UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ELIZABETH A. PUTMAN
United States Air Force

ACM S31546

16 July 2009

Sentence adjudged 26 June 2008 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: Paula McCarron (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, Major Anthony D. Ortiz, and Captain Phillip T. Korman.

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

Before

BRAND, HEIMANN, and HELGET
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with her pleas, of one specification of conspiracy to obstruct justice and one specification of obstruction of justice, in violation of Articles 81 and 134, UCMJ, 10 U.S.C. §§ 881, 934. Her approved sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to E-1.[1]

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[1] A pretrial agreement limited confinement, if adjudged, to no more than 90 days, and provided that any adjudged confinement would be deferred until 60 days after the birth of the appellant's child. However, the convening authority's Action fails to reflect either this deferment provision, which is required by Rule for Courts Martial (R.C.M.) 1107(f)(4)(E), or the place of confinement, which is required by R.C.M. 1107(f)(4)(C). Accordingly, we will return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action and promulgating order. R.C.M. 1107(g).

On appeal, the appellant raises two issues, both concerning the pretrial agreement (PTA) in the case. The first issue is whether the trial defense counsel was ineffective when he failed to object to the trial counsel informing the military judge of the deferment of confinement provision in the PTA.[2] The second issue is whether the military judge erred when she failed to conduct an inquiry with the appellant when the military judge was informed of the deferment provision.

Background

After conducting a thorough plea inquiry, the military judge conducted an inquiry about the PTA. During the inquiry, the military judge asked if there were any provisions in the quantum portion of the agreement other than a limitation on the sentence. The counsel conferred, and then the trial counsel stated there was a "deferment of any potential confinement" provision. At that point, the military judge took a recess. When she came back on the record, the military judge told the parties that she wanted to express, on the record, that what she was told would have no effect on her decision. She further stated she had no knowledge of the sentence limitation and her deliberations would not be affected. The military judge asked if there were any objections and offered counsel the opportunity to voir dire her. Neither counsel objected nor did they voir dire the military judge. The military judge then asked the appellant if she was satisfied with her counsel and the PTA. The appellant told the military judge that she was satisfied.

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). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel is 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 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). Where there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was in fact deficient, and, if so (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

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[2] Both the appellant and the trial defense counsel provided affidavits. We will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Having reviewed the record of trial, the submissions by counsel, and the affidavits, it is clear that the trial defense counsel was not ineffective when he failed to object to the revelation of the deferment provision of the PTA. 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, 694. Assuming the trial defense counsel's conduct was deficient, we find no prejudice.

Pretrial Agreement Inquiry

Interpretations of PTAs are questions of law which are reviewed de novo. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006); *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). In interpreting PTAs, this Court looks to the appellant's understanding of the agreement as reflected in the record as a whole. *Lundy*, 63 M.J. at 301. It is imperative that the accused not only know and understand the agreement's impact on the charges and specifications but also know and understand other terms of the agreement. *United States v. Hunter*, 65 M.J. 399, 403 (C.A.A.F. 2008).

After the military judge was informed of the deferment provision, but prior to deliberations, she informed the parties that her knowledge of that provision would have no effect on her deliberations. Additionally, the military judge asked the appellant if she understood her PTA and if she had had enough time to discuss it with her counsel. The appellant clearly indicated she understood her PTA and had ample opportunity to discuss it with her counsel. Following announcement of the sentence, the military judge inquired further and established again that the appellant understood her PTA and the effect of it on the sentence. This issue is without merit.

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). Therefore, the findings are affirmed. However, because the Action fails to note either that confinement was deferred, as is required by R.C.M. 1107(f)(4)(E), or the place of confinement, as is required by R.C.M. 1107(4)(f)(C), the Action is incorrect. Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action. Further, we order the promulgation of a corrected Court-Martial Order reflecting the correct Action.

Thereafter, Article 66, UCMJ, shall apply.

AFFIRMED.

OFFICIAL

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