UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JOHN S. PACE
United States Air Force

ACM 36222

31 August 2006

Sentence adjudged 11 January 2005 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

MOODY, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant pled guilty to one specification of rape of a child under 16 years of age, one specification of indecent acts with that same child, and one specification of assault consummated by battery on a second child, in violation of Articles 120, 134, and 128, UCMJ, 10 U.S.C. §§ 920, 934, 928. A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, and sentenced him to a dishonorable discharge, confinement for 14 years, and reduction to E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant claims that his trial defense

counsel were ineffective, and asserts that his sentence is inappropriately severe.[1] Finding no error, we affirm.

Competence of Counsel

The appellant claims his trial defense counsel were ineffective because they allowed the prosecution to introduce, without objection, evidence that hundreds of pornographic images depicting children were seized from the appellant's home computer.[2] The appellant claims the images were damaging and prejudiced his defense, giving the trial counsel a springboard from which to suggest that the appellant was a "predator" who deserved a lengthy sentence. The appellant further claims his counsel did not merely acquiesce in the admission of evidence concerning the images, but actually signed off on them in a stipulation of fact. The appellant claims this behavior "fell below eth [*sic*] standards of military attorneys," and argues there "is no reasonable explanation for counsel's actions in allowing evidence of this nature. . . ."

We review the appellant's claims de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). Trial defense counsel are presumed to be competent, and the appellant bears the burden of overcoming that presumption. *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citing *United States v. Scott*, 24 M.J. 186,188 (C.M.A. 1987)). In evaluating the competence of counsel, we focus on three issues: first, whether the appellant's allegations regarding his counsel's actions are true, and, if so, whether there is a reasonable explanation for those actions; second, whether the complained of actions fell measurably below the performance ordinarily expected of fallible lawyers; and third, whether there is a reasonable probability that, absent the error, there would have been a different result in the appellant's case. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Our review of the record satisfies us that the appellant's claims do not survive the first prong of this test. Although his trial defense counsel did indeed permit the trial counsel to offer evidence of the appellant's uncharged misconduct, and in fact actually stipulated to its admission, the appellant's claims fail on the question of whether there was a reasonable explanation for their actions. Despite the appellant's insistence that there "is no tactical reason why defense counsel would allow this evidence to be entered," there is in fact an obvious reason: it was required by the terms of the appellant's pretrial agreement (PTA). The appellant agreed, in exchange for a limit on his possible term of confinement, to include

[1] The latter issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Although the appellant was at one time charged with possession of child pornography, that Charge and its Specification were withdrawn prior to sentencing.

evidence concerning the withdrawn child pornography specification in a stipulation of fact.

At trial, the appellant acknowledged his understanding and agreement that, although the images amounted to evidence of uncharged misconduct, the military judge could use them in arriving at a sentence. He informed the military judge that he knew his PTA required him to agree to the admission of such evidence. Had the appellant failed to fully comply, the PTA contained a clause allowing the government to withdraw from the deal, leaving the appellant with no protection against a maximum sentence that could have included confinement for life without the possibility of parole.[3]

We find that the terms of the PTA reasonably explain the trial defense team's actions.[4] The appellant and his trial defense counsel made a tactical decision to allow the evidence in exchange for a cap on his sentence. We do not ordinarily second-guess the strategic or tactical decisions of counsel, and see no reason to do so here. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Even were we otherwise inclined, we would conclude that the sentence limitation negotiated for the appellant -- confinement for no more than 15 years -- was substantial, and find nothing unreasonable in the trade-off required by the PTA to obtain that limit. *Cf. United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977). The appellant has failed to overcome his counsel's presumption of competence. *McConnell*, 55 M.J. at 482.

Sentence Severity

We next consider the appellant's assertion that his sentence is inappropriately severe. We consider such claims in light of the entire record, including the nature of the appellant's offenses and his character. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). That record is, on the whole, a troubling one.

The appellant, a 37-year-old non-commissioned officer, began molesting his youngest victim, AD, when she was only 11 years of age. The appellant's assaults on EG, who was at the time 13 years old, were not as extensive, but were egregious nonetheless: on several occasions, he touched EG inappropriately, putting his hands inside her shirt, pants, and underwear -- on at least two

[3] *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45e (2005 ed.); Rule for Courts-Martial 1004(e). The provisions of the 2002 edition of the *MCM*, in effect at the time of the appellant's court-martial, were substantially identical.

[4] Remarkably, there is no mention whatsoever of this provision in the appellant's brief to this Court, despite its obvious relevance to this assignment of error. While we do not hold this omission against the appellant in any way, we remind counsel at all levels of their obligation to exercise candor before their respective courts.

occasions, while in the presence of other children. Although the appellant reduced AD to tears after the first incident, and EG yelled at him and ran away after he touched her, the appellant persisted in his misconduct. While professing at trial not to blame his victims, the appellant told the military judge that AD was "particularly affectionate toward me," and "seemed like she was coming on to me." He described himself as "very passive" and opined that he "just *let things* get worse." (emphasis added.)

AD described the appellant's repeated acts of molestation in far more harrowing terms. The appellant not only took advantage of his parental authority[5] to secure her silence and acquiescence, he also used physical force when he raped AD shortly after her twelfth birthday. The appellant grabbed AD, pushed her down when she tried to get away, and, despite her entreaties to stop, inserted his penis into her. He told her "You're about to have an orgasm" and to "shut up." Not until she "screeched" because of the pain and kicked him did the appellant relent, and even then only after he apparently ejaculated. AD testified about how, after the rape, she had trouble sleeping, threw up repeatedly, and experienced nightmares about being raped again. Shortly before trial, she cut her wrists with a pair of scissors.

We are mindful of the appellant's many years of service, but we cannot say, considering the record in its entirety, that the appellant received any more punishment than he deserved. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We find this assignment of error without merit.

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 findings and sentence are

AFFIRMED.

Senior Judge MOODY participated in this decision prior to his retirement.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[5] The appellant was, at the time of the offenses, foster father to both AD and EG.