UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ALBERT D. SPEELMAN II
United States Air Force

ACM 36471

14 September 2007

Sentence adjudged 11 July 2005 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: James Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 40 months, and reduction to E-1.

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, Major Matthew S. Ward, Major Kimani R. Eason, and Major John P. Taitt.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of one specification of attempted carnal knowledge, one specification of carnal knowledge, one specification of using a means of interstate commerce (telephone, computer internet services, and interstate highways) to entice a 13 year old to engage in sexual activity as prohibited by 18 U.S.C. §§ 2422(b) and 2246, and one specification of crossing state lines for the purpose of engaging or attempting to engage in illicit sexual activities with a 13 year old as prohibited by 18 U.S.C. §§ 2423(b) and 2246, in violation of Articles 80, 120, and 134, UCMJ, 10 U.S.C. §§ 880, 920, 934. His approved sentence consists of a bad-conduct discharge, confinement for 40 months, and reduction to E-1.

Issues Asserted

The appellant asserts two issues on appeal.

I. WHETHER THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL: (1) FAILED TO MOVE TO SUPPRESS APPELLANT'S CONFESSION; (2) FAILED TO INVESTIGATE ASPECTS OF APPELLANT'S CASE; AND (3) FAILED TO OBJECT TO THE SPECIFICATIONS OF CHARGE III AS BEING MULITIPLICIOUS WITH THE SPECIFICATIONS OF CHARGES I AND II.

II. WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE HE WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 55 OF THE UNIFORM CODE OF MILITARY JUSTICE, WHERE GUARDS AT THE CONFINEMENT FACILITIES INTENTIONALLY MISTREATED AND HUMILIATED HIM.

We address each issue individually.

Ineffective Assistance of Counsel

Regarding the ineffective assistance of counsel issue, we have reviewed the record of trial, the assignment of error, the government's answer thereto, and the affidavits submitted by both parties. Service members 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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. It is well established, the appellate court will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687. There are three questions to be answered when analyzing a claim of ineffective assistance of counsel. They are: 1) if the appellant's assertions are true, is there a reasonable explanation for counsel's actions; 2) did the performance of the trial defense counsel fall "measurably below the performance [ordinarily expected] of fallible lawyers;" and 3) if counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the 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). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). The appellant has failed to carry his burden on this issue and we find the claim to be without merit. Further, assuming arguendo, there was ineffective assistance of counsel, there is not a reasonable probability the result would have been different.

Post-Trial Cruel and Unusual Punishment

Appellant next contends that he suffered illegal post-trial punishment in violation of the Eighth Amendment to the Constitution of the United States and Article 55, UCMJ, 10 U.S.C. §855. He claims that while incarcerated in the Offutt Air Force Base, Nebraska confinement facility he was yelled at in front of other inmates; forced to repeatedly make his bed for the sole purpose of humiliating appellant; and forced to twirl around while one of the facility officers put his finger on appellant's head while the facility officer and another staff member hummed the circus song all in front of other inmates. Appellant contends that while at Miramar confinement facility, he has been constantly yelled at and not permitted to work outside the confinement facility because he was labeled a sex offender. Appellant contends he has repeatedly attempted to report his complaints at Miramar directly to the "Commanding Officer" but appellant's "counselor" refuses to allow appellant to talk to her.

To support a claim that conditions of post-trial confinement amount to cruel and unusual in violation of the Eighth Amendment the appellant must show:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938."

United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997)). Appellant has failed to establish that he exhausted the prisoner-grievance system or petitioned for relief under Article 138 at either confinement facility.

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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court