UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ABRAHAM P. ROBINETTE
United States Air Force

ACM S31528

22 March 2010

Sentence adjudged 06 August 2008 by SPCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Nancy Paul.

Approved sentence: Bad-conduct discharge, confinement for 8 months, and forfeiture of $900.00 pay per month for 10 months.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Major Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Judge:

Pursuant to a pretrial agreement that referred the charges to a special court-martial, the appellant pled guilty to wrongful use of oxycodone (Percocet) and clonazepam (Klonopin) as well as wrongful distribution of clonazepam, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] A panel of officers sentenced him to a bad-conduct discharge,

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[1] The Charge alleged one specification of wrongful use of oxycodone, one specification of wrongful use of clonazepam, and one specification of wrongful distribution of clonazepam. The Additional Charge alleged two

confinement for 8 months, and forfeiture of $900 pay per month for 10 months. The convening authority approved the sentence adjudged.

Before this Court the appellant raises five issues. First, he questions the providence of his guilty plea to wrongful use of oxycodone and clonazepam, asserting now that his use was consistent with a lawful prescription. Second, he attacks the effectiveness of his counsel. Third, he argues the military judge abused her discretion by admitting certain aggravating testimony in sentencing. Fourth, he claims prejudice from the military judge's failure to instruct concerning pretrial confinement credit. Fifth, he argues that a punitive discharge is inappropriately severe.[2] Finding no error to the substantial prejudice of the appellant, we affirm.

The Offenses

The appellant had a prescription for oxycodone, a pain killer, and clonazepam, an anti-anxiety drug. One evening in August 2007, the appellant shared his clonazepam pills, which appellant called "mean greens," with two other airmen, Airman First Class (A1C) N and Senior Airman (SrA) G, while they watched movies and drank alcohol in their dormitory. Neither A1C N nor SrA G had a prescription for clonazepam.

The three airmen also used oxycodone in conjunction with their use of clonazepam and alcohol. Each had a prescription for oxycodone. They used both drugs by crushing the pills and snorting the powder. As they continued snorting the drugs, SrA G became irritable. He died the next morning. Autopsy results show his death resulted from a combination of the drugs and alcohol that resulted in a "polypharmacy overdose."

The appellant continued to use clonazepam after his friend's death. A year later he sought clonazepam from a woman he met at a bar. She provided him some of her pills, and he snorted them after crushing them on her kitchen counter. The next night he did the same.

The Guilty Plea

The appellant impugns his plea of guilty to wrongfully using oxycodone and clonazepam as alleged in Specifications 2 and 4 of Charge I and Specifications 1 and 2 of the Additional Charge by claiming that the military judge failed to elicit sufficient facts to show that the appellant's use of prescribed oxycodone and clonazepam was wrongful. He asserts on appeal that his snorting of these pills after crushing them into a powder was simply to speed the lawful effects of the medication to relieve pain and stress. Given that he had a prescription for both drugs to relieve pain and stress, the appellant argues that

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specifications of wrongful use of clonazepam. The appellant pled guilty to all. A fourth specification under the Charge alleging wrongful distribution of oxycodone was withdrawn after acceptance of pleas.

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the military judge "never probed these matters with respect to an innocent use defense." The record shows otherwise.

We review the military judge's decision to accept the appellant's guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts "as revealed by the accused himself" to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). Where there is a substantial basis in law and fact for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Here, the military judge conducted a thorough inquiry with the appellant on all aspects of his pleas of guilty. After advising the appellant that use of a controlled substance is not wrongful if done pursuant to some legitimate medical practice she discussed with the appellant at length why he thought his use was wrongful since he had a valid prescription for the charged drugs. The appellant repeatedly described how he wrongfully used the drugs in a manner inconsistent with that prescribed by snorting them, exceeding the recommended dose, and taking them with alcohol.

