UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TRACY L. DAVIDSON
United States Air Force

ACM 34911

27 February 2004

Sentence adjudged 21 September 2001 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jeffrey A. Vires, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

BRESLIN, ORR, and GENT
Appellant Military Judges

OPINION OF THE COURT

GENT, Judge:

A court-martial composed of a military judge alone found the appellant guilty, consistent with his pleas, of carnal knowledge and indecent acts with S.M., a 13-year-old girl, desertion for over 12 years, sodomy of two boys, E.M. and M.M., while they were 11 and 12 years old, and indecent acts and indecent liberties with these boys, in violation of Articles 120, 134, 85, 125, and 134 UCMJ, 10 U.S.C. §§ 920, 934, 885, 925, 934 respectively. The appellant's sentence included a dishonorable discharge, confinement for 35 years, forfeiture of

all pay and allowances, and a reduction to E-1. The convening authority approved the sentence, except that he reduced the confinement to 30 years in accordance with a pretrial agreement. The appellant now claims that the trial defense counsel who represented him in 2001 was ineffective and his sentence was inappropriately severe. We disagree and affirm.

In 1988, military authorities at Bergstrom Air Force Base, Texas, charged the appellant, who was 23 years old, with rape and carnal knowledge of S.M., a 13-year-old girl, indecent acts with S.M. and D.H. (another girl under the age of 16), and distributing to S.M. a Schedule III controlled substance. The appellant asked his trial defense counsel to negotiate a plea agreement with the convening authority. While the parties negotiated an agreement, the appellant planned to desert the Air Force and assume the identity of a deceased relative. A family member gave the appellant the deceased person's birth certificate, which he used to obtain a new driver's license and social security number.

Two days before his trial was to begin, the appellant deserted. He moved to Atlanta, Georgia, and began a new life as William Kenny Watson. A few years later he married R.M., a woman with low intellectual functioning. She had two-year-old twin sons, E.M. and M.M., also with low intellectual functioning. The children had been removed from her home because she was unable to properly care for them. They were returned to her once she married the appellant.

When the boys were 11 years old, the appellant showed them pornographic images during the weekends while his wife was working. He also masturbated in their presence while looking at the pictures. The appellant masturbated the boys and thus conditioned them to masturbate him and each other. On several occasions, he also sodomized the boys both orally and anally and forced them to do the same to him and to one another. Although they cried when he entered them anally, the appellant continued to sodomize them. He sometimes ejaculated on them and inside E.M. and made them ejaculate on him as well. This continued until the boys were 12 years old. The appellant was arrested in January 2001.

A new trial defense counsel represented the appellant at the proceedings that took place in 2001. The appellant claims that his 2001 trial defense counsel was ineffective by failing to call witnesses who would have discussed the impact of these crimes on the victims. His complaints center primarily around trial defense counsel's decision not to introduce the testimony of the mother of the boys and the appellant's parents to show that, when he was not molesting the boys, the appellant was a good father. He next contends that trial defense counsel could have introduced testimony that S.M. was affectionate and romantic toward him when she was 13. The appellant further avers that once the trial defense counsel obtained a pretrial agreement, he put forward the bare minimum of effort. Finally,

the appellant asserts that the trial defense counsel should have called witnesses to testify about him saving the hand of a co-worker rather than relying on a document that conveyed the same information. In his declaration, the appellant admitted the trial defense counsel interviewed his parents and otherwise informed himself of the substance of the proposed witness' testimony. The appellant admitted that trial defense counsel said it was hard for him to "see anything that the witnesses could say to help me."

We note that at trial, the appellant testified that he was satisfied with the advice given to him by his trial defense counsel. The appellant also testified that he had had enough time and opportunity to discuss his case with his trial defense counsel and he was satisfied that the legal advice trial defense counsel gave him was in his best interest. After the trial concluded, the appellant consulted with his trial defense counsel concerning submission of clemency matters. They agreed on the matters to be submitted. The appellant signed a document on 21 December 2001 stating that he was satisfied with his clemency package, and once again, that he was also satisfied with the assistance and advice given by his trial defense counsel. The appellant and trial defense counsel agreed that the trial defense counsel saw no advantage to putting forward testimony from certain witnesses as suggested by the appellant.

Appellate defense counsel has not advocated that we order a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). In *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997), our superior court held that a *DuBay* hearing is not required where the facts are uncontroverted. After considering this matter, we find no factual dispute that would be illuminated by a *DuBay* hearing. The appellant and his trial defense counsel agree that the trial defense counsel interviewed the witnesses suggested by the appellant, or otherwise informed himself of the content of their potential testimony. *Cf. United States v. Sales*, 56 M.J. 255 (C.A.A.F. 2002) (*DuBay* hearing ordered because the appellant and his counsel disagreed about whether trial defense counsel had interviewed a certain witness).

We are mindful of the standards for evaluating claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Fagan*, 59 M.J. 238 (C.A.A.F. 2004); *Sales*, 56 M.J. at 255. After reviewing the appellant's submissions, the submissions by the trial defense counsel, and the record of trial, we conclude that trial defense counsel's strategy in not calling the witnesses was reasonable given all the facts and circumstances. We find that the appellant has not met the burden of overcoming the presumption that his counsel was competent. *Strickland*, 466 U.S. at 687-89. Therefore, we decline to grant relief.

The appellant also alleged, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his sentence was inappropriately severe. Based upon our review of the entire record, we find that the approved sentence is not inappropriately severe, given the number of victims, the nature of the offenses, the devastating impact on each of the victims, and the appellant's character. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We decline to grant relief on this ground as well.

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

LAQUITTA J. SMITH
Documents Examiner