UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant DOUGLAS L. PAGE, JR.
United States Air Force

ACM 37612

25 August 2011

Sentence adjudged 15 December 2009 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Michael J. O'Sullivan (sitting alone).

Approved sentence: Dismissal, confinement for 2 months, a fine of $1000, forfeiture of $2000 pay per month for 2 months, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Charles G. Warren; Major Scott C. Jansen; and Mr. Gerald R. Bruce, Esquire.

Before

ORR, ROAN and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

Consistent with his pleas, a general court-martial composed of a military judge convicted the appellant of one specification of making a false official statement and two specifications of larceny of a value less than $500, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. The adjudged sentence consists of a dismissal, confinement for 2 months, forfeiture of $2000 pay per month for 2 months, a fine of $1000, and a reprimand. The convening authority approved the findings and sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982),

the appellant raises one issue for our consideration: whether his trial defense counsel were ineffective by providing misleading advice concerning the collateral consequences of his guilty plea. Having reviewed the record of trial, briefs from both sides and accompanying documents, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

The appellant pled guilty to two specifications of larceny, based on two separate incidents at the Lackland Air Force Base Exchange, where he manipulated price tags on golf equipment and then purchased the equipment at less than its actual price. The appellant's 14-year-old son also participated in these incidents with him. Their criminal activity was recorded on closed-circuit television. The appellant also pled guilty to signing a false official statement about his involvement in this conduct.

At the time of these offenses and his conviction, the appellant served as an emergency room nurse at Wilford Hall. On appeal, he contends that his trial defense counsel provided misleading advice about the consequences of a guilty plea on his future employment as a registered nurse.

Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims 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)). 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 by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Davis*, 60 M.J. at 473 (analyzing (1) whether the trial defense counsel's conduct was deficient and, if so, (2) whether the counsel's deficient conduct prejudiced the appellant). Our superior court has applied the *Strickland* test by answering three basic questions:

> (1) "Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?"; (2) If the allegations are true, "did the level of advocacy 'fall[ ] measurably below the performance . . . [ordinarily expected] of fallible lawyers?'"; and (3) "If ineffective assistance of counsel is found to exist, 'is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?'"

United States v. Miller, 63 M.J. 452, 456 (C.A.A.F. 2006).

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, 409-10 (C.M.A. 1993) (citing *Strickland*, 466 U.S. at 689; *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).

Affirmative misrepresentations or false assurances by counsel about significant collateral consequences of a conviction may constitute ineffective assistance of counsel. *Padilla v. Kentucky,* 130 S.Ct. 1473, 1484-1485 (2010); *Miller*, 63 M.J. at 458. For prejudice to result from faulty advice regarding a collateral consequence of a guilty plea, the law requires that the issue be "a significant factor in deciding how to plead." *Denedo v. United States*, 55 M.J. 114, 129 (C.A.A.F. 2008), *aff'd*, 129 S. Ct. 2213 (2009).

To support his claim, the appellant provided an affidavit asserting that one of his trial defense counsel, Captain (Capt) C, informed him prior to trial that he would suffer no civilian ramifications from a court-martial conviction, that the conviction would not show up on any background investigations (based on his experience in conducting criminal background checks on prior clients), and that it would not affect his ability to be professionally licensed as a nurse. Appellant alleges this conversation occurred in the presence of his senior defense counsel, Major (Maj) Y. After he was released from confinement, the appellant claims he was denied a nursing license by the Georgia Board of Nursing when his court-martial conviction was discovered during a criminal background check. According to the appellant, he would not have pled guilty if he had known his court-martial conviction would adversely impact his future employment.

Both Maj Y and Capt C provided affidavits discussing their involvement in the appellant's case and specifically addressing the appellant's assertion of error. Generally, evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the record as a whole compellingly demonstrates the improbability of the asserted facts or when the affidavit alleges an error that would not result in relief even if the factual dispute was resolved in the appellant's favor. *Id.* Such is the case here. The appellant's assertions are without merit.

Both trial defense counsel deny advising the appellant that his court-martial conviction would not be an issue for future employment or professional licensing. When asked by the appellant prior to trial how a conviction would affect his licensing status, Capt C states that he advised the appellant that he did not know how individual states would view the conviction. He advised the appellant to contact the licensing boards in the states where he intended to seek employment to get information on the matter. Capt C also denies ever telling the appellant that a court-martial conviction would not appear on a criminal record check. Maj Y denies being present for any conversation between Capt C and the appellant on this issue, and states he would have corrected Capt C if he had made the statements alleged by the appellant.

Here, the record as a whole compellingly demonstrates the improbability of the facts being asserted by the appellant. It is improbable that the trial defense counsel would have advised the appellant that his and other clients' court-martial convictions would or did not show up in a criminal background investigation, or that they would advise the appellant that a court-martial conviction would cause him no ramifications in the civilian sector or with his professional licensure. In the defense clemency submission, for example, Capt C noted that the appellant is now forced to seek new employment, and that the harsh economic climate and his court-martial conviction could make that difficult, evincing his recognition that the court-martial conviction will not be invisible to non-military employers.

It is equally implausible that appellant did not understand that a court-martial conviction would have long-term consequences for him. The judge had advised him that his plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. In his unsworn statement, the appellant acknowledged that his conviction and subsequent sentencing would result in a "lifelong punishment." Lastly, it is highly unlikely that the appellant could believe that his conviction for larceny and false statement would be irrelevant to decisions made by licensing boards, and that he could hide the fact of his conviction from licensing boards if, for some reason, the military conviction was not recorded in a way that would be discovered in a background investigation.

We find no basis to conclude that Maj Y's or Capt C's actions fell outside the prevailing norms expected of competent counsel, and we conclude the appellant has not been denied effective 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.

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