UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class Anthony M. Svajlenka
United States Air Force

ACM 36411 (f rev)

27 July 2007

Sentence adjudged 12 July 2005 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Glenn L. Spitzer and William M. Burd (*Dubay* hearing).

Approved sentence: Bad-conduct discharge, confinement for 14 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Major Sandra K. Whittington, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

SOYBEL, Judge:

The appellant was tried at Goodfellow Air Force Base Texas, by a general court-martial consisting of a military judge. He entered mixed pleas pursuant to a pretrial agreement. The appellant was found guilty of one specification of failing to obey an order by breaking restriction; 3 specifications involving drugs: use of marijuana, divers uses of methamphetamine, and divers distributions of methamphetamine; and, one specification of divers indecent acts by having sexual intercourse in front of another airman, in violation of Articles 92, 112a and 134,

UCMJ, 10 U.S.C. §§ 892, 912, 934. He was sentenced to a bad-conduct discharge, confinement for 14 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

This case is before this Court after we 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 appellant's claim of ineffective assistance of counsel.

The appellant asserts two errors for our consideration: (1) Whether trial defense counsel was ineffective for failing to request deferment of adjudged forfeitures[1] and waiver of automatic forfeitures in favor of appellant's dependants and clemency on behalf of appellant and for failing to raise a motion to dismiss based on a violation of appellant's speedy trial rights; (2) Whether the appellant's sentence was inappropriately severe in light of the disparate sentence imposed on his co-actor.[2]

Ineffective Assistance of Counsel

The Sixth Amendment guarantees effective assistance of counsel in the preparation and submission of post-trial matters. *United States v. Gilley,* 56 M.J. 113, 124 (C.A.A.F. 2001). We review claims of ineffective assistance of counsel de novo. *United States v. Osheskie,* 63 M.J. 432, 434 (C.A.A.F. 2006) (citing *United States v. Wiley,* 47 M.J. 158, 159 (C.A.A.F. 1997)). When raising a claim of ineffective assistance of counsel, an appellant must overcome a strong presumption that the trial defense counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also United States v. Quick,* 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Lee,* 52 M.J. 51, 52 (C.A.A.F. 1999). Additionally, it is the appellant's burden to prove that the trial defense counsel's performance was not only deficient but that this deficiency prejudiced him. *Strickland,* 466 U.S. at 687. *Strickland* informs us that counsel's actions must so undermine the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

In these cases, we must ask: 1) Whether the allegations are true and if they are, is there a reasonable explanation for them; 2) Did counsel's performance measurably fall below that expected of fallible lawyers; and, 3) Is there a reasonable probability that absent the error the outcome would have been different? *See Gilley,* 56 M.J. at 124 (citing *United States v. Polk,* 32 M.J. 150,

[1] We note none were adjudged in this case
[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

153 (C.M.A. 1991)). Our threshold determination then is whether the facts alleged by the appellant in making his claim are true.

In support of his claim of ineffective assistance of counsel, the appellant submitted an affidavit in which he stated that he asked his trial defense counsel, Captain (Capt) W, to type up his clemency paperwork because he had no computer access, but was told by Capt W that it was not Capt W's job and was instructed by Capt W to submit a hand written letter. He said he also informed his counsel that he wanted to ask for a reduction of sentence and "a deferment of pay and allowances." The appellant averred he was discouraged after hearing from his attorney because he did not know how a clemency letter should be written and believes counsel's advice was ineffective. He also claims that he was unaware of Capt W's understanding that if Capt W did not hear from appellant, no clemency matters would be submitted.

Capt W, on the on other hand, submitted an affidavit stating that after being fully informed orally and in writing of his clemency rights, the appellant specifically chose on his own accord not to submit matters in clemency. He said the two spoke several times and the appellant, after taking time to think about it, decided it would be "pointless" to submit matters under Rule for Courts-Martial (R.C.M.) 1105. Trial defense counsel stated that his normal practice was to draft a letter for the client if the client wanted to submit one and to also write a second letter for his own signature. In two years as an Area Defense Counsel (ADC) the appellant was one of only two clients who did not submit clemency matters.

Counsel also stated that the appellant was "adamant" that he did not want to submit a request for deferment and or waiver of forfeitures. He said the appellant was very angry at his wife because of her alleged drug use, prostitution, and for making false allegations against him that resulted in a restraining order preventing him from seeing his son. These are the same problems the appellant told the military judge about in his unsworn statement. He also told the military judge that his wife had "another man on the side". However, in his pre-sentencing, unsworn statement and in a written submission the appellant also stressed how important his son was to him

This Court cannot decide post-trial claims of ineffective assistance of counsel by making findings of fact based on conflicting post-trial submissions. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). A post-trial *DuBay* hearing is necessary when the record is incomplete or when resorting to affidavits prove unsatisfactory. *United States v. Dykes* 38 M.J. 270, 272-73 (C.M.A 1993) (citing *DuBay*, 37 C.M.R. at 413)). Pursuant to this Court's order dated 26 January 2006, a post-trial hearing was held. Both the appellant and his former ADC, Capt W, testified and the military judge submitted findings of fact resolving

the issue at hand. The standard of review for findings of fact made by a military judge is "clearly erroneous." *United States v. Ivey*, 55 M.J. 251, (C.A.A.F 2001); *United States v. Wean*, 45 M.J. 461 (C.A.A.F. 1997).

