UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEAN E. THOMPSON, JR.
United States Air Force

ACM 37380 (rem)

27 July 2011

Sentence adjudged 20 November 2008 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Thomas W. Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael A. Burnat; and Major Reggie D. Yager.

Appellate Counsel for the United States: Colonel Don. M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Naomi Porterfield; and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

OPINION OF THE COURT

UPON REMAND

ORR, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of divers use of ecstasy and one specification of divers use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consists of a bad-conduct discharge, one year of confinement,

forfeiture of all pay and allowances, and reduction to the grade of E-1. After receiving the matters submitted by the appellant and his trial defense counsel requesting clemency, the convening authority reduced the amount of the appellant's adjudged confinement by 3 months. The approved sentence consisted of a bad-conduct discharge, 9 months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

This case was remanded to this court for further review. In a published decision, issued 3 June 2010, this Court affirmed the approved findings and sentence. *United States v. Thompson*, 69 M.J. 516 (A.F. Ct. Crim. App.), *rev'd*, 69 M.J. 456 (C.A.A.F. 2010) (mem.). By decision issued 20 December 2010, the United States Court of Appeals for the Armed Forces (C.A.A.F.) found that we failed to apply the "colorable showing of possible prejudice" standard when determining whether the appellant received ineffective assistance of counsel. *Thompson*, 69 M.J. at 456. As a result, our superior court vacated our decision and remanded the case to this Court for further review. Finding no material prejudice to the appellant, we affirm the findings and the sentence.

Background

The appellant used ecstasy and marijuana with several Airmen while stationed in Monterey, California, on multiple occasions between 1 October 2007 and 29 February 2008. The United States Army Criminal Investigation Division (CID) discovered the appellant's drug use after Airman Basic (AB) PS and AB PD told CID agents that they used illegal drugs with the appellant. At trial, AB PS and AB WP testified that they did not a have a distinct memory of the appellant using ecstasy or marijuana, but Airman First Class (A1C) JC testified that, in late 2007, he frequently used marijuana with the appellant and used ecstasy between three and seven times with the appellant. Without objection from trial defense counsel, the military judge admitted AB PS's and AB WP's pretrial agreements into evidence. On appeal, the appellant asserts that he received ineffective assistance of counsel and that his sentence was inappropriately severe. The appellant asks this Court to bring this case to a close by affirming the findings and only so much of the sentence as provides for 6 months of confinement, reduction to E-1, and a bad conduct discharge. Alternatively, he requests a *Dubay*[1] hearing to resolve the conflicting post-trial affidavits.

Assistance of Counsel

In his first assignment of error, the appellant gives the following reasons why he believes his trial defense counsel were ineffective: they (1) conducted a deficient cross-examination of AB WP, a co-actor; (2) inappropriately acquiesced to the admission of two of the co-actors' pretrial agreements, did not request limiting instructions in findings

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

or sentencing, and elicited details from the co-actors about their adjudged sentences, pretrial agreement caps, and clemency even though their pretrial agreements did not require cooperation or testimony against the appellant; (3) failed to request a deferment/waiver of forfeitures; (4) without authority, conceded the appellant's guilt during the sentencing argument and clemency submission; (5) without authority, conceded the appropriateness of the appellant's punitive discharge and forfeitures during the clemency submission; and (6) committed cumulative errors.

After considering the entire record and the submissions of the trial defense counsel, we concluded that trial defense counsel were not ineffective and the cumulative error doctrine did not apply. We found that the trial defense counsel had strategic reasons for cross-examining AB WP in the manner in which they cross-examined him and in not objecting to the admission of the pretrial agreements. Additionally, we found that trial defense counsel's sentencing argument was an acknowledgment of and not a concession of the appellant's guilt. Trial defense counsels' decisions were reasonable and we did not second-guess them. In finding that the appellant's trial defense counsels' performances were not deficient, we did not articulate whether we used the different standard applicable to post-trial assistance. *Thompson*, 69 M.J. at 519.

Generally, claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). When there is a lapse in judgment or performance alleged, we ask (1) whether the trial defense counsel's conduct was, in fact deficient, and if so, (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687. Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). The appellant bears the heavy burden of establishing that his trial defense counsel were 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). However, the threshold for finding prejudice stemming from ineffective assistance of counsel for post-trial proceedings is lower.

We fully recognize that the convening authority is the appellant's best hope for relief. *See United States v Bono*, 26 M.J. 240, 243 (C.M.A. 1988); *United States v Wilson*, 26 C.M.R. 3, 6 (1958). As a result, our superior court imposed a lower threshold for claims of post-trial ineffective assistance of counsel. "However, because of the highly discretionary nature of the convening authority's clemency power, the threshold for showing [post-trial] prejudice is low." *United States v Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Therefore, the appellant gets the benefit of the doubt and needs to make only a "colorable showing of possible prejudice." *Id.*

We considered the conflicting affidavits from the appellant and his trial defense counsel as we tested for possible prejudice. When conflicting affidavits create a factual

dispute, we cannot resolve it by relying on the affidavits alone; rather, we must resort to a post-trial fact-finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the alleged errors would not warrant relief even if the factual dispute were resolved in the appellant's favor. *Id*. at 248. In the case sub judice, even after resolving the factual disputes favorable to the appellant, we did not find a showing of possible prejudice.

The major points of conflict in the affidavits center around the issues of the request for a deferment/waiver of forfeitures and whether the appellant authorized his trial defense counsel to acknowledge the appropriateness of his punitive discharge and forfeitures. We discuss these issues in turn.

