UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW J. THOMPSON
United States Air Force

ACM S32019 (f rev)

18 March 2013

Sentence adjudged 13 December 2011 by SPCM convened at Buckley Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

En Banc

UPON FURTHER REVIEW

PER CURIAM:

On 13 December 2011, in accordance with the appellant's pleas, a military judge sitting alone found the appellant guilty of one specification of wrongful use of a synthetic cannabinoid, commonly referred to as "spice," and one specification of wrongful use of said "spice" while on duty as a sentinel or lookout, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1. On 18 January 2012, the convening authority approved the sentence as adjudged.

On 27 August 2012, the appellant raised two issues for our consideration on appeal: 1) Whether the appellant's confinement in the same open cell, or "pod," with foreign nationals at the Douglas County Jail (DCJ) in Colorado violated Article 12, UCMJ, 10 U.S.C. § 812, and, if so, whether the burden should be placed upon the appellant to resolve a violation of Article 12, UCMJ, because it promotes a national security interest beyond the individual interest of the appellant, and 2) Whether the appellant was denied his Sixth Amendment[1] right to effective assistance of counsel when the appellant's trial defense counsel failed to advise the appellant of his Article 12, UCMJ, rights or the process for resolving an Article 12, UCMJ, violation.[2]

On 19 November 2012, we issued an opinion in this case finding an Article 12, UCMJ, violation and awarded the appellant 30 days of confinement credit. *United States v. Thompson*, ACM S32019 (A.F. Ct. Crim. App. 19 November 2012) (unpub. op). On 19 December 2012, the Government filed a motion asking us to reconsider our decision en banc in accordance with A.F. CT. CRIM. APP. R. PRAC. AND PROC. 17.1 and 19 (2010). Among the reasons cited by the Government urging reconsideration is that the decision in this case is inconsistent with our decision in *United States v. Hogeland*, ACM 37821 (A.F. Ct. Crim. App. 10 October 2012) (unpub. op.). On 8 February 2013, we issued an order granting the Government's motion to reconsider en banc and vacating our prior decision.

This Court has reviewed the appellant's issues on reconsideration. We deny the appellant relief on both claims.

Background

On 13 December 2011, the appellant was tried at Buckley Air Force Base, Colorado. At the conclusion of his trial, the appellant was initially confined at DCJ and remained there until his transfer to the Miramar Naval Brig on 12 January 2012. In his post-trial declaration, the appellant stated that, each day during his 30 days of confinement time at DCJ, he had direct and indirect interaction on numerous occasions with 8-12 "Mexicans" being held there for deportation. The appellant stated that, between 0700-2130 hours, he congregated with the foreign nationals by watching television, playing cards and games, sharing cleaning details, and playing basketball together. During the nighttime hours, the appellant was confined to a separate cell.

Even though it was clear to the appellant that he was confined with foreign nationals, which implicates Article 12, UCMJ, he did not advise his trial defense counsel or submit a complaint under Article 138, UCMJ, 10 U.S.C. § 938. In his declaration, the appellant stated, "I had no knowledge of Article 12, UCMJ, or that my confinement in immediate association with a foreign national was a violation of Article 12," UCMJ. He

[1] U.S. CONST. amend. VI.
[2] Both issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

states he was aware of a prisoner grievance system at DCJ, but did not use the system because he was "unaware that my situation was in violation of any regulations." He further avers that he did not seek redress under Article 138, UCMJ, because neither his unit nor his defense counsel told him about that process. The appellant has not submitted any independent evidence to support his allegation.

Violation of Article 12, UCMJ

We review de novo the question of whether an appellant's post-trial confinement violates Article 12, UCMJ. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007). Article 12, UCMJ, states: "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces." The "immediate association" language means that military members can be confined in the same jail or brig as a foreign nationa,l but they have to be segregated into different cells. *Wise*, 64 M.J. at 475.

