UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ROBIN L. SHARPTON
United States Air Force

ACM 36460

24 July 2007

Sentence adjudged 23 August 2005 by GCM convened at Hurlburt Field, Florida. Military Judge: Jennifer A. Whittier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major John P. Taitt.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of indecent acts with a minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 4 months, and reduction to E-4. On appeal, the appellant asserts four errors for our review. The first three errors are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The first two assigned errors claim that the appellant received ineffective assistance of counsel: first, when the trial

defense counsel failed to introduce documentary evidence or argument showing the amount of money the appellant and his family would lose in retirement benefits should a punitive discharge be adjudged; and, second, when the trial defense counsel failed to request a dismissal of the charge due to denial of the appellant's Sixth Amendment right to speedy trial. The third asserted error claims that the imposition of a bad-conduct discharge constituted inappropriately severe punishment. We find no merit in the first three assigned errors. Finally, the appellant asserts that the court-martial promulgating order needs to be corrected to accurately reflect that the Charge of which he was convicted, asserting it should cite Article 134, UCMJ, rather than Article 107, UCMJ, as currently displayed. We concur that such a correction needs to be made.

Background

The information provided by the appellant during the military judge's inquiry conducted pursuant to *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969) and contained in a stipulation of fact revealed that, while stationed at Anderson Air Force Base, Guam, and during the time frame of 1 June 2002 and 5 July 2002, the appellant engaged in physical contact with his step-daughter, KS, at their on-base quarters. She was three years old when the appellant married her mother, and 11 years old when the contact occurred. KS was physically mature for her age. On one night during this period, KS went to the appellant's bedroom. The appellant was already in bed. KS was wearing a t-shirt with a training bra underneath and pajama bottoms. The appellant was wearing a t-shirt and shorts. The appellant began to tickle, touch and rub KS's back, what they referred to as "back tickles," which the appellant and KS would often engage in when she was younger. The "back tickles" had not previously involved any touching of a sexual or indecent nature. They consisted of the appellant rubbing his hands up and down KS's back and shoulders using both of his hands.

KS was lying face down on the bed, the appellant leaning over her. At one point, the appellant reached up under the back of KS's t-shirt and unsnapped her bra. At the appellant's request, KS took off her t-shirt and he continued massaging her back. He sensed she was uncomfortable and discontinued the massage. He remained clothed throughout the incident.

On one night during the period 5 July 2002 to 1 September 2002, the appellant entered KS's bedroom and asked if she remembered the previous incident. She answered affirmatively. He asked if she would be okay with him doing it again. She eventually said it was okay since it was only "back tickles." The appellant sat at the edge of the bed in his t-shirt and shorts. KS was lying in bed on her back. The appellant removed her t-shirt. She was then wearing only her pajama bottoms. The appellant touched and fondled KS's breasts with his hands. He then kissed her breasts. The appellant realized KS was tense and stopped. She put her t-shirt back on. The appellant stated he was sorry, and asked if she was okay and how she felt about his actions. KS responded that

she had no thoughts about the matter. The appellant then warned KS that if she told anyone what had happened, she might be taken away or out of the family. The appellant thereafter refrained from any further indecent acts with KS.

On 24 August 2004, KS disclosed to a friend that the appellant had touched her inappropriately. The friend relayed the information to a police officer at their school. KS later told her mother of the incident. Her mother then confronted the appellant who admitted it was true. His wife then reported the matter to authorities the following day.

Erroneous Court-Martial Order

The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). Rule for Courts-Martial 1114(c)(1), requires that the convening authority publish a post-trial promulgating order including the charges and specifications on which the accused was arraigned and the findings. The record clearly reflects that the offenses of which the appellant was tried and convicted fell under Article 134, UCMJ. The convening authority is directed to issue a corrected court-martial promulgating order reflecting the correct information.

Ineffective Assistance of Counsel

A. Impact of Punitive Discharge

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002).

The Supreme Court established a two-pronged test for ineffective assistance of counsel requiring, first, that the appellant demonstrate that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and second, that his counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Broad generalized accusations are insufficient to satisfy the first prong. *Key*, 57 M.J. at 249.

On appellate review, there is a strong presumption that counsel are competent, *United States v. Grigoruk*, 56 M.J. 304, 306-307 (C.A.A.F. 2002). Our superior court has established a three prong test to determine if the presumption of competence has been overcome: (1) are accused's allegations true and, if so, is there a reasonable explanation for counsel's actions; (2) if allegations are true, then did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, is there reasonable probability that, absent

such errors, there would have been a different result. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001).

In *United States v. Burt*, 56 M.J. 261 (C.A.A.F. 2002), the defense counsel objected to an instruction proposed by the military judge which would have informed the members that, "However, regardless of the sentence of this court, even if a punitive discharge is adjudged, the Secretary of the Air Force or his designee may instead allow the accused to retire from the Air Force." *Id.* at 263. The court concluded that the trial defense counsel's tactical decision to object to the instruction forced the court members to come to grips with the hard decision of whether to impose a punitive discharge and strip the accused of his vested retirement benefits, without the distraction of the possibility of relief by the Secretary. *Id.* at 265.

At the time of trial in the instant case, the appellant had served 15 years and five months. In his sentencing argument, the trial defense counsel chose to emphasize the appellant's restraint following the second incident, the desire of his family to have him back, his lack of denial and seeking of professional help, the victim's lack of trauma, the limited nature of the abuse, and the quality of his service. He repeated these factors in his argument against the imposition of a punitive discharge. In view of the extensive and well-presented case put forth by the trial defense counsel during the sentencing phase of this trial emphasizing these factors, both in live testimony by two psychologists and extensive supportive documentary evidence, it is clear that the trial defense counsel believed that these would have a more telling effect than the preservation of retirement benefits that were almost five years from vesting. As in *Burt*, it would be presumptive of this court to conclude that the defense consul's choice in this matter was not the wiser course. Perhaps the otherwise moderate sentence speaks for itself in this regard.

Accordingly, we find that the trial defense counsel's representation of the appellant during sentencing was within, and arguably above, the quality generally put forth by his peers. Therefore, having failed to satisfy the second prong of the test established in *Gilley*, we find the appellant's claim of error to be unmerited.

B. Speedy Trial

Speedy trial issues are reviewed de novo. United *States v. Cooper*, 58 MJ 54, 59 (CAAF 2003). In determining whether a violation of the Sixth Amendment's speedy trial clause had occurred, four factors should be considered: the length of pretrial delay, reasons for the pretrial delay, whether the accused had demanded speedy trial, and prejudice suffered by the accused because of the delay. *United States v. Nichols*, 42 M.J. 715, 719 (A.F. Ct. Crim. App. 1995).

The chronology in this case is as follows: the victim disclosed the abuse in August 2004; charges were preferred on 11 April 2005; charges were referred to trial on

7 June 2005; the trial date was set on 21 June 2005 by agreement of the prosecution, trial defense counsel, and Chief Military Judge; and, the trial was conducted on 23 August 2005. No speedy trial claim was asserted at or before trial.

The prejudice claimed by the appellant during the one year between the surfacing of the allegations and trial consists of stress and separation from family. However, our review of the record suggests that that same year was well spent by the appellant and, rather than having a prejudicial effect, provided him the time to engage in those activities which resulted in the impressive and extensive portfolio of support assembled and ably presented at trial by his defense counsel. Not least of these was the effusive testimony of Chaplain C who had not become acquainted with the appellant until June 2005.

Failure to pursue a legal claim is not necessarily deficient conduct by counsel if that claim is not shown to have a reasonable probability of being found meritorious as a matter of law and fact. The failure to pursue it is not error and certainly not ineffective assistance of counsel. *United States v Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). Based upon our observations above, we find that the one year period from the surfacing of the allegations to the date of trial was not unreasonable. Additionally, we find that the delay, as such, was most likely of benefit to the appellant in the preparation of matters in mitigation and that no prejudice to the appellant's ability to effectively present his case attached.

Inappropriate Sentence

Article 66(c) UCMJ, 10 U.S.C. § 866(c), requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved. In order to determine the appropriateness of a sentence, this Court must consider the particular accused, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v Gorgas,* 55 M.J. 521, 524 (A.F. Ct. Crim. App. 2001) (citing *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982)).

We have carefully considered the facts in this case and the matters presented by the appellant during the sentencing portion of his trial. We are cognizant of the fact that, after his second act of indecent contact with the victim, he thereafter refrained from such conduct. The testimony of the two psychologists indicates that the trauma experienced by the victim was not substantial and that the family desires to reunite with the appellant. The appellant's performance reports and many of the letters of support indicate that he is an exceptional airman.

However, courts do not exist in a vacuum. They are an organic part of the society in which they serve. Thus, they absorb and reflect the values of that society. The nature of the offense in this case, an indecent act inflicted upon a child by an adult member of

the child's family, is considered particularly loathsome by our society. This is evidenced, in part, by the extraordinary efforts taken by communities to identify and protect themselves from those who have been convicted of such crimes.

In light of the above, we conclude that the sentence imposed by the military judge and approved by the convening authority appropriately reflects the particular accused, the nature and seriousness of the offenses, this accused's record of service, and all matters contained in the record of trial.

Conclusion

The record of trial is returned to The Judge Advocate General for remand to the convening authority for correction of the General Court-Martial promulgating order and substitution of a corrected one. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

Judge ZANOTTI did not participate.

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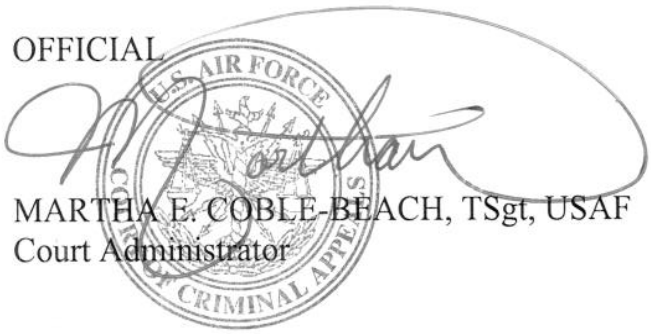

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator