UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TODD A. SHUTTLEWORTH II
United States Air Force

ACM S30625

26 May 2006

Sentence adjudged 19 May 2004 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 106 days, reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Tracey L. Printer.

Before

MOODY, SMITH, and PETROW
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

The appellant was convicted, in accordance with his pleas, of desertion, disobeying the lawful orders of superior commissioned and non-commissioned officers, dereliction of duty, and adultery, in violation of Articles 85, 90, 91, 92, and 134, UCMJ, 10 U.S.C. §§ 885, 890, 891, 892, 934. The military judge, sitting alone, sentenced the appellant to a bad-conduct discharge, confinement for 115 days, and reduction to E-1. The convening authority later reduced the term of confinement to 106 days and approved the remainder of the sentence as adjudged. On appeal, the appellant asserts two errors pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982): (1) Whether his

sentence is inappropriately severe in comparison to the punishment received by a co-actor; and (2) Whether his trial defense counsel was ineffective in that he failed to advise the appellant regarding the concept of illegal pretrial punishment under Article 13, UCMJ, 10 U.S.C. § 813. We find no merit in either contention.

Background

Beginning in early September 2003, the appellant initiated a sexual relationship with Airman First Class (A1C) G, a fellow member of the 365th Training Squadron (TRS) at Sheppard Air Force Base (AFB), Texas. Both parties to the tryst were married to other people at the time. On 2 December 2003, the 365 TRS first sergeant ordered the appellant and A1C G to have no further contact with each other. Later that day, the appellant and A1C G left Sheppard AFB without leave and traveled to Mexico together. They returned on 14 December 2003. Although the appellant was reassigned to the Transition Flight on 22 December 2003, he continued to communicate with A1C G by telephone, written notes, and in person. On 30 January 2004, the 365 TRS commander issued the appellant a written order not to have contact with A1C G. Nonetheless, the appellant continued to speak with A1C G by telephone.

On 14 February 2004, the Transition Flight supervisor discovered that the appellant, still married at the time, had given flowers to Airman Basic (AB) P and ordered the appellant to refrain from further contact with her. On 28 February 2004, the appellant knowingly violated that order. On 1 March 2004, the appellant was ordered into pretrial confinement in a local civilian jail where he remained until his court date on 19 May 2004.

Discussion

The appellant asserts that his trial defense counsel was ineffective in that he failed to adequately advise the appellant regarding illegal pretrial punishment under Article 13, UCMJ, § 813. 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 appellant must show that trial defense counsel's performance was deficient and that the deficient performance prejudiced his defense. *United States v. Burt*, 56 M.J. 261, 264 (C.A.A.F. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The two-pronged test for ineffective assistance of counsel requires that the appellant demonstrate; first, 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 his defense. *Strickland*, 466 U.S. at 687. On appellate review, there is a strong presumption that counsel was competent. *United States v. Grigoruk*, 56 M.J. 304, 306-07 (C.A.A.F. 2002).

Our superior court established the following three-prong test to ascertain if the presumption of competence has been overcome:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?";
>
> (2) If the allegations are true, 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 a "reasonable probability that, absent the errors," there would have been a different result?

Id. at 307.

Prior to his trial, the appellant was in pretrial confinement at a civilian facility. According to his declaration of 10 January 2005, when he was brought to Sheppard AFB for appointments, including visits to the enlisted dining facility, he would be wearing the jail's orange jumpsuit and full restraints. He states that, prior to trial, his trial defense counsel did not discuss with him the concept of illegal pretrial punishment.

In his declaration dated 11 February 2005, the appellant's trial defense counsel asserts that, prior to the 3 March 2004 pretrial confinement hearing:

> I discussed the law and defense strategy with [the appellant]. I explained [Rule for Courts-Martial (R.C.M.)] 305 and the concept of illegal pretrial confinement. In addition, I talked to him about the difference between illegal pretrial punishment and illegal pretrial confinement. As with all of my clients, I used the example of the commander parading an Airman in handcuffs and prison garb in front of the squadron and ridiculing him publicly. I distinguished illegal pretrial punishment under Article 13 with a violation of R.C.M. 305.

He also asserts that prior to trial he had the appellant read through the trial script twice. He inquired if the appellant had any questions, and the appellant responded that he had none.

In light of the factual disparities between the submissions of the appellant and his trial defense counsel, we must first determine whether a *DuBay*[1] hearing is required to resolve them. *See generally United States v. Walters*, 45 M.J. 165, 166-67 (C.A.A.F.