First, we address the deferment/waiver of forfeitures request issue. If a convicted service member submits a request, the convening authority may defer an adjudged forfeiture of pay or allowances until the date on which he approves the sentence. Article 57(a)(2), UCMJ, 10 U.S.C. § 857(a)(2); Rule for Courts-Martial (R.C.M.) 1101(c)(2); *United States v. Emminizer*, 56 M.J. 441, 442-43 (C.A.A.F. 2002). The convening authority may also waive automatic forfeitures of pay and allowances for the benefit of a convicted service member's dependents if the service member received a qualifying sentence, is in confinement or on parole, and is entitled to pay and allowances that are subject to mandatory forfeitures. Article 58b(b), UCMJ, 10 U.S.C. § 858b(b); R.C.M. 1101(d)(2); *Emminizer*, 56 M.J. at 444.

However, the granting of a deferral/waiver is a matter solely within the discretion of the convening authority. Assuming that the appellant had submitted a deferral/waiver of forfeitures request, it is entirely speculative whether the convening authority would have granted such a request. Giving the appellant the benefit of the doubt, it is possible that the convening authority may have granted a deferral and/or waiver. While deferrals are unlikely, convening authorities often give sympathetic consideration to requests for waiver of forfeitures in favor of innocent dependents. Without question, the appellant did not submit a request for waiver or deferment of forfeitures. After considering the post-trial affidavits, we find that his failure to do so was not as a result of any unprofessional conduct by his trial defense counsel. Both of the appellant's trial defense counsel were aware of his desire to submit a request for deferral and a waiver. In fact, the appellant understood that submitting his wife's bank account information was a condition precedent to submitting such requests. Despite several assurances that he would do so, the appellant failed to provide the necessary banking information. As a result, on 8 January 2009, the appellant's trial defense counsel requested the information directly from the appellant's wife. Rather than providing the banking information, on 31 January 2009 she replied in an email: "dean told me he sent you my bank information. do you need me to send again?" Because the convening authority took action in this case on 26 January 2009, the requested banking information was no longer necessary. We

believe that any chance that the appellant had for obtaining a waiver of forfeiture was negated by his inaction. In short, the appellant has failed to make a colorable showing of possible prejudice due to ineffective assistance of counsel.

Next, the appellant contends that his trial defense counsel made concessions in his clemency submissions to the convening authority without his authorization. Specifically, his trial defense counsel acknowledged the appropriateness of his punitive discharge and forfeitures. In response, the trial defense counsel asserts that they made the concessions with the appellant's informed consent because the appellant disagreed with their original strategy designed to remove the punitive discharge. We find that the trial defense counsel made a strategic decision to forego seeking relief from the punitive discharge and forfeitures in an attempt, which proved successful, to reduce the appellant's confinement. In fact, the convening authority granted all of the appellant's requested relief. As a result, we will not second-guess this strategic decision. Moreover, assuming, arguendo, that the trial defense counsel did not have authority to concede the appropriateness of the appellant's punitive discharge and forfeitures, we find no prejudice. Given the appellant's crimes as well as the crimes and approved sentences of his co-actors, it is highly unlikely that the convening authority would have disapproved, mitigated, or suspended the appellant's adjudged punitive discharge and forfeitures.[2] Put simply, the appellant's trial defense counsel were not ineffective and the cumulative error doctrine does not apply.[3]

Sentence Severity

The appellant asserts that his sentence was inappropriately severe because he received more than twice the confinement of his co-actors for crimes arising from the same facts and charges. He asks this Court to reassess his sentence and disapprove the punitive discharge.

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while

[2] The appellant has failed to provide this Court with the information he would have submitted to the convening authority to convince him to grant relief from the adjudged punitive discharge and forfeitures. "In most ineffectiveness cases, an [appellant] is in the best position to identify relevant information and present it to the appellate court. When factual information is central to an ineffectiveness claim, it is the responsibility of the [appellant] to make every feasible effort to obtain that information and bring it to the attention of the appellate court." *United States v. Moulton*, 47 M.J. 227, 230 (C.A.A.F. 1997). On this point, the appellant has fallen woefully short and this, in part, causes us to find no prejudice.

[3] The cumulative error doctrine is based on the premise that errors exist. *See United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)). As this Court has found that the trial defense counsel were not ineffective, the cumulative error doctrine is clearly inapplicable.

we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In closely related cases, this Court will engage in sentence comparisons between the appellant and his co-actors. *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008)), *review denied*, 68 M.J. 231 (C.A.A.F. 2009). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are '*highly disparate*.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id*. (emphasis added); *see also United States v. Kent*, 9 M.J. 836, 839 (A.F.C.M.R. 1980) (quoting *United States v. Capps*, 1 M.J. 1184, 1188 (A.F.C.M.R. 1976)) (noting that service courts may use their Article 66, UCMJ, 10 U.S.C. § 866(c), authority to reduce any disparity that is not supported by "good and cogent" reasons).

Because the appellant, AB WP, AB PS, and AB PD are co-actors and they all received similar sentences for their crimes, we conclude that their sentences are not highly disparate. Conversely, the disposition of the appellant's and A1C JG's case are in fact, different. While not engaging in sentence comparison, we considered whether there was any evidence of discriminatory or otherwise illegal prosecution or referral and found none. *See United States v. Noble*, 50 M.J. 293, 294-95 (C.A.A.F. 1999). The appellant used ecstasy and marijuana on divers occasions whereas A1C JG used only marijuana on only one occasion. The appellant's crimes are more serious, and this distinction justifies the different dispositions of the cases.

Finally, we consider whether the appellant's sentence was appropriate "judged by 'individualized consideration' of the particular [appellant] 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find that the appellant's sentence, one which includes a bad-conduct discharge and more confinement than his co-actors, is inappropriately severe.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court