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

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**UNITED STATES**

**v.**

**Senior Airman MARCUS J. DUKE**
**United States Air Force**

**ACM S31930**

**03 July 2013**

Sentence adjudged 25 February 2011 by SPCM convened at Joint Base Pearl Harbor-Hickam, Hawaii. Military Judge: Vance H. Spath.

Approved Sentence: Bad-conduct discharge, restriction to the limits of Joint Base Pearl Harbor-Hickam, Hawaii for a period of 2 months, and reduction to E-3.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, of conspiracy to commit larceny of lawful currency and government benefits, in violation of Article 81, UCMJ, 10 U.S.C. § 881, as well as larceny of lawful currency and government benefits, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The adjudged and approved sentence consisted of a bad-conduct discharge, restriction to base for 2 months, and reduction to E-3.

On appeal, the appellant asserts two errors: 1) That the military judge erred by admitting one or more prosecution exhibits during findings in violation of Mil. R. Evid. 407; and 2) that the appellant received ineffective assistance of counsel when his defense counsel admitted the appellant's guilt in both his sentencing argument and in a post-trial clemency submission. Finding no error prejudicial to a substantial right of the appellant, we affirm.

*Background*

On 21 October 2009, the appellant married Ms. JQ in a small civil ceremony. Ms. JQ was a civilian who was recently divorced from another Air Force member and was experiencing financial difficulties. The appellant had dated Ms. JQ a few years earlier while in technical training, but had little interaction with her in the time leading up to the marriage. Soon before their marriage, the appellant and Ms. JQ discussed the possibility of marriage. During this conversation, another person in the room, Airman First Class (A1C) ES, overhead the term "contract marriage" being used, although she did not recall any other details about the conversation.

The appellant's marriage made him eligible to move out of the base dormitories and into off-base housing, so the appellant leased an off-base house with a co-tenant, a male Airman. Shortly after the marriage ceremony and his move off base, the appellant left for temporary duty (TDY) for about a month, followed soon thereafter by leave out of state over the holidays. During the appellant's absence, Ms. JQ had a sexual relationship with another man, a relationship that eventually resulted in her pregnancy. Soon after the appellant returned, he applied for and received Basic Allowance for Housing at the with-dependent rate and a higher Cost of Living Allowance, along with other military dependent benefits for Ms. JQ.

The appellant resided at the off-base house until about April 2010. During this time, the appellant's male co-tenant never saw Ms. JQ live at the house, although she did reside at separate quarters on the same property. Ms. JQ's name was not on the appellant's lease agreement and the co-tenant never saw the appellant and Ms. JQ acting as husband and wife. The co-tenant testified that the appellant once admitted that the marriage was a financial arrangement that allowed him to move out of the dorms and also provide money each month to Ms. JQ.

Co-workers and friends became suspicious of the appellant's marriage to Ms. JQ. Questions about the appellant's marriage to Ms. JQ intensified after the appellant began a romantic relationship in early 2010 with A1C ES, the same Airman who overheard the initial use of the term "contract marriage." By March or April 2010, the appellant and A1C ES held themselves out to be engaged, despite the appellant's still-existing marriage to Ms. JQ. Ms. JQ's pregnancy, plus her sexual relationship during this time with a different man, also added to questions about the marriage. Eventually, at a party

commemorating the upcoming deployment of several squadron members (including the appellant), a unit Key Spouse volunteer noticed that the appellant appeared to be acting romantically toward A1C ES at the same time Ms. JQ was listed as his spouse. She brought this information forward to investigators, which led to this court-martial.

At trial, the Government sought to introduce three exhibits – Prosecution Exhibits 8, 9 and 10 – that consisted of documentation relating to the appellant's marriage license and marriage certificate.[1] In an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the Government called a state registrar to lay the foundation for these exhibits. The witness explained that obtaining a marriage certificate is a three-step process: application for a marriage license, the marriage ceremony, and then issuance of the marriage certificate after the registrar's office receives proof that the ceremony was completed. Prosecution Exhibit 8 consisted of documents demonstrating that while the appellant and Ms. JQ applied for a marriage license in early October 2009, as of 17 February 2011, they had not completed the process by sending proof of the marriage ceremony and obtaining the final marriage certificate. Therefore, the temporary marriage certificate they used to obtain military benefits had since expired. Prosecution Exhibits 9 and 10 consisted of documents demonstrating that soon after 17 February 2011 (and shortly before trial), the appellant and/or Ms. JQ belatedly completed the process by sending proof of the earlier marriage ceremony, thereby obtaining a replacement marriage certificate.

