**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman Basic BRADLEY R. WESCHE**
**United States Air Force**

**ACM S30456**

**16 November 2005**

Sentence adjudged 18 September 2003 by SPCM convened at Schriever Air Force Base, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 4 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT



SMITH, Judge:

The appellant was tried at Schriever Air Force Base, Colorado, by a military judge sitting as a special court-martial. In accordance with his pleas, the appellant was convicted of one specification of larceny and one specification of forgery, in violation of Article 121 and 123, UCMJ, 10 U.S.C. §§ 921, 923. The sentence approved consisted of a bad-conduct discharge and confinement for 4 months.

On appeal, the appellant asserts that he was denied effective assistance of counsel guaranteed by the 6th Amendment. He contends his trial defense counsel failed to present

essential mitigation evidence during presentencing and failed to present favorable character information during the clemency process. Finding no error, we affirm the findings and sentence.

*Background*

The appellant, a security forces airman, stole another airman's debit card and used the card to buy food items at a Wal-Mart by forging the victim's name on the debit receipt.

The appellant's presentencing case consisted only of his unsworn statement, delivered in a question and answer format. His post-trial clemency submission[1] consisted of a memorandum from his trial defense counsel with three attachments: a letter from the appellant's father (an active duty Air Force lieutenant colonel), excerpts from the record of trial (including the appellant's unsworn statement), and three financial statements showing the appellant's debts. In his letter, the appellant's father questioned whether the Air Force had made an adequate effort to rehabilitate his son for further service.

In a declaration to us, the appellant contends he would have presented character and clemency letters to attest to his excellent rehabilitation potential, had his trial defense counsel advised him of his right to do so. To support his contention, the appellant submitted representative declarations from his father, his grandfather (a retired chief petty officer), and a former teacher.

Appellate government counsel submitted an affidavit from the trial defense counsel to explain the trial defense counsel's presentencing and clemency strategy.

*Discussion*

The test for ineffective assistance of counsel is whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Further, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). In determining whether this presumption of competence has been overcome, our superior court has established a three-pronged test:

[1] Submitted in accordance with Rule for Courts-Martial (R.C.M.) 1105.

> (1) Are appellant's allegations true; if so, 'is there a reasonable explanation for counsel's actions?';
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall 'measurably below the performance . . . [ordinarily expected] of fallible lawyers?'; and
>
> (3) If defense counsel was ineffective, is there a 'reasonable probability that, absent the errors,' there would have been a different result?

*United States v. Grigoruk*, 56 M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). We conclude that we can apply this test and resolve the assigned error without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) or *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Appellate defense counsel argue that the trial defense counsel was deficient by failing to offer testimony from witnesses who could have vouched for the appellant's character and rehabilitation potential, and by failing to provide the convening authority with any character letters other than the letter from the appellant's father. In his declaration to us, the appellant identifies potential character witnesses and summarizes the nature of their expected testimony. They would state, the appellant avers, that he is of good moral character and would be a good candidate for rehabilitation. In view of the matters relevant to rehabilitation potential that were before the court and the convening authority, and the appellant's representations of what other matters he would have presented, we find no basis for relief.

We need not examine the trial defense counsel's actual performance and strategy because the basis for our threshold conclusion that a *DuBay* hearing is not required[2] mirrors the basis for our conclusion that the presumption of competent counsel has not been overcome (*Grigoruk*, third prong): even if trial defense counsel's performance was deficient, relief is not warranted because there is no reasonable probability of a different result had he presented the very evidence the appellant now proposes. There was significant adverse evidence of the appellant's character and rehabilitative potential before the military judge and the convening authority. The charges themselves reflect a lack of integrity, in that the appellant stole a fellow airman's debit card and used it by forging the airman's signature. Further, in presentencing the government submitted the records of two earlier actions taken against the appellant: (1) a reprimand for willfully damaging government property by shooting 2 big screen televisions, 2 windows, and 12 wall pictures with a BB gun; and (2) nonjudicial punishment for negligently discharging

[2] *Ginn*, first principle: "[I]f the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Ginn*, 47 M.J. at 248.

a 9-millimeter handgun into the passenger door of a patrol car and willfully failing to return the proper number of 9-millimeter rounds to the armory. This pattern of misconduct spanned roughly 5 of the first 13 months of the appellant's enlistment. We fail to see how additional character statements would have produced a more favorable sentence at trial or clemency from the convening authority.[3] Therefore, we do not find that the presumption of competence of counsel has been overcome, in that there is no "reasonable probability that, absent the errors," there would have been a different result. *See Grigoruk*, 56 M.J. at 307.

*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 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[3] With respect to confinement, in a pretrial agreement with the appellant the convening authority agreed not to approve a sentence to confinement in excess of six months. Based on the adjudged sentence, the convening authority could approve no more than four months confinement.