UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DONALD L. KUHN II
United States Air Force

ACM 37357

08 March 2010

Sentence adjudged 30 September 2008 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Stephen Woody.

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Jennifer J. Raab, and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Jason M. Kellhofer, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

In accordance with his pleas, a military judge convicted the appellant of one charge and five specifications of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] A panel of officers sitting as a general court-martial

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the charge and specifications in return for the convening authority's promise not to approve confinement in excess of 15 months.

sentenced him to a bad-conduct discharge, ten months of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the adjudged sentence. On appeal, the appellant asks this Court to set aside his bad-conduct discharge or provide other appropriate sentence relief. As the basis for his request, the appellant opines that his trial defense counsel was ineffective because she failed to identify and raise a motion for appropriate relief based upon an unreasonable multiplication of charges for sentencing.[2] Finding no prejudicial error, we affirm.

Background

On 4 April 2008, the appellant was randomly selected to provide a urine sample for drug testing. He provided a sample, his sample was sent to the Drug Testing Division (DTD) of the Air Force Medical Operations Agency for analysis and subsequently tested positive for benzoylecgonine (BZE), a cocaine metabolite. On 17 April 2008, pursuant to his wing's drug re-inspection policy, the appellant provided a urine sample for drug testing. His sample was sent to DTD for analysis and subsequently tested positive for BZE. On 25 April 2008, again pursuant to his wing's drug re-inspection policy, the appellant provided a urine sample for drug testing. His sample was sent to DTD for analysis and it tested positive for BZE. On 8 July 2008, the appellant was randomly selected to provide a urine sample for drug testing. He provided a sample, his sample was sent to DTD for analysis, and his sample tested positive for BZE. On 15 July 2008, pursuant to his wing's drug re-inspection policy, the appellant provided a urine sample for drug testing. His sample was sent to DTD for analysis and subsequently tested positive for BZE.

At trial, the appellant pled to and was found guilty of wrongfully using cocaine with his civilian friends on 2 April 2008, 16 April 2008, 23 April 2008, 4 July 2008, and 14 July 2008.

Discussion

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Without question, service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was, in fact, deficient and, if so, (2) whether the counsel's deficient conduct

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

prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). To establish a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by showing specific errors [made by his defense counsel] that were unreasonable under prevailing professional norms." *McConnell*, 55 M.J. at 482 (citing *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)).

> The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. "In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."

Scott, 24 M.J. at 188 (alteration in original) (quoting *United States v. Cronic*, 466 U.S. 648, 690 (1984)). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

"When . . . an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). An accused may both knowingly and voluntarily waive constitutional protections. *Id*. at 314 (quoting *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)); *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003). Additionally, "absent some affirmative indication of Congress' intent to preclude waiver, [the Supreme Court has] presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Edwards*, 58 M.J. at 52 (quoting *Mezzanatto*, 513 U.S. at 201).

The appellant, through his appellate counsel, asserts that his trial defense counsel was ineffective because she failed to identify and raise a motion for appropriate relief based upon an unreasonable multiplication of charges for sentencing. We need not decide whether the appellant's trial defense counsel was ineffective because the appellant waived any error associated with this issue when, in an effort to obtain a pretrial agreement, he knowingly and voluntarily waived all waivable motions. *See Gladue*, 67 M.J. at 314.

Moreover, assuming, arguendo, that the appellant did not waive this issue, he is still not entitled to relief. In response to the appellant's ineffective assistance of counsel assertions, the government submitted a post-trial affidavit from Captain JW, the appellant's trial defense counsel. She asserts that she researched the potential unreasonable multiplication of charges for sentencing issue, found it to be unviable, discussed the issue with the appellant, and made a tactical decision not to raise the issue in keeping with the appellant's pretrial agreement to minimize his sentence exposure.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone; rather, we must resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, in the case sub judice, there are no conflicting affidavits because the appellant did not raise this issue via an affidavit. We can therefore resolve this issue without resorting to a post-trial fact finding hearing. Under these facts, we find that the trial defense counsel made a tactical decision not to raise unreasonable multiplication of charges for sentencing at trial and her actions do not amount to ineffective assistance of counsel. In short, the appellant waived any error on this issue and, even assuming waiver is inapplicable, we find that the appellant's trial defense counsel made a reasonable tactical decision, one we will not second-guess.

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