UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant MICHAEL E. SMITH
United States Air Force

ACM S30169 (f rev)

4 January 2005

Sentence adjudged 18 July 2002 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Gregory E. Michael. Lance B. Sigmon (*DuBay* hearing).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-6.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of one specification of willful disobedience of an order by a superior commissioned officer, in violation of Article 90, UCMJ, 10 U.S.C. § 890. The special court-martial, consisting of officer members, sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to E-6. The convening authority approved the sentence. On appeal, the

appellant does not complain of the findings. Rather, he raises three assignments of error relating to the sentence: (1) The military judge failed to properly instruct the members on the effects of a bad-conduct discharge in light of a misleading sentencing argument by trial counsel and concerns raised by the members; (2) The appellant received ineffective assistance of counsel; and (3) The sentence is inappropriately severe. Finding error as regards the second assignment, we order corrective action.

Background

The evidence adduced at trial established that the appellant's commander presented him with an order to have no contact with Senior Airman JD or his wife, MD. The basis of the order was the appellant's apparent improper relationship with MD. The evidence further established that, on more than one occasion between 13 and 15 April 2002, the appellant violated the order.

The appellant was a master sergeant with more than 20 years of service. During the pre-sentencing phase of trial, his trial defense counsel submitted a pay chart to assist the court members in determining the financial impact of a punitive discharge on the appellant's retirement benefits, but provided no detailed evidence concerning the matter.

The appellant also made an unsworn statement. During the statement, which was lengthy, rambling, and sometimes incoherent, the appellant described his love for MD, attacked his commander, questioned the integrity of the military justice system, and admitted to uncharged misconduct. At one point during his unsworn statement, he said:

> If there is a God and he has a plan, then everywhere you are is where you need to be, and everything you do is what you need to do. . . . I am going to be punished for my sins but someone else is going to be redeemed. . . . I heard the perjury and . . . it broke my heart, because nobody wanted to tell the truth. . . . [The commander] wanted to hurt me one way or the other, and he knew I was going to violate this order, and he knew it. And I did, more than once; more than what the Prosecution knows; more than anybody knows, because I am discreet. I am a discreet man. . . . I knew I would be convicted because despite what the Judge said, we know that you are guilty until you are proven innocent in the Air Force. It's always been that way. . . . Believe it or not, I obey orders when they are issued by competent authority.

The statement went on at length in this vein, with the appellant expressing no remorse, and further attacking his commander by accusing him of misusing a government purchase card. The appellant also compared himself to King David of Israel, as well as to the crucified Christ, by stating, "Forgive them Father for they know not what they do," thereby assuring the court members that he did not hold a grudge against them for the

sentence they were about to impose. Notably absent was any discussion of his retirement benefits.

Confusion about the effect of a punitive discharge on retirement benefits was apparent in the trial counsel's sentencing argument and by the questions the court members raised. During his sentencing argument, the trial counsel made the following comments:

> Worried about how a BCD [bad-conduct discharge] is going to affect a master sergeant's retirement? Well don't, because the Judge is going to instruct you that vested benefits from a prior period of honorable service are not forfeited by receipt of a bad conduct discharge. The bad conduct discharge would only terminate the accused's current term of service.

The trial defense counsel did not object to these statements or ask for additional instructions.

During deliberations, the court members requested further clarification as to the effect of a bad-conduct discharge on retirement benefits. After conferring with counsel during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the military judge repeated the standard instruction concerning a punitive discharge he had given earlier, which included the following language:

> [A] punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits. . . . However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad conduct discharge that would terminate the accused's current term of service.

On appeal, the appellant raised the three issues previously noted. After considering the record of trial, the appellant's assignment of errors, and the appellee's response thereto, this Court ordered a post-trial factfinding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to develop more evidence relating to the appellant's claim of ineffective assistance of counsel. In particular, we asked the parties to address the facts surrounding the following: (1) the quantum of evidence presented on the loss of retirement benefits, (2) the failure to request a more detailed instruction concerning loss of retirement benefits in light of the members' expressed concern, and (3) the advice given to the appellant in preparation of his unsworn statement. We raised this last issue sua sponte.

