UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN B. CARY JR.
United States Air Force

ACM S30146

8 February 2005

Sentence adjudged 23 May 2002 by SPCM convened at Misawa Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $500.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Kyle R. Jacobson, Major Andrew S. Williams, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Jennifer R. Rider, Major John D. Douglas, Major John C. Johnson, and Major Kevin P. Stiens.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GENT, Judge:

A military judge sitting alone as a special court-martial found the appellant guilty, pursuant to his pleas, of two specifications of dereliction of duty, one specification of carnal knowledge on divers occasions, and one specification of obstruction of justice, in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. The appellant's adjudged and approved sentence included a bad-conduct discharge, confinement for 6 months, forfeiture of $500.00 pay per month for 6 months, and reduction to E-1. The appellant assigns two errors on appeal: (1) Whether it was plain

error for the trial counsel to introduce evidence during presentencing that incorrectly stated the appellant had received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815; and (2) Whether the appellant's sentence was inappropriately severe.[1] In addition, we specified the following issue: Whether the trial defense counsel was ineffective because he failed to object to the inaccurate reference to nonjudicial punishment on the appellant's personal data sheet (PDS). For the reasons set forth below, we affirm.

Background

The appellant, who was 24 years old at the time of the offenses, pled guilty to dereliction of duty for allowing underage dependent girls to visit his dormitory room in violation of base regulations. The appellant also pled guilty to having consensual intercourse with one of the girls on two occasions. She was 15 years old at the time. Finally, he pled guilty to obstructing justice by asking the girl to deny that she knew him after he learned his commander was investigating whether he had allowed underage girls in his dormitory room.

It is Air Force practice for trial counsel to summarize information from the appellant's personnel records in a PDS to offer as an exhibit during presentencing. Rule for Courts-Martial (R.C.M.) 1001(b)(2); Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 3.5 (2 Nov 1999).[2] During presentencing, the military judge admitted into evidence a PDS that indicated the appellant had been administered nonjudicial punishment under Article 15, UCMJ. Specifically, it stated: "NO. OF PREVIOUS ARTICLE 15 ACTIONS: 1." Although it was not accurate, the trial defense counsel offered no objection. In a declaration to this Court, the appellant asserts he has never been punished under Article 15, UCMJ. He also said he does not recall reviewing the PDS at trial.

During post-trial processing, the erroneous PDS was also attached to the staff judge advocate's recommendation (SJAR). The SJAR did not specifically highlight the reference to the nonjudicial punishment and otherwise characterized the appellant's service as "satisfactory." Although both the appellant and trial defense counsel reviewed a copy of the SJAR, the appellant did not object to the erroneous reference to the Article 15 in his clemency submission to the convening authority under R.C.M. 1106(f).

The government concedes the reference to an Article 15 on the PDS was incorrect, but asserts that the inaccurate reference was a "clerical" error and it was not "obvious." The government also contends that the appellant was not materially prejudiced at trial because this was a bench trial, there was no further evidence offered concerning the

[1] This assignment of error was made pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] AFI 51-201, Figure 3.4, contains an example of a PDS.

"fictitious" Article 15, and trial counsel made no reference to it in his sentencing argument. The government similarly argues the appellant was not prejudiced by the erroneous PDS attached to the SJAR.

Plain Error

To prevail under the plain error doctrine, the appellant has the burden to show: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)). *See also United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999). We consider application of the plain error doctrine de novo. *Powell*, 49 M.J. at 462 (citing 1 Stephen A. Childress & Martha S. Davis, *Federal Standards of Review* § 2.14 (2d ed. 1992)).

We first consider the appellant's claim that trial counsel committed plain error by introducing the PDS at trial. Appellate defense counsel has not alleged prosecutorial misconduct, and we find no evidence whatsoever that the error in the PDS arose from any cause other than a clerical error. We, therefore, turn our attention to the conduct of the military judge in admitting the document. We find the military judge also did not err. Although one would expect the government to introduce additional evidence about an Article 15 action when a PDS indicates an appellant has been given nonjudicial punishment, there are circumstances well known to military judges where the evidence is not available or would be inadmissible. Given there was no objection from trial defense counsel, we find no reason to conclude the military judge erred in admitting this evidence.

We also consider, sua sponte, whether the appellant suffered prejudice because the government attached the erroneous PDS to the SJAR. The appellant did not object to the erroneous SJAR in his clemency submission to the convening authority. By failing to object to matter in the SJAR before it was sent to the convening authority, the appellant waived any later claim of error, absent plain error. R.C.M. 1106(f)(6); *Kho*, 54 M.J. at 65. "Because of the highly discretionary nature of the convening authority's action on the sentence, we will grant relief if [the] appellant presents 'some colorable showing of possible prejudice.'" *Id.* (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). If the appellant makes such a showing, we must either provide meaningful relief or return the case for a new SJAR and action. *Wheelus*, 49 M.J. at 289. Given that the text of the SJAR was correct, the clerical error in an attachment does not rise to the level of an obvious error. Moreover, we can find no prejudice to the appellant since the text of the SJAR stated that the appellant's pretrial service was "satisfactory." This statement undoubtedly undermined the minimal reference to the fictitious Article 15 action in the PDS. We hold that the appellant has failed to carry his burden of making a colorable showing of prejudice.

Ineffective Assistance of Trial Defense Counsel

Using the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), we next consider whether trial defense counsel rendered ineffective assistance. The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686. Our superior court has summarized the principles announced in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable.

United States v. Quick, 59 M.J. 383, 385-86 (C.A.A.F. 2004) (quoting *Strickland*, 466 U.S. at 687). "The burden on an appellant is heavy because counsel is presumed to have performed in a competent, professional manner." *Quick*, 59 M.J. at 386. In the instant case, we are not persuaded that trial defense counsel's performance was deficient.

The government, citing documents that are not part of the record, claims it served a copy of the defective PDS on the appellant when officials served the charges on him. The PDS attached to the indorsement to the charge sheet included in the pretrial allied papers indicates that it was prepared on the same date as the first day of trial, specifically, 22 May 2002. Thus, neither the appellant, nor trial defense counsel, could have reviewed that precise document on a previous day.

It appears that multiple iterations of the PDS existed at the time of trial. In response to an order by this Court that he answer certain questions in an affidavit, trial defense counsel stated that it was his practice to review the PDS before trial. He specifically recalled that the appellant also reviewed the PDS before trial. Although he could not recall the specific steps taken to review the PDS in the appellant's case, we conclude it was reasonable for trial defense counsel not to object to the document at trial, given his apparent belief that it was correct. The record before us discloses no deficiency in trial defense counsel's conduct, much less one so substantial that we are persuaded the appellant was denied effective assistance of counsel.

Even if we assumed trial defense counsel's conduct fell below that expected of "fallible lawyers," we find no prejudice to the appellant. *See United States v. Grigoruk*, 56 M.J. 304, 307 (C.A.A.F. 2002); *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). First, this was a bench trial. Given the absence of extrinsic evidence concerning an Article 15 action, we are certain the military judge did not attach significant weight to the incorrect reference to one in the PDS. Second, as mentioned above, although the staff judge advocate attached the inaccurate PDS to his SJAR, the text of the SJAR made it clear the appellant's service before trial was satisfactory. Because the appellant has not met his burden of demonstrating prejudice, we hold that trial defense counsel was not ineffective.

After careful consideration of the record and the argument of appellate defense counsel, we find the remaining assignment of error without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator