UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant HEATHER L. OGLETREE
United States Air Force

ACM 37168

12 March 2009

Sentence adjudged 11 December 2007 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Charles E. Wiedie, Jr.

Approved sentence: Dismissal.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Major Shannon A. Bennett, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Michael T. Rakowski.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to her pleas, a military judge found the appellant guilty of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sitting as a general court-martial sentenced the appellant to a dismissal. The convening authority approved the sentence. On appeal, the appellant asks this Court to set aside the findings and the sentence, order a rehearing, order new post-trial processing, or grant other appropriate relief. The basis for her request is: (1) trial

defense counsel were ineffective and (2) she lacked the mental responsibility for the offense and the mental capacity to stand trial.[1] Finding no error, we affirm.

Background

On 26 May 2007, the appellant's husband threw a birthday party for the appellant at their residence. During the party, the appellant drank copious amounts of alcohol. The next morning she awoke and her husband told her that on the night of the party she had snorted a white powder he believed was cocaine. On 31 May 2007, the appellant was randomly selected for a urinalysis. The appellant submitted a urine sample, the sample was sent to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for cocaine. On 12 June 2007, Air Force Office of Special Investigation (AFOSI) agents summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived her rights and provided a written statement where she admitted her husband told her that on the night in question, "[a] guy had a metal object with white powder on it and I breathed it in like snuff. The white powder was cocaine."

Ineffective Assistance of Counsel

Without question, 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)). Counsel are presumed to be competent, and we will not play "Monday Morning Quarterback" and 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 her trial defense counsel were 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). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). 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 appellant submitted a post-trial affidavit wherein she asserts she did not knowingly and voluntarily plead guilty, she waived clemency because her counsel told her she would face jail time because that would be a lesser punishment than a dismissal, and her trial defense counsel were ineffective because they failed to: (a) challenge the admissibility of her statement to AFOSI agents; (b) investigate her mental state and

[1] The assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

request a sanity board; (c) interview her husband; (d) challenge her drug testing results; (e) raise the lack of mental responsibility and the lack of mental capacity at trial; (f) call live witnesses during the sentencing portion of trial; and (g) inform her of the consequences of her decisions.

In response to the appellant's assertions, the government submitted two post-trial affidavits, one each from Major ME and Captain KP, the appellant's trial defense counsel. Captain KP stated that neither counsel advised the appellant against submitting clemency. With respect to the appellant's AFOSI statement, Major ME stated the appellant informed him that she understood her rights prior to giving her statement to the AFOSI agents and that her statement was voluntary and true. Concerning the appellant's mental state, both counsel stated that there was no evidence from their review of the case and their interaction with the appellant, the appellant's co-workers, and the appellant's supervisor, which caused them to question the appellant's mental responsibility and mental capacity. They thus did not believe mental responsibility was an issue or that a sanity board was warranted.

Both also stated that Captain KP interviewed the appellant's husband and that based on that interview, a tactical decision was made to not call the appellant's husband as a witness because doing so would hurt the appellant's case. With respect to the appellant's urinalysis test results, neither counsel made reference to their failure to contest the appellant's urinalysis test results. However, both counsel stated they discussed possible defenses with the appellant, and the appellant informed them that she wanted to plead guilty as a sign of accepting responsibility for her actions and to possibly mitigate her sentence. Both also averred they called at least one live sentencing witness during the sentencing portion of trial and the record of trial supports their claims. Lastly, both Major ME and Captain KP assert they informed the appellant of the consequences of pleading guilty.

With respect to the appellant's assertions that she did not knowingly and voluntarily plead guilty, we find otherwise. The appellant's *Care*[2] inquiry, wherein she stated she was pleading guilty voluntarily and of her own free will, and her unsworn statement, wherein she told the members "I've also known for a while that I was going to plead guilty at this court-martial and accept responsibility," belie any notion that she did not knowingly and voluntarily plead guilty.

Concerning the appellant's assertions that her trial defense counsel were ineffective because they failed to challenge the admissibility of her AFOSI statement and her urinalysis test results, we find that her trial defense counsel made a tactical and strategic decision not to challenge the admissibility of the appellant's AFOSI statement and her urinalysis test results. Their decision was based, in part, on the appellant's

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

intention to plead guilty, the voluntariness and stated truth of her AFOSI statement, and a lack of viable defenses to confront the appellant's knowing use of cocaine. In short, we will not second guess their tactical and strategic decision.

