UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW S. TALLEY
United States Air Force

ACM 36491

30 November 2007

Sentence adjudged 4 October 2005 by GCM convened at Hill Air Force Base, Utah. Military Judge: Carl L. Reed (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Daniel Breen, and Captain Jefferson E. McBride.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of a single charge and specification each of carnal knowledge, sodomy, and adultery in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. § 920, 925, 934. A military judge sentenced him to a bad-conduct discharge, confinement for 30 months, and reduction to E-1. Consistent with a pretrial agreement the convening authority approved only confinement for 18 months, a bad-conduct discharge, and reduction to E-1.

On appeal, the appellant raises four issues:

I. WHETHER APPELLANT IS ENTITLED TO A NEW STAFF JUDGE ADVOCATE RECOMMENDATION AND CONVENING AUTHORITY ACTION BECAUSE THE CONVENING AUTHORITY FAILED TO CONSIDER HIS REQUEST FOR DEFERMENT OF MANDATORY FORFEITURES.

II. WHETHER NAVAL CONSOLIDATED BRIG MIRAMAR HAS UNLAWFULLY MODIFIED AND INCREASED THE SEVERITY OF APPELLANT'S SENTENCE.

III. WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL DEFENSE COUNSEL'S FAILURE TO REQUEST A SANITY BOARD UNDER R.C.M. 706.[1]

IV. WHETHER APPELLANT'S GUILTY PLEA TO ADULTERY SHOULD BE SET ASIDE BECAUSE APPELLANT MARRIED HIS WIFE BASED ON HER MISREPRESENTATIONS ABOUT THE PARENTAGE OF HER UNBORN CHILD AND APPELLANT FILED FOR AN ANNULLMENT PRIOR TO HIS COURT-MARTIAL.[2]

Deferment of Forfeitures

On appeal, the appellant asks this Court to either set aside the convening authority action, requiring a new post-trial processing, or provide for other unspecified meaningful relief on his adjudged sentence because of errors in the post-trial processing of his case. Specifically, the appellant alleges error in the handling of his deferment of forfeitures request. The appellant's request for deferment was included in his eleven page hand-written letter dated 15 October 2005 where he asked the convening authority to "consider deferment of pay to support my children, or allow partial forfeitures at a pay rate comparable to my children's needs." It was submitted to the convening authority by trial defense counsel with his entire clemency package on 31 October 2005. His trial defense counsel does not mention the forfeiture deferment request in his cover letter in which he asks the convening authority to "grant AB Talley his requested relief."

The deferment request was also not discussed in the addendum to the Staff Judge Advocate's (SJA) recommendation dated 1 November 2005, which was prepared in response to the appellant's clemency submission and deferment request to the convening authority. Even more significant is the fact that the SJA's addendum expressly advises

[1] This issue raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] This issue raised pursuant to *Grostefon*, 12 M.J. 431.

the convening authority that the appellant has **only** requested a reduction in his confinement. The convening authority took action on 2 November 2005, reducing confinement to 18 months in accordance with the pre-trial agreement but did not comment on the request for deferment. Finally, there is no indication in the record that the convening authority ever acted on the forfeiture deferment request.

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). In doing so, we determine whether there was, in fact, error; and if so, whether the error prejudiced the appellant. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Article 57(a)(2), UCMJ, 10 U.S.C. § 857(a)(2), authorizes a convening authority to defer automatic forfeitures as required by Article 58b(a)(1), UCMJ, 10 U.S.C. § 858b(a)(1), on application of an accused. The Rules for Courts-Martial (R.C.M.) further provides, the convening authority "may, upon written application of the accused, at any time after the adjournment of the court-martial, defer the accused's . . . forfeitures . . . that has not been ordered executed." R.C.M. 1101(c)(2). The appellant has the burden of showing an appropriate justification for deferment. R.C.M. 1101(c)(3). A deferment request **and the convening authority's action on it must** be attached to the record of trial. *See* R.C.M. 1103(b)(3)(D).

We review a convening authority's decision to deny a request for deferment of forfeitures under an abuse of discretion standard. R.C.M. 1101(c)(3). Although the Discussion to R.C.M. 1101(c)(3) only states that a "basis for the denial should be provided," our Superior Court has mandated it. "If there has been any doubt in any quarter before, let us now resolve it: When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based." *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992).

There is nothing in the record indicating the convening authority acted on the request or that he was ever advised that a request for the deferment is a separate and distinct request from the overall clemency request submitted by appellant.[3] There being no indication to the contrary, we conclude, as a matter of fact, the convening authority failed to act on the appellant's request for deferment of forfeitures. This conclusion is particularly mandated by the fact that the convening authority was expressly advised in the SJA's addendum that the appellant was only seeking a reduction of the confinement. This failure to act constitutes error.

Having concluded error, we must now address any prejudice. Congress expressly "recognized the serious impact that [] forfeitures would have on the family of the accused

[3] By finding this to be error we do not establish a requirement that separate written legal advice is required on the deferment. *See United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000); *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002).

by providing the authority for deferment and waiver." *United States v. Brown*, 54 M.J. 289, 292 (C.A.A.F. 2000). Whenever it is clear from the record the convening authority was provided a timely request for deferment of forfeitures, the appellant has dependents, and there is no indication in the record that the convening authority acted on the request, we will presume the appellant was materially prejudiced by the loss of a substantial right granted by Congress to him and his family. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *see United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998); *United States v. Sebastian*, 55 M.J. 661, 664 (Army Ct. Crim. App. 2001). The appellee has offered nothing to suggest that such a presumption should not apply to this case.

In this case, we agree with the appellant that error was committed in the handling of his request for deferment of forfeitures. We also find that the appellant was prejudiced and grant appropriate relief by reassessing the sentence below.[4]

Article 56, UCMJ, Claim

In his second asserted issue, the appellant contends that the Navy Consolidated Confinement Facility in Miramar California (Navy Brig) "unlawfully modified and increased the severity of appellant's sentence" in violation of Article 56, UCMJ, 10 U.S.C. § 856. That Article provides, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe." Here the appellant asserts that the conditions of his confinement from 11 Oct 05 to 16 Oct 06,[5] violated Article 56, UCMJ when the Brig restricted his rights to contact his children because he was convicted of an offense involving sex with a minor.[6]

In support of this issue, the appellant has offered and we have granted his motions to submit a number of documents relating to the conditions of his post-trial confinement at the Navy Brig. Most notable of the documents submitted are his affidavit of 10 January 2007 which states his complaint and the harm he has suffered, the complained of 17 April 2006 Navy Brig policy on contact between prisoners convicted of sexual offenses and minors, and a copy of a complaint filed in accordance with Article 138, UCMJ, 10 U.S.C. § 938, dated 19 Oct 06 addressed to the Chief of Naval Operations.[7]

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[4] We reject the appellant's assertion in post-trial matters that he was seeking a six month waiver of forfeitures and reduction in rank. Such a claim is not supported by the record or matters ever submitted to the convening authority.

[5] The appellant's total confinement at the Navy Brig was from 11 Oct 05 to 30 Nov 06.

[6] The appellant has a child with both his wife and the victim.

[7] We expressly note that the appellant does not allege a violation of Article 55, UCMJ, 10 U.S.C. § 855, or the Eighth Amendment to the Constitution in his brief or his submissions before this Court. Concluding that the facts does not raise even a prima facie claim of cruel and unusual punishment, we do not address this issue. To prove an Eighth Amendment violation, 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) (footnotes omitted). However, assuming arguendo such an argument was raised, we conclude that it is without merit.

Complaints about the conditions of post-trial confinement raise a number of preliminary questions. One of these is in the nature of a precondition to jurisdiction by this Court. Specifically the law requires the appellant exhaust his administrative remedies prior to seeking judicial review. *See United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001); *United States v. Wise*, 64 M.J. 468, 469 (C.A.A.F. 2007).

