UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BRIAN K. LATTA
United States Air Force

ACM 36403

11 May 2007

Sentence adjudged 2 June 2005 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: William A. Kurlander (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 15 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Captain Jefferson E. McBride.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge, sitting alone, convicted the appellant, in accordance with his pleas, of one specification of attempted indecent acts with a minor, nine specifications of indecent acts or liberties with a minor, and two specifications of sodomy with a child under the age of 16, in violation of Articles 80, 134, and 125, UCMJ, 10 U.S.C. §§ 880, 934, 925. The military judge sentenced the appellant to a dishonorable discharge, confinement for 45 years, and reduction to the grade of E-1. The convening authority approved a sentence consisting of a dishonorable discharge, confinement for 15 years and reduction to the grade of E-1.[1]

[1] There was a pretrial agreement limiting the maximum period of confinement to no more than 15 years. Mandatory forfeitures were waived for six months.

Background

Over the course of four years, the appellant committed indecent acts with eight children under the age of sixteen, including his own daughter. The appellant exposed his penis to two of the victims. In April 2004, he attempted to lift the shirt of a ninth victim but she awakened while he was attempting to do so. She reported the incident, and the appellant was questioned in July 2004; however, he denied any wrongdoing. In September 2004, another victim came forward and reported the appellant. This time, when he was questioned, the appellant confessed.

The two issues on appeal are:

> I. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL (A) FAILED TO MOVE TO SUPPRESS APPELLANT'S STATEMENTS TO OSI[2] . . . OBTAINED IN VIOLATION OF SUPREME COURT PRECEDENT AND MILITARY RULE OF EVIDENCE 305; (B) FAILED TO ARGUE THAT APPELLANT WAS SUBJECTED TO ILLEGAL PRE-TRIAL PUNISHMENT; AND (C) FAILED TO REQUEST THE CONVENING AUTHORITY RECUSE HIMSELF EVEN THOUGH THE CONVENING AUTHORITY WAS DISQUALIFIED FROM ACTING ON APPELLANT'S CASE DUE TO A PERSONAL RELATIONSHIP WITH APPELLANT.[3]
>
> II. WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF WHERE HE WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 55 OF THE UNIFORM CODE OF MILITARY JUSTICE, WHERE GUARDS AT THE MILITARY CONFINEMENT FACILITY REPEATEDLY MISTREATED HIM.[4]

Ineffective Assistance of Counsel

As to the first assignment of error, we reviewed the record of trial, the assignments of error, and the government's answer thereto. Service members have a fundamental right to 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)). We analyze claims of ineffective assistance of counsel under the

[2] The Air Force Office of Special Investigations
[3] This issue was raised pursuant to *United States v Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] This issue was also raised pursuant to *Grostefon*.

framework established by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). In order to satisfy the prejudice requirement, the appellant must show there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty. *United States v. Ginn*, 47 M.J. 236, 246-47 (C.A.A.F. 1997); *see also Hill v. Lockhart,* 474 U.S. 52 (1985). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *Ginn*, 47 M.J. at 248.

The appellant based the ineffectiveness of his counsel on three premises. The first premise is that trial defense counsel failed to move to suppress the statements of the appellant. The appellant avers he requested counsel the second time he was interviewed. Within the four corners of the appellant's statements to investigators, the appellant waived his right to counsel and agreed to talk. This claim is inadequate on its face. As to whether the appellant was subjected to illegal pretrial punishment and his counsel failed to raise the issue, the record supports that this is not the case. The appellant was specifically asked this very question on the record, and he replied he was not subjected to illegal pretrial punishment. Further when being questioned by the military judge about whether he wanted his defense counsel to continue representing him,[5] the appellant elaborated, stating "I'm very confident in Capt H and his loyalty to me as his client."

The last premise is based upon the fact that the convening authority was previously the appellant's wing commander and during that time, the appellant had hosted the convening authority's family for an afternoon of weapons safety and firing at the range. The appellant, in fact, received and submitted as a defense exhibit during his court-martial, a letter dated June 1999 from his commander thanking him for this event. Even in the clemency submission, the trial defense counsel specifically referenced that the appellant had met the convening authority and his family, the appellant was thankful for the pretrial agreement and now he (the appellant) "begs" for clemency. The appellant presents nothing to show the convening authority "was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter" and was therefore disqualified. *United States v. Voorhees,* 50 M.J. 494, 499 (C.A.A.F. 1999) (citing *United States v. Jackson,* 3 M.J. 153, 154 (C.M.A. 1977). Clearly, the appellant has failed to meet his burden in establishing his trial defense counsel was ineffective. The appellate filings and the record as a whole "compellingly

[5] A potential issue as to conflict-free counsel was raised and resolved by the military judge, and is not an issue on appeal.

demonstrate" the improbability of those premises. *Ginn,* 47 M.J. at 248. Further, the appellant never stated he would have changed his guilty plea in this case. He merely requested reduction in his sentence.

Cruel and Unusual Punishment

As to the second error, the appellant alleges he was subjected to cruel and unusual punishment while placed in the local confinement facility. Whether raised under the Eighth Amendment[6] or Article 55, UCMJ, 10 U.S.C. § 855, to prevail in an assertion of cruel and unusual punishment, the appellant must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of the prison officials amounting to deliberate indifference to his health and safety; and (3) that he has exhausted the prisoner-grievance system and has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938. *United States v. Lovett,* 63 M.J. 211, 215 (C.A.A.F. 2006) (citations omitted). Taking his affidavit at face value and applying the factors set out in *Ginn*, the appellant has failed to meet any prong of the test set out in *Lovett.*

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 findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[6] U.S. CONST. amend. VIII.