The military judge found Capt W to be "highly credible." While Appellant was in post-trial confinement, Capt W made several attempts to "gather information from the appellant to prepare clemency submissions . . . [but] . . . [a]ppellant was uncooperative at every stage." The military judge further found that appellant never told Capt W that he wanted to seek clemency and in fact told him that he felt doing so would be "pointless." The appellant also stressed that he did not want his wife to receive any money. Finally, the military judge found that despite having generous access to a telephone "the [a]ppellant never returned Capt[] W[]'s phone calls and made no attempt to communicate with him."

We also look back at the original record of trial and note an appellate exhibit, entitled "Post Trial Rights Advisement," where Capt W indicated that he fully counseled appellant orally and in writing about his post-trial rights and the appellant indicated he read and understood them. Both signed the document and, at trial, the military judge asked the appellant if his attorney explained his rights to him and if he had any questions about these rights. The appellant said Capt W explained his rights to him and he had no questions.

Finally, the appellant indicated in his affidavit that he does not remember ever talking to his trial defense counsel about the speedy trial issue. He said he did not know he had a constitutional right to a speedy trial and did not know his trial defense counsel could raise the issue for him. The appellant states in his affidavit for his appeal, that he "understand[s] now that a pretrial confinee should really only spend 120 days pretrial confinement before they must go to court."

Even though he mentioned the "constitutional right to a speedy trial," it is clear by referencing the 120-day rule the appellant was referring to R.C.M. 707 that requires an accused be brought to trial within 120 days after imposition of restraint under R.C.M 304(a)(2)-(4).

In resolving this issue we note there are no conflicting affidavits here. Capt W does not claim in his affidavit that he discussed the R.C.M. 707 issue with the appellant. Rather, he wrote "[f]or strategic and tactical reasons I would not raise a speedy trial motion in [appellant's case]."

Trial defense counsel had good reasons for that decision. Capt W was concerned that he would have lost a very beneficial pre-trial agreement (PTA) if he raised the issue. In appellant's PTA, the convening authority agreed to dismiss one charge encompassing four specifications and one Specification of Charge II.

Capt W's affidavit stated that he felt he had a good chance getting three of these five specifications dismissed with pre-trial motions, but thought they would have to plead guilty to the other two (an AWOL and a failure to go) if the government did not withdraw them.

Capt W stated he was also concerned about other significant misbehavior committed by the appellant while in pretrial confinement. He wanted to get to trial as quickly as possible before the government decided to formally charge him for misconduct that was detailed in a letter of reprimand admitted at trial. Appellant removed a drain cover from a shower; repeatedly melted light fixtures then broke light bulbs while they were in their sockets so as to cause several cells to loose light; caused the fire alarms to go off by blowing baby powder into the fire alarms; lit a fire in his cell by using tin foil inserted into a wall socket to create sparks thereby igniting paper; broke the cell block television; distributed his prescription medication to other inmates; and, possessed a can of chewing tobacco in violation of facility rules.

Capt W analyzed the situation such that even if he was successful in getting the charges dismissed under R.C.M. 707, the government could always try him again on those charges and "would likely have referred even more charges. I felt [appellant] was dodging a bullet by proceeding to his then scheduled court-martial without the government bringing additional charges." Certainly the appellant does not argue that if a R.C.M. 707 motion were successful, the charges and specifications would have been dismissed with prejudice. *See* R.C.M. 707 (d)(1). Given these undisputed facts we think Capt W's decisions were well founded and he was "render[ing] adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 687.

Sentence Appropriateness

The appellant asserts that his sentence was inappropriately severe compared to his co-actor's sentence. The standard of review for sentence appropriateness is de novo. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 2002); *United States v. Wacha*, 55 M.J. 266 (C.A.A.F 2001). In exercising our "highly discretionary 'sentence appropriateness' role",[3] this Court considers several factors including the entire record, the character of the offender, and the nature of the offense. In this area we exercise our judicial function to ensure justice was done. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). We are also guided by three factors set out in *Lacy*. When an appellant is comparing his sentence with that from another court-martial, we look at: 1) whether the cases are closely related; 2)

[3] *See United States v. Durant,* 55 M.J. 258 (C.A.A.F. 2001)

whether the sentences are highly disparate; and, 3) whether there is a rational basis for the differences between these cases. *Lacy*, 50 M.J. at 288.

A1C CA was convicted of divers uses of methamphetamine, indecent acts, and dereliction of duty. The appellant was convicted of the same or similar offenses as well as of divers distributions of methamphetamine and wrongful use of marijuana. The appellant's potential maximum sentence included 27 years of confinement while A1C CA's potential maximum sentence was 10 years. The appellant received a bad-conduct discharge, reduction to E-1, and 14 months confinement. A1C CA was sentenced to a bad-conduct discharge, reduction to E-1, confinement for eight months, and total forfeitures, a detail left out of the appellant's affidavit and a punishment he did not receive.

Although these cases are closely related in some aspects they certainly are not identical. There are significant differences in the offenses of which they were convicted and the maximum punishment to which each was exposed. The appellant's maximum confinement exposure is almost three times that of A1C CA's. We are also convinced that the six months difference in confinement does not create "highly disparate sentences." Further, the same judge heard A1C CA's case the day after he heard the appellant's case and adjudged both sentences with a clear ability to compare both cases and both the accused in order to render appropriate sentences in each case. The appellant's claim is without merit.

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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA COBLE-BEACH, TSgt, USAF
Court Administrator