UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CARLOS D. SANTIAGO
United States Air Force

ACM S31398

25 November 2008

Sentence adjudged 07 September 2007 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Charles E. Wiedie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Timothy M. Cox, and Captain Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Major Steven R. Kaufman

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

The appellant was tried at Francis E. Warren Air Force Base (AFB), Wyoming. In accordance with his pleas, he was found guilty of attempted larceny,[1] violating a lawful order, and housebreaking, in violation of Articles 80, 92, and 130, UCMJ, 10 U.S.C. §§

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[1] The appellant was charged with and initially pled guilty to larceny; however, during the *Care* inquiry, *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), the military judge expressed uncertainty as to the appellant's ability to plead guilty to larceny. After consultation with his trial defense counsel, the appellant subsequently withdrew his plea of guilty to the larceny offense and instead pled guilty to the lesser included offense of attempted larceny. The government did not attempt to prove the greater offense of larceny.

880, 892, 930. The approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.[2]

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the appellant's trial defense counsel was ineffective by offering a certain letter as evidence in the presentencing proceedings. The letter in issue did not describe any positive attributes of the appellant or recognize any rehabilitative potential, but rather stated that the appellant "could not be trusted," demonstrates "exceptionally poor judgment," "prey[s] on others," "does not possess characteristics of a . . . wingman," and should "be released from active duty." We find that the trial defense counsel was not ineffective, and affirm.

Background

On 5 April 2007, the appellant unlawfully entered the dorm room of Airman First Class (A1C) RS with the intent to commit larceny therein. While in her dorm room, the appellant stole A1C RS' government travel card. Later that same day, the appellant fraudulently charged three separate purchases against A1C RS' government travel card, in the total amount of $300.46. At the time he committed this offense, the appellant believed that A1C RS would be financially responsible for the charges he made to her government travel card.[3]

On 23 August 2007, the appellant was placed in pretrial confinement for the offenses of communicating a threat and insubordination. On 29 August 2007, he was released from pretrial confinement by the Pretrial Confinement Reviewing Officer, but was restricted to the confines of Francis E. Warren AFB. On 1 September 2007, the appellant violated the restriction order by leaving Francis E. Warren AFB and traveling to Fort Collins, Colorado, where he was apprehended by the Larimer County, Colorado, Sheriff's Office for being involved in a traffic accident.

During the presentencing proceedings, the trial defense counsel offered three character letters on behalf of the appellant. One of these character letters was an unsigned letter from Mr. HR. The letter contains several derogatory comments about the appellant, such as: "His attention to detail lacks that of his peers, he seems preoccupied and tasks at hand do not appear to be terribly important to him;" "I began to silently question Airman Santiago, his poor choices, bad decisions and disregard for his friends by taking advantage of their personal and financial support;" "I cannot begin to understand his exceptionally poor judgment in every aspect of his life;" "[H]e has absolutely no common sense and exercises no logic in the things that always brings him

[2] The appellant was credited with 12 days of pretrial confinement.
[3] Airman First Class RS was never held financially responsible for the three charges made by the appellant on her government travel card.

trouble;" "He appears to prey on others;" and "He does not possess characteristics of a trustworthy wingman.'' Mr. HR concluded his statement with:

> The positive accomplishments Airman Santiago has given to the 90th Operations Group and Operations Support Squadron have truly been outweighed by the negative publicity and counterproductive situations he has been involved in and should not be further tolerated. While he is definitely in need of and searching for some sort of professional treatment, this should no longer be at the expense of Air Force time and US tax dollars.

In the trial defense counsel's affidavit submitted on appeal, he states that he initially advised the appellant against offering the letter from Mr. HR. However, the appellant wanted to submit the letter because it showed he was incompatible with military service and that he lacked common sense, but he was not a malicious person.[4] The appellant did not want to serve lengthy confinement, even if it meant receiving a bad-conduct discharge. Ultimately, the decision was made to include the letter from Mr. HR to hopefully minimize the amount of confinement that would be imposed by the military judge.

During his unsworn statement to the military judge, the appellant stated, "Sir, I would only ask that you please take a look at my plea and my misconduct and maybe that I was not someone who should have been in the Air Force."

Prior to the announcement of the sentence, the military judge specifically addressed the letter from Mr. HR:

> Before I announce sentence I do want to make clear for the record how I considered one piece of evidence in particular. What I am referring to is Defense Exhibit C, which was the letter from Mr. [HR]. With respect to that letter, I considered what extenuation and mitigation there was in the letter. As far as there were some statements in there that might be considered aggravating statements, I considered those in the context of the defense's argument that Airman Santiago was incompatible with military service, that was something the Air Force knew before and that he probably would have been discharged before, and to take that in consideration. However, I did not consider some of what might be considered aggravating statements in that letter for the purpose of determining what is an appropriate sentence.

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[4] The appellant's record included an Article 15, UCMJ, a letter of reprimand, a letter of admonishment, and a letter of counseling, all of which were for failure to go to his appointed place of duty.

In his submission of clemency matters, the appellant took responsibility for his misconduct and did not assert that he had received ineffective assistance of counsel. Further, the appellant did not submit with his appeal a post-trial affidavit alleging that he received ineffective assistance of counsel.

Discussion

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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent, and the appellate courts will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan,* 37 M.J. 407, 409-10 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Where a lapse in judgment or performance is alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the 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 trial defense counsel was not ineffective in this case. The letter written by Mr. HR was strategically offered by the trial defense counsel, with the appellant's consent, to show the appellant was incompatible with military service, and to hopefully convince the military judge not to impose a sentence that included lengthy confinement. Although this may have been a questionable strategy to have employed, considering the military judge specifically stated that he did not consider the aggravating portions of the letter in determining an appropriate sentence, the appellant has not shown how he was prejudiced by the inclusion of Mr. HR's letter. Accordingly, the appellant has failed to meet his burden, and we find no merit to this issue.

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

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