Looking to the documents submitted we note the appellant did in fact seek and obtain relief from the April 06 Brig restrictions when he complained via Article 138, UCMJ, on 30 August 2006.[8] Specifically, in his second Article 138, UCMJ, complaint of 19 October 2006 the appellant acknowledges that he and the confinement facility "openly negotiated a reasonable resolution" to the policy and they "revamped the policy governing Complainant's requested contact with his children" which went into effect on or about 16 October, 2006.[9] These negotiations apparently were directly in response to his August 2006, Article 138, UCMJ, claim. Thus the appellant's Article 56, UCMJ, complaint before this Court is limited to the one year period the replaced policy was in effect.[10]

An appellant who asks this Court to review prison conditions must establish a "clear record" of both "the legal deficiency in administration of the prison and the jurisdictional basis for our action." *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997). Whether the conditions alleged constitute a violation of Article 56, UCMJ, is a question we review de novo. *See generally Wise*, 64 M.J. 468 (citing *White*, 54 M.J. at 471). The burden to make this showing rests upon the appellant.

The appellant has failed to establish that the April 06 Navy Brig restrictions on his rights to contact his children are in violation of Article 56, UCMJ. Under that Article the question is, "Did the restriction on contact constitute punishment?" Looking to the policy, we find a well articulated basis for the policy that serves a legitimate penological purpose. We note that not all visitation or outside contact was withheld from the appellant, just a certain segment of it. Further, we find the April 2006 policy had reasonable, rationally based options for exceptions to the policy with a legitimate penological interest. Finally, we find it significant that when confronted with the appellant's complaints of the policy, the Navy Brig made adjustments that the appellant expressly found satisfactory. For all of these reasons we conclude that the appellant has failed to establish his Article 56, UCMJ, claim of unlawful additional punishment.

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[8] The appellant only submitted his second complaint under Article 138, UCMJ, to this Court. He references his first complaint in the body of the second.

[9] As for the 19 October 2006 Article 138, UCMJ, complaint, it appears that it remains pending before the Chief of Naval Operations and seeks reinstatement and compensation from the service secretaries for the prior restriction which he acknowledges is no longer in effect.

[10] We note the appellant has *not* provided any evidence as to the "contact restrictions" in place from Oct 05 to Apr 06.

Ineffective Assistance of Counsel

Prior to trial, the appellant was referred to a private licensed clinical psychologist for individual psychotherapy. The off-base referral was from the installation psychiatrist apparently because of the private clinical psychologist's expertise in dealing with "childhood trauma."

At the trial, the appellant was represented by military defense counsel who introduced a statement in sentencing from the clinical psychologist. In the statement, the psychologist indicates that he met with the appellant four times and his diagnostic impression is that the appellant meets the "criteria for Post-traumatic Stress Disorder and Depressive disorder, not otherwise specified." Further the clinical psychologist recommended that the appellant "undergo a psychosexual evaluation by a qualified professional in order to help determine any potential future risk to others and recommendations for his future psychological care."

After admission of the above sentencing exhibit the military judge expressly asked trial defense counsel, "Do you believe there are any mental competency issues in this case?" The trial defense counsel replied, "No. Your Honor, I've fully explored those with Dr. Perovich, and there is absolutely no reason for the defense to believe that mental responsibility, or lack thereof, is at issue in this case." The appellant was not questioned on the issue by the military judge.

On appeal, appellate defense counsel now asserts that the appellant was "denied effective assistance of counsel by his trial defense counsel's failure to request a sanity board under R.C.M. 706." In his affidavit before this Court the appellant further adds that had a sanity board been conducted "my Trial Defense Counsel would have discovered evidence that would have reduced my mental responsibility or would have helped to mitigate the severity of my conviction."

