UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WILLIAM E. WOODARD, JR.
United States Air Force

ACM 36838

29 October 2007

Sentence adjudged 26 June 2006 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 years and 4 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Chadwick A. Conn, and Mark L. Waple.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Coretta E. Gray, and Captain Jamie L. Mendelson.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted by general court-martial of one specification each of carnal knowledge with a child between the ages of 12 and 16 years, sodomy of the same child, assault, and taking indecent liberties with a female under age 16, in violation of Articles 120, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 928, 934. A military judge sentenced the appellant to a dishonorable discharge, confinement for 3 years and 4 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant asserts he was denied effective assistance of counsel because his lawyers did not call live witnesses in extenuation and mitigation during the sentencing portion of the trial. Finding no error, we affirm.

Background

During the sentencing portion of the trial, no live witnesses were called to testify either for the defense or the government. The appellant's two-lawyer defense team introduced an unsworn statement of the appellant, favorable character letters from two of the appellant's supervisors, a letter of appreciation garnered by the appellant for his performance during an Air Show Major Accident Response Exercise, four certificates of performance recognition from his unit, and a copy of a Deferred Prosecution Agreement with the State of North Carolina related to one of the offenses for which he was court-martialed. The appellant's post-trial clemency submission to the convening authority included all of the matters submitted by the defense during sentencing, plus 18 additional character letters from family members, friends, and acquaintances. The appellant contends that one or more of the individuals who submitted post-trial clemency letters on his behalf should have been called to testify in person during sentencing. He focuses primarily on his parents, both of whom submitted affidavits indicating they wanted and expected to testify, and were at the trial for that purpose, but were never called by the defense. Had they been allowed to testify, they would have told the court the appellant was a loving, kind, and helpful son, grandson, and brother who, among other things, helped out on the family farm and helped care for his younger disabled brother.

Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo, applying the two-part test enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007); *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). Under *Strickland*, the appellant bears the burden of establishing: 1) That the performance of his counsel was deficient; and 2) That he was prejudiced by that deficiency. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). Appellants who seek to meet this burden "must surmount a very high hurdle," due to a "'strong presumption' that counsel was competent." *United States v. Dobson*, 63 M.J. 1, 10 (C.A.A.F. 2006) (citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) and *United States v. Grigoruk*, 56 M.J. 304, 306-07 (C.A.A.F. 2002)).

In examining counsel's performance under the first prong of *Strickland*, we must ask: "(A) Are appellant's allegations true? (B) If so, is there a reasonable explanation for counsel's actions? (C) If there is not a reasonable explanation, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?" *Dobson*, 63 M.J. at 10. When doing so, we will generally "not second-guess

the strategic or tactical decisions made at trial by defense counsel." *Paxton*, 64 M.J. at 490 (quoting *Perez*, 64 M.J. at 243). Applying these guidelines to the case sub judice, the appellant has failed to carry his burden under prong one of *Strickland*, and so we do not reach the second prong.

The charges to which the appellant pled guilty were very serious and were aggravated by the physical condition of one of the victims and the young ages of the others. The assault charge arose from the appellant's sexual assault of his 18-year-old wife by engaging in unwanted sexual intercourse with her, over her objection, while she was suffering from a painful medical condition. The victim of the carnal knowledge and sodomy charges was a 13-year-old girl, with whom the appellant had on three occasions engaged in sexual intercourse and twice engaged in sodomy. The victim of the indecent acts charge was a 12-year-old girl, whom the appellant had sexually molested by fondling her breasts.

Un-contradicted affidavits from the appellant's two trial defense counsel indicate that based on the nature and seriousness of the appellant's offenses, they made a conscious strategic decision, with the agreement of the appellant, to focus their sentencing theme on the appellant's "acceptance of responsibility" for his crimes. To that end, they traveled to the appellant's home town and other locations to interview potential witnesses and even had the appellant examined by a psychologist. Their efforts disclosed no information which they thought would help in their sentencing theme and they decided not to call live witnesses, but to rely on the favorable documentary evidence outlined above.

The decision not to call live witnesses included a specific decision not to have the appellant's parents testify. Based on prior interviews with the parents, both trial defense counsel concluded that allowing the parents to testify would significantly undermine their attempt to portray the appellant as someone who had accepted full responsibility for his actions. Contrary to his lawyers' advice, the appellant refused to tell his parents the truth about his crimes and would not let his lawyers do so. In fact, the appellant even asked that his parents not be allowed in the courtroom during the *Care*[1] inquiry so they would not learn the full extent of his crimes. As a result, the parents continued to believe, and assert in their conversations with his lawyers, that their son had done nothing wrong and that the fault lay with the young victims, whom they referred to as "whores." Worse, the appellant's mother even went so far as to tell his trial defense counsel that "if her boy got jail time, there would be a killing" if a certain relative of the appellant attended the trial, or words to that effect. The defense team was concerned enough about that statement to report it to the government, resulting in additional courtroom security during the appellant's trial. Although the relative in question ultimately did not attend, all of this led

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

the appellant's lawyers to conclude they would not be able to control the parents if they were called to testify and that the parents would undermine their strategy in sentencing of focusing on acceptance of responsibility. This strategic decision was reasonable under the circumstances and one which we will not second-guess at this level. *Paxton*, 64 M.J. at 490.

The above described strategic approach would not, of course, have precluded use in sentencing of some of the additional written character statements included in the appellant's clemency submission. However, failure to do so does not equate to ineffective assistance of counsel, particularly in light of the other documentary evidence the defense did submit on sentencing. It is not unusual for the defense to present different, more extensive matters to the convening authority in a clemency submission than were introduced in sentencing at trial.

Erroneous Promulgating Order

Although not raised by the appellant, we note that the promulgating order does not correctly reflect the pleas and findings as to Specification 2 of Charge I. As referred for trial, Charge I alleged two specifications of rape, in violation of Article 120, UCMJ. By exceptions and substitutions, the appellant was found guilty in Specification 1 of the charge to the lesser included offense of assault and in Specification 2 of the charge to the lesser included offense of carnal knowledge. Thus, he was found guilty of an Article 128, UCMJ violation as to Specification 1, and an Article 120, UCMJ violation as to Specification 2. The promulgating order fails to recognize that distinction and will need to be corrected.

Conclusion

The government is directed to issue a new promulgating order correctly reflecting the appellant's pleas and the findings of the court-martial. 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, GS-11, DAF
Clerk of the Court