In addition, '"[A] prisoner must seek administrative relief prior to invoking judicial intervention' to redress concerns regarding post-trial confinement conditions." *Id.* at 471 (quoting *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001)). *See also United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997); *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993). The purpose of this requirement is to promote the "resolution of grievances at the lowest possible level and [to ensure] that an adequate record has been developed" to aid our appellate review. *Wise*, 64 M.J. at 471 (quoting *Miller*, 46 M.J. at 250). "Since a prime purpose of ensuring administrative exhaustion is the prompt amelioration of a prisoner's conditions of confinement, courts have required that these complaints be made while an appellant is incarcerated." *Id.* "Exhaustion requires [the a]ppellant to demonstrate that two paths of redress have been attempted, each without satisfactory result." *Id.* The appellant "must show that, 'absent some unusual or egregious circumstance . . . he has exhausted the prisoner-grievance system [in the confinement facility] and that he has petitioned for relief under Article 138,'" UCMJ. *Id*. (citing *White*, 54 M.J. at 472).[3]

The appellant failed to exhaust available administrative remedies within the military system that might have triggered an investigation into his allegation in a timely

[3] Article 138, UCMJ, 10 U.S.C. § 938, states:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

manner. For example, the appellant failed to file an Article 138, UCMJ, complaint; failed to submit a complaint with the Inspector General; failed to file a grievance with the confinement facility; and failed to inform his chain of command or his defense counsel about his situation. In fact, the appellant waited nearly five months after release from confinement and seven months after final action to file an affidavit raising the issue. We find no "unusual or egregious circumstance[s]" to excuse the appellant's failure to pursue available administrative remedies. *See Wise*, 64 M.J. at 471. Under the unique facts of this case, we conclude the appellant is barred from pursuing his claim.

Ineffective Assistance of Counsel

The appellant next argues he was denied his Sixth Amendment right to effective assistance of counsel because his trial defense counsel failed to advise him about Article 12, UCMJ, or the process for resolving an Article 12, UCMJ, violation. We again disagree and deny the appellant's claim for relief.

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), where the appellant must demonstrate (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) the "deficient performance prejudiced the defense [through errors] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

The deficiency prong requires the appellant to show his defense counsel's performance "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In doing so, the appellant "must surmount a very high hurdle." *Perez*, 64 M.J.at 243 (citing *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)). This is because counsel is presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *Alves*, 53 M.J. at 289 (citing *Strickland*, 466 U.S. at 689).

"[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 69. *See also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (Counsel "has a duty to make reasonable investigations to determine what the true facts are."). When there is a factual dispute, appellate courts determine whether further factfinding is required under

United States v. Ginn, 47 M.J. 236 (C.A.A.F. 1997). We may decide a factual dispute without further factfinding when the "appellate filings and the record as a whole 'compellingly demonstrate' the improbability" of the facts alleged by the appellant. *Id*. at 248.

In his affidavit, the appellant asserts inter alia that his defense counsel, Captain (Capt) MF told him he was "being transferred [to Miramar from DCJ] because the UCMJ prohibited [him] from being housed in a civilian confinement facility for more than 30 days." He also states that he was "never told of the Article 138, UCMJ, process by my unit or my defense counsel" and, consequently, did not seek redress using that process. Finally, he states he was aware of the prisoner grievance process but did not use it "because I was unaware that my situation was in violation of any regulations."

The appellant has not met his burden under the first prong of *Strickland*, *i.e*., he has not established the truth of the factual allegations underlying his claim that Capt MF's performance as trial defense counsel was deficient. *See Strickland*, 466 U.S. at 687. We conclude Capt MF effectively represented the appellant before, during, and after his court-martial. In her affidavit, Capt MF stated that, during her post-trial representation of the appellant, she asked the base legal office about the status of the appellant's move from DCJ to Miramar. The legal office told Capt MF that the appellant's mother had raised issues about his safety at DCJ. Upon hearing this, Capt MF immediately followed up with the appellant, whom she says assured her that "he was not personally concerned for his own safety." He also did not mention to Capt MF, at that time, that he was housed with foreign nationals. The appellant also failed to raise this issue to Capt MF during the clemency process.

In addition, Capt MF explained to the appellant, during his court-martial, that it was impermissible for military members to be housed with foreign nationals in the context of illegal pretrial confinement under Article 13, UCMJ, 10 U.S.C. § 813. The appellant acknowledged to the military judge that he understood this concept. The appellant was at least on notice that being housed with foreign nationals might be an issue during his post-trial confinement.

Having found Capt MF's performance as trial defense counsel did not fall "below an objective standard of reasonableness," according to the prevailing standards of the profession, *Strickland*, 466 U.S. at 688, we also find that additional factfinding is not required in this case. *See Ginn*, 47 M.J. at 248.

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, UCMJ, 10 U.S.C. § 866(c);

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

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court