With respect to trial defense counsel's failure to investigate the appellant's mental state, request a sanity board, or otherwise raise a lack of mental responsibility or a lack of mental capacity at trial, we note that an accused is presumed to be mentally responsible and mentally competent, and bears the burden of establishing a lack of mental responsibility or a lack of mental capacity by clear and convincing evidence and by a preponderance of the evidence respectively. Rule for Courts-Martial (R.C.M.) 916(k)(3)(A) and its Discussion; R.C.M. 909(b), 909(e)(2). Moreover, the record is devoid of any evidence that calls into question the appellant's mental responsibility and mental capacity. Therefore, the appellant's trial defense counsel had no reason to question the appellant's mental state at the time of the offense and trial and no reason to request a sanity board.

In the case *sub judice*, the affidavits conflict on four issues. Whether trial defense counsel: (1) advised the appellant not to submit clemency; (2) interviewed the appellant's husband; (3) called a live witness during the sentencing portion of trial; and (4) informed the appellant of the consequences of her decisions. When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing unless the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, then we may reject the claim. *United States v. Ginn*, 47 M.J. 236, 244, 248 (C.A.A.F. 1997).

Additionally, if the record as a whole "compellingly demonstrate[s]" the improbability of the asserted facts, we may discount the asserted facts and decide the legal issue. *Id.* at 248. Lastly, when the claim contradicts a matter that is within the record of the guilty plea, we may decide the issue on the basis of the appellate file and record unless the appellant sets forth facts that would rationally explain why she would have made such statements at trial but not upon appeal. *Id.*

While there is a conflict in the affidavits as to whether trial defense counsel advised the appellant not to submit clemency, we can resolve this conflict without resort to a post-trial hearing. Assuming trial defense counsel was deficient in advising the appellant not to submit clemency, the appellant has failed to show what she would have submitted in the form of clemency or to sufficiently demonstrate that her clemency matters would have convinced the convening authority to approve a lesser sentence. Put simply, we find that even if trial defense counsel had advised the appellant not to submit clemency matters, the error would have been harmless and would not have resulted in relief. *United States v. Ginn*, 47 M.J. 236, 244, 248 (C.A.A.F. 1997).

It is without legal consequence whether trial defense counsel interviewed the appellant's husband. First, the appellant's stated intention early on, at least according to her unsworn statement, was to accept responsibility for her actions by pleading guilty. Under such circumstances, her husband's testimony would have been of little benefit—especially in light of the appellant's AFOSI statement and her positive urinalysis test results. Second, assuming the appellant was not going to plead guilty, she has not shown what an interview with her husband would have disclosed or how his potential testimony would have benefitted her.

With respect to the third disputed issue, the record compellingly demonstrates that contrary to the appellant's assertions, Major ME and Captain KP called a live witness, the appellant's uncle, during the sentencing portion of trial. Thus, we dispense with this issue adversely to the appellant.

Lastly, the record compellingly demonstrates trial defense counsel informed the appellant of the consequences of her decisions. One need only examine the appellant's: (1) pretrial advisement of rights; (2) statement of client rights at trial; (3) statement of decisions; and (4) post-trial appellate rights to reach this conclusion. Additionally, during the trial, the appellant advised the military judge that she received the full benefit of her counsel's advice and had no questions. Moreover, we also note that the military judge, in his *Care* inquiry, advised the appellant of the consequences of her guilty plea and the maximum punishment she faced as a result thereof. After such advice, the appellant cannot reasonably claim she did not understand the consequences of her decisions.

In the final analysis, Major ME and Captain KP were not deficient. Furthermore, assuming trial defense counsel were deficient in their conduct, 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 687. Here, the appellant offers nothing, and under the aforementioned facts, we find no prejudice.

Lack of Mental Responsibility and Mental Capacity

As previously mentioned the appellant was presumed to be mentally responsible and mentally competent and bears the burden of establishing the lack of mental responsibility and lack of mental capacity by clear and convincing evidence and by a preponderance of the evidence respectively. In this regard she has woefully failed. Additionally, the record is devoid of any evidence that calls into question the appellant's mental responsibility and mental capacity. Lastly, during her *Care* inquiry, the appellant testified that she knowingly and consciously used cocaine. Under the facts of this case we refuse to find a lack of mental responsibility and lack of mental capacity.

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.

OFFICIAL

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