The appellant told the military judge that he took the drugs recreationally to get high and that no medical official ever told him that his method of use was lawful. To summarize her inquiry and ensure that the appellant understood that his use was wrongful despite his having a valid prescription, the military judge asked the following:

> MJ: On both of these occasions, as well as the occasions that we previously talked about, you were using the medication in a manner to get high, not in a manner that had been prescribed to you by the doctor, correct?
>
> ACC: Under these dates?
>
> MJ: Right.
>
> ACC: Yes, Your Honor.

The stipulation of fact shows that the appellant often snorted his "medication" with other airmen while drinking alcohol and watching movies, providing still further evidence that the appellant's use was recreational rather than medicinal. He told the

military judge that some of the clonazepam was not even his, stating that he got it from a woman he met at a bar and that he snorted it on the kitchen counter in her apartment.

We find no substantial basis in law or fact to question the appellant's plea. Contrary to the appellant's assertion that the military judge "never probed" the possibility of lawful use based on the appellant's prescription for both drugs, the record shows that the military judge repeatedly contrasted lawful and wrongful use in her discussion with him. His responses show that he understood the difference and that his use of both substances was wrongful. The military judge did not abuse her discretion in accepting the appellant's pleas of guilty.

Effectiveness of Counsel

Despite expressing under oath at trial his complete satisfaction with his defense counsel, the appellant now attacks his trial defense counsel's performance. By comparing the relatively large volume of material submitted in clemency to that presented at trial, the appellant asserts that his trial defense counsel failed to properly prepare and present a sentencing case at trial and that this failure constitutes ineffective assistance of counsel. The record does not support the appellant's claim.

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 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 the trial defense counsel's conduct was in fact deficient, and, if so (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland v. Washington*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant bears a heavy burden of establishing that his trial defense counsel was ineffective. *See 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 trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). To prevail on a claim of ineffective assistance of counsel, the appellant must rebut this presumption by pointing out specific errors made by his trial defense counsel that were unreasonable under prevailing professional norms. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

"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." *Id.* The counsel's function is to make the adversarial process work in a particular case from the

perspective of prevailing professional norms. *Id.* Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

The trial defense counsel may choose to limit presentation of evidence in sentencing for many possible and reasonable reasons, perhaps the most obvious being the threat of potentially damaging rebuttal. Such is the case here. The trial defense counsel's declaration details the evidence he uncovered during his pretrial investigation of significant uncharged misconduct committed by the appellant such as continued prescription drug abuse, "doctor shopping" to get more medication than needed, advising others how to get prescription medications for recreational use, theft of prescription medications, and advising another to lie to investigators about drug abuse. With this ominous evidence on the horizon, the trial defense counsel quite properly chose to steer a careful course in sentencing that highlighted the positive without exposing the appellant to a storm of rebuttal. The appellant agreed with his trial defense counsel's advice.

The trial defense counsel's damage containment strategy also secured a special court-martial plea agreement after an Article 32, UCMJ, 10 U.S.C. § 832, hearing officer had recommended a general court-martial and referral of additional charges. The trial defense counsel explains that after he secured a sentence to confinement for four months less than the government requested at trial he was no longer constrained by the threat of rebuttal and, therefore, provided an extensive clemency package that included matters not offered at trial. Contrary to the appellant's assertion of "no reasonable explanation" for his counsel's trial strategy, the record shows that the trial strategy adopted by the trial defense counsel *and* the appellant was eminently reasonable. Not only has the appellant failed to carry his burden of showing his trial defense counsel was ineffective, the record shows that his trial defense counsel was highly effective in limiting the punitive danger faced by the appellant.

Evidence in Aggravation

The military judge allowed into evidence the testimony of the pathologist who performed the autopsy on SrA G, the airman who died from an overdose of drugs which included those distributed to him by the appellant. Overruling a defense objection to the testimony, the military judge found the evidence proper aggravation within Rule for Courts-Martial (R.C.M.) 1001(b)(4) in that the pathologist would testify that "the distribution, of which the [appellant] has pled and been found guilty, contributed to the death of [SrA G]," and that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The trial defense counsel placed the appellant's culpability in context by establishing on cross-examination that the level of clonazepam, the drug distributed by the appellant, would not alone have killed SrA G but was one factor among several.

