UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DANIEL J. THOMAS
United States Air Force

ACM 34627

3 April 2002

Sentence adjudged 10 May 2001 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Timothy W. Murphy and Major Patricia A. McHugh.

Appellate Counsel for the United States: Lieutenant Colonel William B. Smith and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, PECINOVSKY, and LOVE
Appellate Military Judges

OPINION OF THE COURT

LOVE, Judge:

At a general court-martial, a military judge convicted the appellant, in accordance with his pleas, of conspiracy, larceny, and forgery. Articles 81, 121, and 123, UCMJ, 10 U.S.C. §§ 881, 921, 923. His approved sentence consisted of a dishonorable discharge, confinement for 24 months, and reduction to airman basic. The appellant contends that he received ineffective assistance of counsel based on improper argument and that his sentence is inappropriately severe. We disagree and affirm.

I. FACTS

The appellant was a 21-year-old member of the Security Forces Squadron at Tinker Air Force Base (AFB), Oklahoma. He discovered that an easy way to obtain cash was to steal checks from his fellow dormitory residents, forge the checks so that they were payable to him, deposit the checks into his credit union account, and write checks to his friends for cash. This "get rich quick" scheme was quickly discovered.

II. VALIDITY OF DEFENSE COUNSEL'S ARGUMENT

The appellant claims that his defense counsel was ineffective because he inappropriately argued for a punitive discharge against the appellant's wishes. The standard of review on claims of ineffective assistance of counsel is based on a two-pronged test. The appellant must demonstrate: (1) that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment; and (2) that his counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Ingham*, 42 M.J. 218 (1995). The appellant bears the burden of proving ineffective assistance of counsel and failure to meet both prongs of the test is fatal to his claim. *United States v. Gibson*, 46 M.J. 77 (1997)

A defense counsel may ask the sentencing authority for one kind of punishment over another, as long as it is consistent with the accused's wishes. *See United States v. Lyons*, 36 M.J. 425, 427 (C.M.A. 1993); *United States v. Weatherford*, 42 C.M.R. 26 (C.M.A. 1970). However, "[w]here the record is silent regarding an accused's desires, defense counsel may not concede that a punitive discharge is appropriate." *Lyons*, 36 M.J. at 427. "Accordingly, when defense counsel does seek a punitive discharge … counsel must make a record that such advocacy is pursuant to the accused's wishes." *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994).

In this case, the appellant has not satisfied even the first prong of the test. The relevant portion of defense counsel's argument on sentencing reads as follows:

> A fair sentence in this case would be 14 months confinement.
>
> ….
>
> He's not asking for a discharge at all, but if you are going to discharge him, he's asking that you not give him a dishonorable discharge. These aren't the actions that were so to the left of the norm that he should be dishonorably discharged. If you're going to give him a discharge, a bad conduct discharge is much more appropriate in this situation than a

> dishonorable one, and he's asking that you consider a bad conduct discharge and not a dishonorable discharge.
>
> ….
>
> He's asking, Your Honor, for you to please be lenient when you decide his sentence and only sentence him to 14 months confinement.

To be effective, a defense counsel is advised to anticipate and evaluate the possibilities of what might happen at trial, both on findings and sentence, and to structure his or her arguments accordingly. *United States v. Bolkan*, 55 M.J. 425 (2001) (citing *United States v. Fluellen*, 40 M.J. 96, 98 (C.M.A. 1994)). That is exactly what the defense counsel did in this case. The maximum punishment authorized for the offenses committed by the appellant was a dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to airman basic. The government argued for a sentence of a dishonorable discharge, confinement for 39 months, total forfeitures, and reduction to airman basic. In response, defense counsel argued that a fair sentence would constitute 14 months' confinement and no discharge. In a practical attempt to address the real probability of a punitive discharge, defense counsel argued for the less severe discharge, if one was imposed. To assert that defense counsel's carefully worded argument somehow misrepresented the appellant's wishes is completely off the mark. Defense counsel was clearly arguing for no discharge, but if, and only if, the judge believed that a discharge was appropriate, defense counsel argued for the less severe type of discharge. This argument was not erroneous and defense counsel was not ineffective.

III. SENTENCE SEVERITY

This court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. §866(c). Generally, 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 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Applying that standard to the facts in this case, we believe that the appellant received a fair sentence. His criminal acts were deliberate and cunning. He victimized fellow airmen, and showed a total disregard for society's basic values, i.e., honesty, integrity, and truthfulness. His duty performance over his two and a half years of active duty was sub par, as demonstrated by the nonjudicial punishment he received pursuant to Article 15, UCMJ, 10 U.S.C.§ 815 (misuse of another airman's military identification card), two letters of reprimand, and a referral enlisted performance report. His service record, taken as a whole, evidences a serious lack of self-control and disregard for others.

Despite formal warnings that further misconduct would not be tolerated, he intentionally engaged in criminal activity that besmirched his name, his unit, and the United States Air Force. All of these factors constitute a valid basis for the sentence adjudged in this case.

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; *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge PECINOVSKY did not participate.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator