UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ROBERT RAMOS
United States Air Force

ACM 35364

10 December 2003

Sentence adjudged 20 August 2002 by GCM convened at Hurlburt Field, Florida. Military Judge: Sharon A. Shaffer.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Andrew S. Williams and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Michael J. Cianci, Jr., and Lieutenant Colonel Lance B. Sigmon.

Before

BRESLIN, MOODY, and BILLETT
Appellate Military Judges

OPINION OF THE COURT

BILLETT, Judge:

A general court-martial convicted the appellant, pursuant to his pleas, of one specification of attempted wrongful possession of 3, 4-methylenedioxymethamphetamine (hereinafter referred to as "ecstacy"), in violation of Article 80, UCMJ, 10 U.S.C. § 880, one specification of wrongful use of ecstacy in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of committing indecent acts with a female under the age of 18 in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence was a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to *United States v. Grostefon*, 12 M.J. 431

(C.M.A. 1982), the appellant contends that he was denied effective assistance of counsel. We disagree and affirm.

I. Ineffective Assistance of Counsel

The appellant maintains that his trial defense counsel was ineffective because he did not warn the appellant that he would have to register as a sex offender once he was convicted of committing indecent acts with an underage female. He now claims that if he had known that he would be required to register as a sex offender, he would not have pled guilty to the offense. Also, the appellant asserts that trial defense counsel should have requested confinement credit against his sentence for the time he spent in a training squadron transition flight while he was awaiting trial. Lastly, he asserts that, during sentencing argument, trial defense counsel did not adequately inform the court members about the strenuous conditions imposed on him while he was in the transition flight.

The ultimate conclusions as to whether trial counsel was ineffective and whether those errors were prejudicial are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997); *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). In determining counsel's ineffectiveness, we have adopted the Supreme Court's test for effectiveness of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as well as the presumption of competence articulated in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (citing *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)). *See also United States v. Gibson*, 46 M.J. 77, 78 (C.A.A.F. 1997). While an accused is entitled to effective assistance of counsel, *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970); *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991), it is equally well established that the Sixth Amendment of the United States Constitution does not guarantee a perfect trial. *United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985) (citing *United States v. Hasting*, 461 U.S. 499, 508 (1983)). The two-pronged test established by the Supreme Court in *Strickland* requires the appellant to show: (1) That his counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment; and (2) That the deficient performance resulted in prejudice to the defense. *Strickland*, 466 U.S. at 677. This requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

A. Advice About Registering as a Sex Offender

The appellant contends that he received ineffective assistance of counsel because he was not forewarned that his conviction for committing indecent acts with a female under 18 would require him to register as a sex offender. We find no merit in this argument.

The appellant has failed to present a factual basis for this claim. Nothing in the record of trial indicates whether the appellant was so advised, and the appellant has not submitted an affidavit on this matter.

Even if the appellant had submitted such an affidavit, we see no merit in this claim. A defense counsel is not required to explain the collateral consequences of a guilty plea to an accused. *See United States v. Berumen*, 24 M.J. 737, 742 (A.C.M.R. 1987); *Goodall v. United States*, 759 A.2d 1077, 1081 (D.C. 2000); Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002). Sex offender registration requirements are "more properly characterized as a collateral consequence of conviction." *Leslie v. Randle*, 296 F.3d 518, 522 (6th Cir. 2002) (quoting *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998)). The appellant has failed to assert a basis for deficient performance by his defense counsel.

In light of all the circumstances, including the appellant's detailed confession pretrial, we are convinced the appellant's decision to plead guilty was based upon the strength of the government's case and not upon any misunderstanding as to the consequences of his plea.

B. Request for Pretrial Confinement Credit

The appellant argues that his trial attorney should have requested that he receive pretrial confinement credit for the time he spent in the transitional flight. We note at the outset that the military judge asked the appellant whether he had been subjected to any illegal pretrial punishment and he indicated that he had not. Our review of the available evidence concerning the nature of the appellant's daily routine while a member of that flight leads us to conclude that he would not be entitled to credit and it was unnecessary for his counsel to proffer that he was. In his unsworn statement, the appellant described his transitional flight duties as detail work for seven days a week that varied from five to ten hours a day. He also stated that he typically got two hours a day off from work details. When not working, the appellant was free to partake of various on-base recreational activities such as bowling, water sports, and the movies. Given this factual background, we do not conclude that trial defense counsel was required to make what would have essentially been a frivolous argument.

C. Sentencing Argument

The appellant also asserts that his trial defense counsel did not adequately describe the details of the hardships of his transitional flight duties during sentencing argument. He theorizes that had his attorney been more specific and more forceful concerning this aspect of the case, the court members would have shortened the length of his sentence. The record indicates that the defense counsel did mention his client's experience in the

transitional flight and likened it to hard labor without confinement. Since the fact of the transitional flight experience was brought to the attention of the members during argument, the issue as presented by the appellant requires us to second-guess the trial defense counsel on a matter of proper emphasis during argument. This we will not do.

For these reasons, we find that trial defense counsel's performance was not deficient. Indeed, a review of the entire record indicates that the appellant was well served by his defense counsel in this case.

II. 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

HEATHER D. LABE
Clerk of Court