We review rulings on the admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005). In the court-martial sentencing phase the trial counsel may present evidence of aggravating circumstances directly relating to or resulting from an accused's crimes. R.C.M. 1001(b)(4). Before admitting such evidence the military judge must ensure that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Mil. R. Evid. 403; *United States v. Wilson*, 35 M.J. 473, 476 n.5 (C.M.A. 1992). Death of a drug user is an aggravating factor in a prosecution for distribution of drugs to the deceased. *United States v. Sargent*, 18 M.J. 331, 339 (C.M.A. 1984).

The military judge did not abuse her discretion in admitting the pathologist's testimony regarding the death of SrA G. The pathologist testified that the drugs distributed to SrA G by the appellant were part of the "polypharmacy overdose" that killed him. The evidence presented by the pathologist linked the appellant's crimes to a related consequence, and the military judge properly balanced the probative value of this evidence against the danger of unfair prejudice. That other drugs and alcohol also contributed to the death does not preclude evidence of the appellant's role in supplying one of the fatal ingredients, especially considering that the appellant used the substances with SrA G and noticed the effects on the night he died. The testimony placed the appellant's role in the death of SrA G in proper context for the members to consider and give it the weight they deemed appropriate.

Sentencing Instructions

During discussion of proposed sentencing instructions the military judge agreed to inform the members that the appellant would receive 15 days pretrial confinement credit toward any adjudged sentence to confinement. However, the oral and written instructions provided to the members omit this provision, and neither the military judge nor counsel caught the omission. The adjudged sentence included confinement for eight months, four months less than that requested by trial counsel.

A military judge must instruct court members to consider evidence of pretrial confinement. *United States v. Miller*, 58 M.J. 266, 269 (C.A.A.F. 2003). Failure to do so is error, and such error is not waived by failure to object. *Id.* at 270 (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000)). Such error is tested to determine whether it deprived the appellant of a defense or seriously impaired effective presentation of his case. *Id.* (citing *United States v. Zamberlan*, 45 M.J. 491, 492-93 (C.A.A.F. 1997)).

Here, we find the instructional error did not seriously impair the appellant's presentation of his sentencing case; in fact, it appears to have played no role at all. As in *Miller*, the record contains no evidence that the pretrial confinement conditions were unduly harsh or rigorous, pretrial confinement was not an integral part of the sentencing case, neither side argued pretrial confinement in support of their respective sentence

recommendations, and the length of the pretrial confinement was relatively brief in the context of a case wherein the government argued for twelve months and the defense conceded four. Under these circumstances, we find the instructional error harmless.

Sentence Appropriateness

We review sentence appropriateness de novo. *See United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Boone*, 49 M.J. 187, 192-93 (C.A.A.F. 1998); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

After an Article 32, UCMJ, investigating officer recommended a general court-martial and the referral of additional charges, the appellant entered into a pretrial agreement to plead guilty in exchange for a special court-martial. The appellant argues the inappropriateness of the adjudged and approved punitive discharge, citing his pleas of guilty, deployment history, character letters, completion of alcohol rehabilitation, post-traumatic stress disorder, and other matters submitted in clemency. Bootstrapping his argument here with that regarding ineffective assistance of counsel, the appellant asserts that his sentence is inappropriately severe because the members did not have much of this information at trial. However, all of this information was presented to the convening authority who considered it before taking action on the sentence, and the appellant's argument is essentially a renewal of his clemency request.

These clemency matters do not show that a punitive discharge for his crimes is inappropriately severe. The appellant wrongfully used prescription medication with other airmen, wrongfully distributed prescription medication to another airman who died as a result of the drug abuse facilitated in part by the appellant, unlawfully sought prescription medication from a civilian source, and continued his drug abuse even after his friend's death. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court