The government counters these assertions with an affidavit from the appellant's trial defense counsel. Trial defense counsel, addressing his pretrial preparation in this case, acknowledges that he discussed the case with the clinical psychological, looked for any evidence to suggest a sanity issue, considered the sanity board issue, and made a conscious decision not to pursue a request for a sanity board. The appellant acknowledges that his trial defense counsel met with the clinical psychologist before the trial.[11]

[11] While the affidavits from trial defense counsel and the appellant differ on the particulars of a meeting between the psychologist and the attorney, they both agree that a meeting took place.

In analyzing the appellant's affidavit and the government's response thereto, this Court relied upon the guidance in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). In *Ginn*, our superior court provided six principles to apply in deciding if this Court is permitted to rely upon the affidavits or is required to order a *Dubay*[12] hearing to obtain more facts in order to resolve the underlying substantive issue. *Id.* Applying these principles, we conclude that we do not need to order a *Dubay* hearing and that we may rely upon the affidavits in resolving the appellant's claim of ineffective assistance of counsel.

The first question presented before this Court is whether the appellant's trial defense counsel, in arriving at the decision to not request a sanity board, denied the appellant effective assistance of counsel. In other words, was counsel deficient in not requesting a sanity board, given the information available to him at the time? R.C.M. 706(a) provides the standard:

> If it appears to . . . defense counsel . . . that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation ***shall*** be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

Id. (emphasis added). This provision clearly establishes the duty of trial defense counsel to report sanity issues to an appropriate authority. Notably, in the case of trial defense counsel, it does not allow for consideration of trial tactics or strategy. However, it *does* require as a threshold that it appear *to counsel* that there is "reason to believe" their client either 1) lacked mental responsibility for a charged offense, or 2) lacks the capacity to stand trial.

Our careful review of the affidavits from both the appellant and the trial defense counsel, the Article 32 investigation, as well as the psychologist's letter admitted at trial, convinces us that the threshold question noted above was not met. While the affidavits vary in content and emphasis, clearly implicit in both is the absence of any basis to believe that the appellant lacked mental responsibility for any of his offenses or lacked the capacity to stand trial. This conclusion is also significantly supported by the quality and quantity of glowing performance reports and character statements submitted by the appellant in his sentencing case. Thus, we conclude that the duty imposed by R.C.M. 706(a) was never triggered thus *requiring* counsel to raise the sanity issue.

But the inquiry does not end there. The second question before this Court is whether the appellant's trial defense counsel, in arriving at the decision to not seek additional psychological testing denied the appellant effective assistance of counsel. The

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

appellant contends that such testing "would have helped to mitigate the severity of my conviction." This question presents a more traditional claim of ineffective assistance of counsel.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Servicemembers 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, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002); *see also 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 is presumed to be competent. *Key*, 57 M.J. at 249. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

In this case the appellant has failed to establish any indication in his affidavit that further testing would have produced anything more than the diagnosis he already submitted to the military judge. It is not enough for him to suggest that further testing would have been mitigating; he must show that it in fact further testing would have produce mitigating evidence. Yet, despite apparently extensive counseling while in confinement the appellant offers nothing more than a conclusory statement. This is not enough to overcome the presumption of competence particularly when the counsel offered evidence of the very type the appellant now claims is lacking. Therefore, we find this claim of ineffective assistance to be without merit.

Legal and Factual Sufficiency of Adultery Charge

Finally the appellant asserts that his guilty plea should be set aside because his marriage was null and void because it was based upon false pretenses. While not stated as such we considered this a claim that the conviction was legally and factually insufficient.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having

personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

The appellant stipulated at trial that at the time of his sexual relations with the 13-year-old victim he was in fact married to another and remained married. When questioned by the military judge he admitted under oath that he was and is married. Clearly all of the elements of the offense of adultery have been met. We find the appellant's claim that a possible annulment somehow excuses his conduct to be without merit.

Conclusion

The 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, having found error in not acting on the deferment of forfeitures request, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 17 months and 15 days, and reduction to E-1. Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court