UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANDREW C. SCHNEIDT
United States Air Force

ACM S31509

20 August 2009

Sentence adjudged 22 May 2008 by SPCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Maura T. McGowan.[1]

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Patrick E. Neighbors, Captain Nicholas McCue, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Michael T. Rakowski.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

Pursuant to his pleas, a military judge found the appellant guilty of four specifications of uttering checks without sufficient funds, one specification of larceny, and three specifications of uttering worthless checks by dishonorably failing to maintain sufficient funds, in violation of Articles 123a, 121, and 134, UCMJ, 10 U.S.C. §§ 923a, 921, 934. A panel of officer members sitting as a special court-martial sentenced the

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[1] We note the court-martial order incorrectly lists the military judge as Major Charles Wiedie vice Colonel Maura T. McGowan.

appellant to a bad-conduct discharge, six months of confinement, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.[2]

On appeal, the appellant asks the Court to set aside the findings and the sentence or to provide other appropriate relief. The basis for his request is that he opines: (1) the military judge failed to properly instruct the members on the differences between automatic and adjudged forfeitures, which resulted in a sentence that included automatic forfeitures in contravention of the members' intent; and (2) his trial defense counsel was ineffective in that she failed to fully inform him about the potential consequences of pleading guilty, specifically that he would be subject to automatic forfeitures if sentenced to more than six months of confinement.[3] Finding no prejudicial error, we affirm.

Background

The appellant elected to plead guilty to the charges and specifications and to be sentenced by officer members. Following the acceptance of the appellant's guilty plea, the trial proceeded to sentencing. The military judge instructed the members, both orally and in writing, that "[a]ny sentence which includes confinement for more than six months or any confinement and a bad conduct discharge will require the accused, by operation of law, to forfeit two-thirds of his pay during the period of confinement. . . . [and] if the court wishes to adjudge any forfeiture of pay, the court should explicitly state the forfeiture as a separate element of the sentence."

Upon receiving the sentencing worksheet from the president of the court-martial, the military judge asked the president to clarify the court's sentence. The military judge once again advised the panel that "if the accused is sentenced to confinement for more than six months or some confinement along with a punitive discharge, the accused will be required by operation of law to forfeit two-thirds of his pay during the period of confinement. . . . [and] if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence." She then asked the president if it was correct that the panel did not want the accused to pay any forfeitures, to which the president replied "Yes."

Sentencing Instructions

The issue of whether the military judge gave the members proper instructions is a question of law, which this Court reviews de novo. *United States v. Schroder*, 65 M.J.

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[2] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed, inter alia, to plead guilty to the charges and specifications in return for the convening authority's promise to refer the charges and specifications to a special court-martial.

[3] The issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The appellant asserts that he was subjected to automatic forfeitures because he received six months confinement; however, he was subjected to automatic forfeitures because he received a bad-conduct discharge *and* some confinement.

49, 54 (C.A.A.F. 2007). Failure to object to an instruction or to the omission of an instruction constitutes waiver in the absence of plain error. Rule for Courts-Martial (R.C.M.) 1005(f). However, the waiver rule under R.C.M. 1005(f) is inapplicable to certain mandatory instructions, such as the effect that a sentence to a punitive discharge and some confinement or confinement in excess of six months will have on the accused's entitlement to pay and allowances. R.C.M. 1005(e)(2); *see also United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003).

In the case at hand, the record makes it abundantly clear that the military judge properly instructed the members on the differences between automatic and adjudged forfeitures. Moreover, even if the sentencing instructions were erroneous, an appellant is not entitled to relief unless he can show material prejudice to a substantial right. *United States v. Blough*, 57 M.J. 528, 534 (A.F. Ct. Crim. App. 2002) (citations omitted). Here, there has been no showing of material prejudice to a substantial right of the appellant. In short, the military judge's sentencing instructions were not erroneous and, even assuming error, the error was harmless.

Ineffective Assistance of Counsel Claim

Service members, without question, 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). When there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient; and, if so, (2) whether counsel's deficient conduct 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 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). Counsel are 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). "To make out a claim of ineffective assistance of counsel, the accused must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

The courts evaluate the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error and considering all the circumstances. *Id.* "In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* (alterations in original) (citing *Strickland*, 466

U.S. at 690). "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 appellant asserts that his trial defense counsel was ineffective because she failed to inform him that he would be subject to automatic forfeitures if sentenced to more than six months of confinement. 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. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Such is the case here. The appellant's post-trial and appellate rights advisement, an advisement the appellant read and signed three days before his trial, belie the appellant's assertions.

Additionally, assuming arguendo that the trial defense counsel failed to properly advise the appellant on automatic forfeitures, the appellant has failed to show how he was prejudiced by the alleged deficient conduct. In order to constitute prejudicial error, trial defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). Simply put, the appellant has failed to show prejudicial error, and we decline to find that which does not exist.

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

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