UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ANTONIO L. WILSON
United States Air Force

ACM S31320

11 August 2008

Sentence adjudged 04 April 2007 by SPCM convened at Misawa Air Base, Japan. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Imelda L. Paredes, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of failure to obey a lawful order and one specification of carnal knowledge, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920. Both offenses included multiple violations.* The adjudged and approved sentence consists of a bad-conduct discharge, confinement for nine months, and reduction

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* We note that the Court-Martial Order (CMO) incorrectly omits the "divers occasions" language from the specification of Charge II. We order that the CMO be corrected to reflect that the appellant was convicted of violating Article 120, UCMJ, 10 U.S.C. § 920, on divers occasions.

to E-1. The appellant raises two assertions of error. Finding no merit in either, and no other prejudicial error, we affirm.

Consideration of Clemency Matters

The appellant correctly points out that the record contains no addendum to the Staff Judge Advocate's Recommendation (SJAR). He asserts that without the addendum, there is no way to determine whether the convening authority received or considered the appellant's clemency submissions, as required by Rule for Courts-Martial (R.C.M.) 1107(b) (3).

In response, the government provided this Court with an affidavit from the convening authority attesting that he did in fact receive and consider all clemency matters submitted by the defense, and that he expressly discussed such matters with his staff judge advocate before taking action. While a timely addendum to the SJAR would have been less time consuming and avoided the need for the appellant to raise this issue, the convening authority's affidavit is sufficient to assure this Court that he complied with the mandate of R.C.M. 1107(b) (3). Nothing more is required. *United States v. Godreau,* 31 M.J. 809, 812 (A.F.C.M.R. 1990); see *generally, United States v. Craig,* 28 M.J. 321, 325 (C.M.A. 1989).

Effective Assistance of Counsel

The appellant also asserts that he received ineffective assistance from his trial defense counsel because counsel did not inform him that if convicted of the offense of carnal knowledge, he would be required to register as a sex offender. Had the appellant known that to be so, he would not have pled guilty to that offense.[1]

We review ineffective assistance of counsel claims *de novo. United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006). In assessing such claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). To prevail, the appellant must show both: (1) that any deficiency in counsel's performance was "so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment;" and (2) that counsel's deficient performance prejudiced the defense to such an extent that it "[deprived] the [appellant] of a fair trial . . . ." *Strickland*, 466 U.S. at 687. With regard to the first prong, an error in counsel's performance, if it occurred, does not *per se* amount to ineffective assistance of counsel. Rather, the real question is whether, considering any perceived error, "the level of advocacy [fell] measurably below the performance . . . [ordinarily expected] of fallible lawyers." *United States v. Polk,* 32 M.J.

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

150, 153 (C.M.A. 1991) (quoting *United States v. DiCupe*, 21 M.J. 440, 442 (C.M.A. 1986). With regard to the second prong, an appellant in a guilty plea case "must also show that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Tippit,* 65 M.J. at 76 (internal citations omitted). Applying the above standards, we find no error.

At the end of the trial, the military judge asked trial defense counsel if he had informed the appellant of his post-trial and appellate rights. Counsel indicated he had done so. During the course of that discussion, trial defense counsel added: ". . . although it's not memorialized in [an appellate exhibit then being offered], I've also advised my client of the possibility of sex offender registration and what that would entail."

The appellant admits that the quoted exchange took place at trial and that his trial defense counsel in fact so advised him. Nonetheless, he complains that his counsel did not tell him that he would be *required* to register as a sex offender if convicted, but only said there was a *possibility* he would have to register.[2] Assuming, *arguendo*, that to be true, the differing wording is of no significance within the context of this case.

In *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006), our superior court indicated that trial defense counsel should inform clients of sex offender registration "requirements." However, accepting the appellant's position would require us to read that language far too literally. When considered within context, it is clear that the concern of the *Miller* court was that military members charged with sex offenses be given fair notice that conviction could, as a collateral consequence, result in a requirement that they register as a sex offender, not that they would in fact have to do so. Since sex offender registration requirements vary from state to state, any more specific advisement would be excessively burdensome. Indeed, the court in *Miller* specifically recognized that, "[g]iven the plethora of sexual offender registration laws enacted in each state, it is not necessary for trial defense counsel to become knowledgeable about the sex offender registration statutes of every state." *Id.,* at 459. If counsel is not required to know the sex offenders registration requirements for every state, they obviously cannot be required to advise a client on the specific "requirements" of any given state. In any event, the *Miller* court also recognized that even failure to advise a client on the collateral consequences of sex offender registration does not amount to *per se* ineffective assistance of counsel, but is simply a factor to be considered.

Here, the purported advisement by counsel, if accepted at face value, clearly put the appellant on notice, at the very least, that he *could* be required to register as a sex offender if convicted. That warning was sufficient to meet the general concerns of

[2] Affidavits from the appellant's trial defense counsel and the servicing defense paralegal strenuously rebut the appellant's claim, asserting the appellant was specifically told before trial, and understood, that if convicted he would have to register as a sex offender. Given our disposition of this issue, we need not resolve the factual dispute as to whether or not the appellant was told he would be "required" to file.

Miller. Armed with that knowledge, the appellant, if his fear of having to register as a sex offender was truly paramount, could have pled not guilty and forced the government to prove the charges against him. He did not, opting instead to plead guilty to the sex offense pursuant to a favorable pre-trial agreement (PTA) that limited the case to a trial by special court-martial. Thus, the appellant clearly was not misled by his counsel's advice concerning potential sex offender registration, but entered the PTA, and the resulting trial, with his eyes wide open. Under these circumstances, trial defense counsel was not ineffective within the meaning of *Strickland*.

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court