to their office for an interview and, after a proper rights advisement, the appellant waived her rights and agreed to answer questions. The appellant initially identified someone other than Amn TA as the shooter and later informed the local

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[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority, inter alia, not to approve confinement in excess of 10 years.

[2] These issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The appellant's co-actor was found guilty of essentially similar offenses and his adjudged and approved sentence consisted of a dishonorable discharge, 15 years confinement, total forfeiture of pay and allowances, and a reduction to the grade of E-1.

authorities that she had seen the gun before the shooting but did not know that Amn TA had the gun or that he was going to shoot it.

Discussion

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)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent and we will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

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). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient and, if so, (2) whether 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 government, in its response to the appellant's brief, submitted a post-trial affidavit from Captain MG, the appellant's military trial defense counsel. In her affidavit, Captain MG avers that she reviewed the surveillance tapes and believed the tapes did not have "sufficient information that would be beneficial to the [appellant's] case strategy or contain mitigating information." Presumably, this is the reason she chose not to admit the tapes into evidence and we will not second guess her tactical and strategic decisions.

Moreover, assuming that Captain MG did not provide the appellant an opportunity to review the tapes and assuming such conduct was deficient, the appellant still would not be entitled to relief because we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695. On this point, the appellant has fallen short. There has simply been no evidence put forth that the tapes contained information that would have been of assistance to the appellant during the trial.

Inappropriately Severe Sentence

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of her offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Moreover, while we are required to examine sentence disparities in closely related cases, we are not required to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006).

Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to [her] case and that the sentences are '*highly disparate*.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.* (emphasis added).

Without question, Amn TA was the appellant's co-actor in the crimes committed against SrA TM. As such, Amn TA's case is "closely related" to the appellant's case. However, the fact that the appellant's adjudged confinement consisted of 17 years and Amn TA's adjudged confinement consisted of 15 years does not mean the sentences are highly disparate. The test in determining whether sentences are highly disparate "is not limited to a narrow comparison of the relative numerical values of the sentences at issue." *Id.* at 289. Rather, the test may include consideration of the disparity as it relates to the potential maximum punishment. *Id.*

Here the appellant faced 39 years of confinement for her crimes, while her co-actor faced a maximum of only 29 years of confinement.[3] In both cases, their adjudged sentences to confinement were but a fraction of the maximum confinement they faced—43.5% and 51.7% respectively. Moreover, because of her pretrial agreement, the appellant's approved sentence of confinement is five years *less* than the sentence of confinement she alleges is highly disparate. While the sentences are disparate, under such circumstances they are not highly disparate. We next consider whether the

[3] The military judge found a number of the co-actor's obstruction of justice specifications to be multiplicious for sentencing purposes, thereby reducing the maximum period of confinement to 29 years.

appellant's sentence was appropriate judged by an "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offenses and the character of the accused." *Snelling*, 14 M.J. at 268. After carefully reviewing the entire record of trial, we find the appellant's adjudged and approved sentence appropriate.

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 the sentence are

AFFIRMED.

OFFICIAL

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