UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN E. LAVALLEE
United States Air Force

ACM 35858 (f rev)

26 May 2006

Sentence adjudged 19 November 2003 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Timothy D. Wilson and Print R. Maggard (*DuBay* hearing).

Approved sentence: Bad-conduct discharge, confinement for 48 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, Captain Tanika Capers, and Craig A. Mueller, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, Major Kevin P. Stiens, and Captain Lori Gill.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of multiple offenses under the Uniform Code of Military Justice.[1] He was sentenced by a military judge to a bad-conduct discharge, confinement for 48 months, forfeiture of all pay and allowances,

[1] The appellant was arraigned on three Charges, three Additional Charges, two Second Additional Charges, three Third Additional Charges, and one Fourth Additional Charge, containing 20 specifications in all. He pled guilty to, and was convicted of, 15 of those specifications, the majority of which were failure to go offenses under Article 86, UCMJ, 10 U.S.C. § 886, or drug offenses under Article 112a, UCMJ, 10 U.S.C. § 912a.

and reduction to the grade of E-1. The convening authority did not approve the forfeitures, but otherwise approved the findings and sentence as adjudged.

The appellant alleges, inter alia, that his trial defense counsel were ineffective[2] because they pressured him into accepting a pretrial plea agreement and did not seek to suppress damaging evidence at trial. The government filed affidavits from the appellant's trial defense counsel disputing these claims. Following our superior appellate court's guidance in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we ordered a post trial hearing to be conducted in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), for the purpose of resolving the conflicting claims of the appellant and his trial defense team.[3]

We review allegations of ineffective assistance of counsel de novo. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Our threshold determination is whether the facts alleged by the appellant in making his claim are true. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). The appellant bears the burden of proof of showing that his counsel were not effective. *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). We conclude that the appellant has not met his burden.

The military judge presiding at the *Dubay* hearing left us with a commendably thorough record on which to evaluate the appellant's allegations. The appellant's trial defense counsel testified at the hearing, as did the appellant himself, along with several other witnesses called by the appellant for the purpose of supporting his account of events leading up to trial. Every witness who testified -- including the appellant's own mother -- contradicted his version of events. Like the military judge at the *Dubay* hearing, we find that the appellant's story was not credible. We therefore resolve this assignment of error adversely to him.

---

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

[3] The appellant also alleges: (1) that his trial defense counsel did not assist him in filing a police report when his home was broken into while he was in pretrial confinement; (2) that his civilian trial defense counsel was a Naval Reserve officer at the time of his trial; and (3) that his trial defense team did not offer mental health evidence he believes would have been favorable to him during sentencing. The first of these additional allegations concerns a matter unrelated to the findings or sentence, and is therefore not properly before us. Article 66(c), UCMJ, 10 U.S.C. § 866(c). As to the second, the appellant was well aware of his civilian defense counsel's status with the reserves, even referring to him at trial by his Navy rank. On appeal, the appellant provided documents indicating his mother paid his civilian defense counsel a retainer to represent him at his court-martial and on a related "State court charge." Although such arrangements may be uncommon and might pose the risk of a conflict of interest, they are not per se impermissible. *See United States v. Spriggs*, 52 M.J. 235, 245 (C.A.A.F. 2000). The appellant has not asserted any actual conflict and we perceive none from the record. Finally, the appellant's trial defense counsel articulated in their post-trial affidavits a sound tactical reason for not raising a mental health defense: namely, the appellant's refusal to cooperate with the sanity board process. We see no deficiency in this tactical decision, nor any reasonable likelihood that the appellant would have obtained a better result had they pressed on without a sanity board finding. *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991); *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

We resolve the appellant's other assignments of error adversely, as well. The appellant has not carried his burden of establishing that he is entitled to more than the 143 days credit against his sentence for violations of Article 13, UCMJ, 10 U.S.C. § 813, awarded him at trial, nor do we find his sentence to be inappropriately severe. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002); *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

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 sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator