UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RYAN A. SHEETS
United States Air Force

ACM 37152

30 March 2009

Sentence adjudged 23 August 2007 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Bryan D. Watson.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a panel of officers sitting as a general court-martial convicted him of one specification of attempted aggravated assault, one specification of conspiracy to commit an assault, one specification of negligent dereliction of duty,[1] one specification of assault consummated by a battery, four specifications of assault with a dangerous weapon, two specifications of burglary, one

[1] The appellant had been charged with willful dereliction of duty but the members found him guilty of the lesser-included offense of negligent dereliction of duty.

specification of communicating a threat, and one specification of engaging in service discrediting conduct, in violation of Articles 80, 81, 92, 128, 129, and 134, U.C.M.J., 10 U.S.C. §§ 880, 881, 892, 928, 929, 934. The adjudged and approved sentence consists of a dishonorable discharge, three years confinement, total forfeitures of pay and allowances, and a reduction to E-1.

On appeal the appellant asks this Court to set aside the findings of guilt on the attempted aggravated assault, conspiracy to commit an assault, assault consummated by a battery, and aggravated assault specifications and to reduce his dishonorable discharge to a bad-conduct discharge or provide other meaningful relief. The basis for his request is that he opines: (1) he was denied effective assistance of counsel because his trial defense counsel failed to interview two critical and vital witnesses and (2) his sentence which includes three years confinement and a dishonorable discharge is inappropriately severe in light of compelling mitigating factors.[2] Finding no error, we affirm.

Background

During the evening hours of 2 November 2006, the appellant, his friend, RC, and RC's girlfriend, LJ, went to a local bar. While at the bar, the appellant and RC got into a scuffle with WS, LJ's ex-boyfriend, and WS's friends, TB and JN. Angry, the appellant and RC left the bar and proceeded to the appellant's residence. While at the appellant's residence, the appellant retrieved a handgun and RC retrieved an axe. They then proceeded to what they believed was JN's and WS's residence to confront JN. Unknown to the appellant and RC, the house they entered was not JN's residence. Upon breaking into the residence, the appellant brandished the gun at LS, the resident, and RC brandished the axe at LS.

Eventually the appellant and RC realized they broke into the wrong residence. Realizing their mistake, they departed, retrieved LJ, and proceeded to the correct residence. Upon breaking into JN's and WS's residence, the appellant pointed his hand gun at JN and threatened to blow JN's head off if he moved. RC held the axe near JN as the appellant searched the residence for WS. Unknown to the appellant and RC, WS had earlier departed for a neighbor's residence to call the police. After being unable to locate WS and after JN got away from RC and ran to a friend's house, the appellant and RC departed the residence. At trial, neither the trial counsel nor the trial defense counsel called TB and LJ as witnesses.

Discussion

Ineffective Assistance of Counsel

[2] The issues are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Service members unquestionably 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*, 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 the 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 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.* In evaluating the counsel's performance, the Court should keep in mind that the counsel's function is to make the adversarial process work in the particular case. *Id.* "[C]ounsel [have] a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* (quoting *Strickland*, 466 U.S. at 691). The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

In his brief, the appellant states that his trial defense counsel failed to interview TB and LJ, two witnesses he labels as "critical and vital witnesses," that "[t]he record is void of any evidence of the defense attempting to contact these two individuals," and that such a failure constitutes ineffectiveness of counsel. The government submitted post-trial affidavits from Captain WS and Captain DJ, the appellant's trial defense counsel. Both aver: (1) they interviewed TB; (2) TB had a reputation as an honest and trustworthy individual; and (3) given the potential strength of TB's testimony at trial, they made a tactical decision not to call TB as a witness.

With respect to interviewing LJ, Captain WS and Captain DJ also assert that: (1) they attempted to interview LJ but were unable to locate her; (2) during the course of their investigation they discovered LJ had a reputation as a habitual liar and conniving

drug addict; (3) if LJ was available as a witness her testimony might have been problematic for the defense; and (4) they made a tactical decision not to call LJ as a witness and blame the government, during argument, for not producing LJ as a witness.

When conflicting affidavits create a factual dispute, we usually cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). However, in the case at hand there are no conflicting affidavits—Captain WS's and Captain DJ's affidavits may conflict with the appellant's assertions that they never interviewed TB,[3] but the appellant's assertions are made via his brief, not via an affidavit, and *Ginn* accordingly is inapplicable to the resolution of this issue.

Moreover, assuming *Ginn* is applicable, a post-trial fact finding hearing is not required if, inter alia, "the facts alleged in the [appellant's] affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor." *Ginn*, 47 M.J. at 248. Such is the case here. Assuming trial defense counsel did not interview TB and assuming such conduct was deficient, the appellant has fallen woefully short of highlighting how he was prejudiced by such a failure. Stated alternatively, there has been no showing that there is a reasonable probability that but for trial defense counsel's alleged error, the court-martial result would have been different. Simply put, with an assumption of deficient conduct under the aforementioned facts, we find no prejudice.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *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. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In this case, the appellant: (1) brutalized two victims with a hand gun and axe;[4] (2) conspired and attempted to assault another victim with a hand gun; (3) assaulted yet another victim; (4) burglarized two residences; (5) lied to a civilian police officer investigating the case;[5] and (6) negligently transported his loaded firearm onto the local

[3] The affidavits do not conflict with the appellant's assertion that they did not interview LJ. The trial defense counsel readily admit they did not interview LJ because they were unable to locate her.
[4] The appellant was convicted as a principal (aider or abettor) of assaulting LS and JN with an axe.
[5] This served as the basis for the service discrediting conduct.

military base in violation of base regulations. In committing these actions the appellant seriously compromised his standing as a non-commissioned officer and military member. His good military character[6] does not minimize the seriousness of his crimes. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence 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, 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

[6] The appellant put on a good military character defense by submitting five affidavits from senior non-commissioned officers attesting to the appellant's good military character. However, the appellant's record is not spotless; he had received nonjudicial punishment for drunk driving.