Defense counsel objected to the admission of Prosecution Exhibit 8 based on hearsay and lack of foundation and authentication, along with an objection based on Mil. R. Evid. 403. However, defense counsel stressed that if Prosecution Exhibit 8 was introduced into evidence, the defense wished to have Prosecution Exhibits 9 and 10 introduced as well for the sake of completeness. After completing a Mil. R. Evid. 403 balancing test for Prosecution Exhibit 8, the military judge admitted the exhibit into evidence. After again hearing from defense counsel that they wanted Prosecution Exhibits 9 and 10 to be admitted if Prosecution Exhibit 8 were to be admitted, and after defense counsel declined to object to the admission of Prosecution Exhibits 9 and 10, the military judge admitted Prosecution Exhibits 9 and 10 into evidence as well.

[1] Prosecution Exhibit 8 contains four pages: a certification that as of 17 February 2011, the Hawaii State Department of Health did not have a marriage record for the appellant and Ms. JQ; a record indicating that the state notified the appellant and Ms. JQ on 25 March 2010 that their marriage license had expired; a sample notice sent to marriage certificate applicants when they have not timely submitted proof of a marriage ceremony; and a certification statement from the registrar noting how these documents were generated. Prosecution Exhibit 9 consists of seven documents: an authorization from the registrar on 22 February 2011 to issue a replacement certificate; an affidavit of late marriage registration by a local judge; a letter from the judge addressing the unfiled license and certificate and requesting that a replacement certificate be issued; a copy of the license and certificate of marriage signed by the appellant, Ms. JQ, and the local judge; a copy of the judge's office log of the wedding ceremony; a request for a certified copy of the marriage certificate; and a copy of the marriage license application from October 2009. Prosecution Exhibit 10 is the replacement marriage certificate issued to the appellant and Ms. JQ on 23 February 2011.

*Mil. R. Evid. 407*

On appeal, the appellant asserts that introducing documents in findings demonstrating his attempts to correct the deficiencies in his marriage certificate process violated Mil. R. Evid. 407 because that Rule prohibits the Government from introducing evidence of subsequent remedial measures to prove culpable conduct. We disagree.

A military judge's decision to admit evidence is examined under an abuse of discretion standard. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted). Abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law. *Id.* Mil. R. Evid. 407 states that evidence of subsequent remedial measures is inadmissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. "Subsequent remedial measures" are defined in the Rule as measures taken after an injury or harm allegedly caused by an event that, "if taken previously, would have made the injury or harm less likely to occur."

It is not entirely clear from the appellant's assignment of errors which of the three exhibits he believes were erroneously admitted. It appears that the appellant's complaint centers on the admission of pages 3 and 4 of Prosecution Exhibit 9. These pages consist of a letter and affidavit from a local judge to the state registrar's office demonstrating that the marriage ceremony was performed on 21 October 2009, and requesting issuance of a marriage certificate. While these documents – and the others encompassing Prosecution Exhibits 9 and 10 – do evince an attempt by either the appellant or Ms. JQ to remedy the deficiencies in their process of obtaining a marriage certificate, they do not encompass "subsequent remedial measures" within the meaning of Mil. R. Evid. 407. To the extent that Prosecution Exhibits 9 and 10 demonstrate the appellant's actions (as opposed to Ms. JQ's) to remedy the deficiencies in the marriage certificate process, these actions are not "subsequent remedial measures" because if taken previously, they would not have made the "injury or harm less likely to occur." The harm that was the subject of this court-martial was the appellant's alleged sham marriage to Ms. JQ. Even had the appellant and Ms. JQ timely and properly completed the marriage certificate process shortly after 21 October 2009, the underlying harm – their sham marriage – would nonetheless have occurred. In other words, while Prosecution Exhibits 9 and 10 might demonstrate a subsequent attempt to remedy the deficiencies in the marriage certificate process, these are not "subsequent remedial measures" under the definition in Mil. R. Evid. 407. This situation is in stark contrast to the normal situation envisioned by Mil. R. Evid. 407 or its counterpart in the Federal Rules, where a defendant takes subsequent actions to promote safety and prevent a reoccurrence of the harm that took place. The appellant's later actions simply were not aimed at correcting his underlying actions at issue in the trial, and therefore do not fall within the parameters envisioned by the Rule.

In addition, the defense affirmatively waived this issue by stating it not only had no objection to the introduction of Prosecution Exhibits 9 and 10, but by specifically requesting that these exhibits be admitted if the military judge admitted Prosecution Exhibit 8. The only documents that show the appellant's attempts to remedy the deficiencies in the marriage certificate process are contained in Prosecution Exhibits 9 and 10. The defense's objection was centered on Prosecution Exhibit 8, and was based on grounds of hearsay, foundation, authentication, and Mil. R. Evid. 403. The military judge overruled the objection on these grounds, and found that Prosecution Exhibit 8 was relevant because it tended to show that the appellant did not care enough about his marriage to Ms. JQ to properly complete the process. Once this occurred, the defense counsel affirmatively asked the military judge to introduce Prosecution Exhibits 9 and 10 into evidence, and when asked, specifically stated they had no objection concerning these two exhibits.[2] Defense counsel could have objected to the introduction of Prosecution Exhibits 9 and 10; in fact, they had just done so with regard to Prosecution Exhibit 8. Instead, the defense affirmatively chose to give up any right to object to the exhibits' admission, desiring to have these records introduced to show the entire course of the appellant's actions. As such, the defense intentionally relinquished a known right, and the issue is waived. *See United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Even if the issue were considered forfeited rather than waived, the military judge did not commit plain error in admitting these documents, for the reasons discussed above.[3]

*Ineffective Assistance of Counsel*

The appellant next asserts that he received ineffective assistance of counsel because his defense counsel admitted the appellant's guilt to the members in his sentencing argument and to the convening authority in a clemency submission.

In sentencing, trial defense counsel used several lines of argument to stress mitigating and extenuating factors in the appellant's case, including the following statement:

> First, speaking to the offense, itself. Trial counsel has continued to refer to this as a serious crime. But please take into consideration the lower severity level of this offense. Take into consideration that all things are – when put into perspective, that if you place this offense on a scale of offenses, this is not on the high end. This is not a military member that is breaking into a warehouse, stealing sensitive military property and

[2] Prosecution Exhibit 8 does not demonstrate any measures taken by the appellant to rectify his marriage certificate process, and on appeal, the appellant does not appear to allege the introduction of this exhibit was in error.

[3] Having decided that Prosecution Exhibits 9 and 10 do not evince subsequent remedial measures within the meaning of Mil. R. Evid. 407, and having decided that the appellant waived his right to object to these exhibits, it is not necessary to determine to what extent Mil. R. Evid. 407 applies in a criminal context, as opposed to the civil context in which the underlying Federal Rule is normally employed.

> equipment, selling it on eBay. We're not on that high-level. We're not on the high level of repeated breaking – breaking in, stealing money. We are – now Senior Airman Duke did receive entitlements as a result of this offense. And these entitlements were not – he was not authorized to receive these entitlements. Now I'm not trying to say that what he did was not a crime. I'm just trying to put it in perspective and show you this is not on the high-level. Take that into consideration first.

In clemency, trial defense counsel made the following statement to the convening authority in an effort to moderate the severity level of the offense:

> Admittedly, [the appellant] received entitlements, such as a BAH and COLA, that he would otherwise not have been entitled to receive had he not been married to Ms. [JQ]. However, there is no evidence to suggest that [the appellant] entered into this marriage out of greed, nor out of a desire to be unjustly enriched. After moving off base, [the appellant] used the money he received to pay for the costs associated with living off base in Hawaii, as do all military members who live off base. Since [the appellant] was not entitled to move out of the dorms when he did and entered into an agreement with Ms. [JQ] to get married for this purpose, he is guilty of the crimes of conspiracy and larceny. However, these are not crimes deserving of a punitive discharge especially when you look at [the appellant's] past military record.

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under *Strickland*, an appellant must demonstrate:

> (1) "a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

*United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (internal quotation marks omitted) (*quoting Strickland*, 466 U.S. at 687), *as quoted in Tippit*, 65 M.J. at 76. The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which

cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, "we need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of *Strickland* . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*." *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

Applying these standards, we find it unnecessary to determine whether defense counsel's performance was ineffective, because the comments at issue had no reasonable probability of negatively affecting the outcome for the appellant. A full reading of trial defense counsel's statements in his sentencing argument and in his clemency submission indicates his intent was to stress the low-level nature of the appellant's misconduct. It is reasonable to conclude that the members hearing the sentencing argument or the convening authority reading the clemency submission would have taken the statements complained of to be only passing references to the offenses of which the appellant had already been found guilty while seeking to place these offenses in a favorable context. The comments complained of were only a small aspect of larger arguments by defense counsel in sentencing and clemency that effectively stressed the lack of aggravating factors in the appellant's case. Even assuming that counsel's performance was ineffective, the appellant was not prejudiced by these short statements that were part of larger, well-articulated arguments for leniency.

## *Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Moreover, we find that the delay in this case does not render the appellant's sentence inappropriate under Article 66(c), UCMJ. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court