At the 19 August 2004 *DuBay* hearing, trial defense counsel testified as to his strategy on sentencing, which included his successful attempt to prevent admission of

three instances of prior misconduct as reflected in records of nonjudicial punishment. Trial defense counsel stated that a representative of the local finance office had advised him that, because the appellant had only recently sewn on the rank of master sergeant (he had been reduced to technical sergeant by means of one of the prior nonjudicial punishment actions), he was "ineligible" to retire at that time. He also stated that if he had presented any more detailed information about the potential loss of retirement benefits, it might have drawn attention to this supposed retirement "ineligibility" and led the members to infer the existence of prior disciplinary actions.

Concerning the unsworn statement, trial defense counsel testified that he asked the appellant for a draft of what he intended to say, but the appellant never complied. Trial defense counsel did testify that although he couldn't specifically remember his exact comments to the appellant, he normally advises clients to keep the unsworn statement simple, brief, and sincere. He also testified he advised the appellant that it was permissible to point out to the members "inconsistencies" he had heard during the findings testimony. Significantly, trial defense counsel conceded that he had no prior knowledge of what the appellant was going to say during his unsworn statement.

The appellant testified that the trial defense counsel only warned him against mentioning his prior service so as to avoid admission of his nonjudicial punishment actions in rebuttal.

Law and Analysis

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). There is a strong presumption that counsel was competent. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The following three-pronged test is applied to determine if this presumption is 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?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). *See also United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004).

The unsworn statement is a valuable means for the appellant to present matters in extenuation, mitigation, or rebuttal to the prosecution's evidence. *See* Rule for Courts-Martial 1001(c)(2)(A). While the appellant is given wide latitude in what he chooses to say, the unsworn statement is not without limits. It would be inappropriate for an unsworn statement to include matter that was "gratuitously disrespectful toward superiors or the court [or] a form of insubordination or defiance of authority." *United States v. Grill*, 48 M.J. 131, 132 (C.A.A.F. 1998) (quoting *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991)).

The appellant's statement violates these precepts. It contains little that is logically extenuating or mitigating, and is peppered with comments that manifest disrespect for his commander and contempt for the military justice system. Furthermore, although the appellant's strategy was to avoid the introduction of uncharged misconduct, he announced to the members that he had violated his commander's order more frequently than even the prosecution knew. Although his protestations of love for MD were no doubt sincere, they did not evidence an awareness of the legal precariousness of his situation, and, while he stated in his appellate filings that he was anxious to be able to retire, he said nothing about that to the members.

Competent representation during sentencing demands thorough preparation of an accused for an unsworn statement. The trial defense counsel in this case failed to explain the appellant's allocution rights to the extent reasonably necessary to permit the appellant to make an informed decision on what to say during his unsworn statement. Most notably, he failed to alert the appellant to the possible dangers of making a judicial confession.

This Court is not prescribing a checklist of matters that must be addressed or avoided in all future unsworn statements. However, based on the facts of this case, we find that the generalized advice the trial defense counsel provided to the appellant was not sufficient to enable him to make an intelligent decision as to what to say to the members. Admittedly, the appellant was a master sergeant with some glowing performance reports indicating an above average level of ability and sophistication. Therefore, he had ample reason to know better than to address a panel of officers as he did, regardless of the quality of any legal advice supplied by his counsel. On the other hand, it is to be expected that those facing a court-martial might lose their objectivity. "An accused . . . may not fully understand the sentencing process and may act contrary to his own interests." *United States v. Weathersby*, 48 M.J. 668, 672 (Army Ct. Crim. App. 1998). We conclude that, in giving only such limited advice as he did, the trial defense counsel fell measurably below the performance expected of fallible lawyers. *Grigoruk*, 56 M.J. at 307. We further conclude that the appellant did indeed act contrary to his own interests, and that, if he had received adequate advice from his counsel, there is a reasonable probability he would not have delivered the statement he did, and that the

result of the trial would have been different. Therefore, we hold that the appellant was denied effective assistance of counsel during the sentencing portion of his trial.

In light of this holding, we do not need to address the other allegedly ineffective aspects of trial defense counsel's performance. Neither do we need to address the remaining assignments of error. We nonetheless feel compelled to note that the standard instruction given by the military judge about the effect of a bad-conduct discharge on retirement may not be as clear as perhaps it could be in explicitly distinguishing Veteran's Administration benefits from retirement benefits.

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings are affirmed. The sentence is set aside. A rehearing on sentencing may be ordered. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court