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

1996). A hearing need not be ordered if an appellate court can conclude that "the motion and the files and records of the case . . . conclusively show that [an appellant] is entitled to no relief." *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997) (quoting United States v. Giardino, 797 F.2d 30, 32 (1st Cir. 1986)). If the appellant's post-trial "affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts, the Court may discount those factual assertions and decide the legal issue." *Id.* at 248.

During the sentencing portion of the appellant's court-martial, the military judge addressed the issue of illegal pretrial punishment. She explained to the appellant as follows:

> MJ: It covers more potential conduct by, say, your commander or anyone acting on your commander's behalf, that even if you thought you were somehow illegally put into pretrial confinement. For example, there's clear case law that says if a commander would call you up in front of your unit and ridicule you for these offenses prior to coming to court and being tried for them, call you up, ridicule you, that would be considered illegal pretrial punishment.
>
> . . . .
>
> MJ: [A]re you aware of anything the commander has done or someone acting in the commander's behalf that would constitute some illegal pretrial punishment of you?
>
> ACC: No, Your Honor.

The gist of the appellant's present assertion of illegal pretrial punishment consists of his having been exposed to his fellow servicemen at the base dining facility while in shackles and wearing an orange jail jumpsuit. Certainly, the appellant's memories of such treatment would have been fresher at trial than during the appellate process. It would be reasonable to expect that the mention of being ridiculed in front of his unit would bring such memories rushing back to mind. Yet, the appellant's negative response to the military judge's inquiry clearly suggests that nothing had been amiss during his pretrial confinement. At a minimum, one would expect the military judge's question to have served as a catalyst for an impromptu conversation between the appellant and his counsel. Based on the inconsistency between his declaration at trial and his post-trial claim, we conclude, on the basis of the record before us, that the latter is improbable and, accordingly, no *DuBay* hearing is required for us to find the claim of ineffective assistance of counsel to be without merit.

The appellant also complains of the disparity between his sentence and the punishment received by A1C G. The power to review a case for sentence appropriateness, including relative uniformity, is vested in the Courts of Criminal Appeals. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). The general rule regarding sentence comparison is that courts-martial are not permitted to consider sentences in other cases when determining an appropriate sentence for the accused before them. *United States v. Barrier*, 61 M.J. 482, 485 (C.A.A.F. 2005). The rule has been applied to appellate review, where sentence appropriateness should be judged by "individualized consideration" of the particular accused "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

A recognized exception to the rule against sentence comparison for determining appropriateness is a situation involving connected or closely related cases with highly disparate sentences. *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003); *United States v. Hawkins*, 37 M.J. 718, 722 (A.F.C.M.R. 1993); *United States v. Capps*, 1 M.J. 1184, 1187 (A.F.C.M.R. 1976). The appellant bears the burden of demonstrating that any cited cases are "closely related" to his case and that the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. The first criterion is that there exists a correlation between each of the accused and their respective offenses. *Hawkins*, 37 M.J. at 722. The offenses represented in Charge I, Specification 1 of Charge III, Specification 1 of Charge IV, and Charge VI, to which the appellant pled guilty in his trial, are strikingly similar to the offenses for which A1C BG received nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815, on 21 January 2004. A1C G's punishment consisted of forfeiture of $500 pay and reduction to E-1.[2] The appellant was a participant or co-actor in all four of A1C G's offenses.

However, in addition to those offenses for which A1C G received nonjudicial punishment, the appellant pled guilty to the following: disobeying the order of his commander, not to have contact with A1C G on divers occasions during the period 31 January to 20 February 2004 (Charge II); disobeying the order of a superior noncommissioned officer, on 28 February 2004, not to have contact with AB P (Charge III, Specification 2); and being derelict in his duties during the period 23-28 February 2004 by smoking, drinking alcohol while underage, having a sloppy appearance, and failing to sign-in while in Transition Flight (Charge IV, Specification 2). While the first of these obviously involved A1C G, they all occurred subsequent to her receiving nonjudicial punishment. It is reasonable to conclude that these further offenses tipped the balance in favor of the commander preferring court-martial charges rather than settling for non-judicial punishment and an administrative separation. *See id.* Faced with the appellant's recalcitrance, especially in view of his commander having already threatened him with nonjudicial punishment, apparently with little effect, it is difficult to argue that

[2] A1C G was later administratively separated from the Air Force.

referral to a court-martial was beyond the pale. Furthermore, in view of the nature of the charges to which the appellant pled guilty, the sentence imposed was not unreasonable.

Conclusion

Having found that the appellant failed to satisfy the criteria laid out in *Hawkins*, 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 findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator