UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain PAUL M. LITTLE JR.
United States Air Force

ACM 34726

26 September 2003

Sentence adjudged 22 May 2001 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Gregory E. Pavlik.

Approved sentence: Dismissal and confinement for 18 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Adam Oler.

Before

VAN ORSDOL, STUCKY, and ORR, V.A.
Appellate Military Judges

OPINON OF THE COURT

STUCKY, Judge:

A general court-martial convicted the appellant, pursuant to his pleas, of one specification of wrongful possession of Percocet, a Schedule II controlled substance, used commonly as an analgesic, and 15 specifications of conduct unbecoming an officer and a gentleman, in violation of Articles 112a and 133, UCMJ, 10 U.S.C. §§ 912a, 933, respectively. The appellant was sentenced to a dismissal and confinement for 3 years. The convening authority approved only so much of the sentence as provided for a dismissal and confinement for 18 months.

The appellant was a physician and medical director at the clinic at Goodfellow Air Force Base (AFB), Texas. He became addicted to Percocet. On numerous occasions

between 1 April 1999 and 12 May 2000, the appellant solicited 15 individuals, including patients and staff nurses, to obtain Percocet for him through the Goodfellow AFB pharmacy. The appellant told his patients that he had a sick relative—usually his grandmother—in another state who needed the medication and for whom he could not write a prescription. The patients took the prescriptions the appellant wrote for them to the pharmacy to have them filled. Then, they would give the newly prescribed Percocet to the appellant. The appellant's conduct had some potentially serious consequences. Two civilian nurses at the Goodfellow AFB clinic who were drawn into the appellant's scheme were fired and are in danger of losing their licenses and a civilian medical transcriptionist was suspended from her job for five days.

The appellant raises one issue on appeal pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982). The appellant asserts that he was denied due process when he was not allowed to withdraw his request to proceed to trial while his application to resign in lieu of court-martial (RILO) was pending. The appellant states that the decision to request trial was based upon erroneous advice from his trial defense counsel that any confinement received at trial would be stayed pending a decision on his RILO.

I. Background

The charges were referred to a general court-martial on 12 January 2001 and served on the appellant on 17 January 2001. On 26 January 2001, the appellant submitted a RILO under Air Force Instruction (AFI) 36-3207, *Separating Commissioned Officers*, (6 Jul 2000). On 29 January 2001, the military judge formally set trial for 19 March 2001 based upon his discussions with the parties. On 31 January 2001, the appellant's civilian counsel submitted a letter to the convening authority stating:

> Captain Little is aware that because his Rilo was timely filed, that the court martial proceedings [against him] are stayed unless he waives that right and requests that the case proceed to trial prior to finalization of the Rilo process. By this letter, Capt Little indeed waives the stay provision and requests the matter proceed to trial in the near future. A tentative trial date of March 19th [2001] has been selected and we prefer to proceed on with that date.

The letter was signed by both the appellant and his civilian defense counsel. On 2 February 2001, the Military Justice Division of the Air Force Legal Services Agency (AFLSA/JAJM) approved the 17th Training Wing Staff Judge Advocate (SJA)'s request to proceed to trial in the case against the appellant. In the reply, AFLSA/JAJM specifically advised the SJA not to "under any circumstances, prepare a convening authority action before SAF [Secretary of the Air Force] issues a decision on the resignation."

On 2 March 2001, the appellant sent a second letter to the convening authority concerning his stay request. He told the convening authority:

> On March 1, 2001, I discussed the decision to proceed to court martial during the Rilo process with Mr. Hargrove and Captain Luttrell and I have decided to revoke my consent to proceed to trial at this time. It is my intention to invoke my right to stay the court martial proceedings until the Secretary takes action on my resignation request. The reasons for my decision are covered by the attorney/client privilege and cannot be disclosed in this letter.

This letter was also signed by both the appellant and his civilian defense counsel. The appellant subsequently told the court that Capt R, his first detailed military defense counsel, told him that any confinement adjudged at trial would be "automatically stayed" until a decision was made on his request to resign. The appellant states that his first waiver letter to the convening authority was based upon this advice from Capt R.

When AFLSA/JAJM became aware of the appellant's second letter, they advised the appellant's defense counsel that the appellant "had no right to stay the proceeding[s] at the time of his concurrence," and that his "revocation of consent to proceed to trial has no effect on the currently scheduled court-martial." In closing, AFLSA/JAJM told the appellant to address any requests for delay to the military judge assigned to the case. The letter was dated 8 March 2001.

The appellant filed a motion to delay the trial until May 2001 to accommodate the schedule of an expert witness. The military judge gave the government an opportunity to respond and then set a new trial date of 21 May 2001. The military judge notified the appellant of the new trial date in writing. He informed the appellant that his decision was made pursuant to Rule for Courts-Martial (R.C.M.) 801(a)(1), which authorizes the military judge to schedule referred cases for trial. In addition, he told the appellant that the relevant portions of AFI 36-3207 "are not designed to give an accused the right to an automatic delay upon submission of a RILO until that RILO is acted upon."

The appellant's civilian defense counsel raised the automatic stay issue at trial and asked the military judge to delay the sentencing phase of the case until the Secretary of the Air Force made a decision concerning the appellant's RILO. The military judge held the appellant's "administrative rights were comported with" and denied the request for a continuance. The Secretary of the Air Force subsequently denied the appellant's RILO two weeks later on 4 June 2001.

II. Discussion

The appellant claims that he was deprived of fundamental due process rights when he was not allowed to withdraw his request. He states that he relied on Captain R's advice to his detriment, and that he would not have submitted the request to proceed to trial if he had known that a sentence to confinement would not have been deferred. Finally, he implies that the Secretary of the Air Force delayed action on the RILO until the trial was over, and that he had no chance of having it approved once the Secretary of the Air Force knew of the "harsh sentence adjudged" in his case.

The Secretary of the Air Force clearly has authority to promulgate an administrative regulation providing for the tender of a RILO, if that officer has committed acts rendering him subject to such trial. *United States v. Woods,* 26 M.J. 372, (C.M.A. 1988). Since the RILO process is an administrative one, the appellant must first look to the controlling regulation. The regulation in question, AFI 51-201, *Administration of Military Justice*, (2 Nov 1999), provides in paragraph 8.9.1 that "prior authorization from AFLSA/JAJM is required before proceeding to trial in all officer cases in which action on a RILO is pending." In paragraph 8.9.2 the regulation states that AFLSA/JAJM will normally approve such requests if the RILO is submitted more than seven days after service of the charges on the accused under R.C.M. 602. In this case, the RILO was submitted more than seven days after such service.

The regulation does not provide for the withdrawal of an approved request to proceed to trial. It is settled that an accused has no right, as a matter of law, to a continuance while a RILO is processed. *United States v. Rogan,* 25 C.M.R. 243, 249 (C.M.A. 1958). Grant of a request to withdraw an application for discharge is discretionary; there is no right to do so. OpJAGAF 2000/74, 6 Civ. Law Ops. 746 (2000). In other words, the regulation does not give an applicant a right to withdraw his consent to trial once approved. This is understandable, because the charges have been referred to trial and the matter is now in the hands of the convening authority and the military judge. *Woods,* 26 M.J. at 374.[*] Thus, the only issue is whether the regulation offered the appellant fundamental due process, which is generally understood as notice and an opportunity to be heard. *United States v. West*, 17 M.J. 627, 631 (N.M.C.M.R. 1983). Here, the appellant had the opportunity to present his contentions to an experienced military judge who gave them careful consideration before denying the request for delay. Nothing more is required.

We now turn to the military judge's decision to deny the appellant's motion to delay the sentencing phase of the trial until the Secretary of the Air Force made a decision on the appellant's RILO. We review a military judge's denial of a continuance

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[*] The analogous personnel regulation does provide for requests to withdraw a RILO, but approval of such a request is discretionary. AFI 36-3207, *Separating Commissioned Officers*, (6 Jul 2000), ¶ 2.27. Of course, the appellant here did not attempt to withdraw his RILO, but rather his consent to trial.

on an abuse of discretion standard. *United States v. Menoken*, 14 M.J. 10, 11 (C.M.A. 1982). A judge's denial of a continuance lies within the judge's sound discretion, and will not be overturned absent a clear abuse of that discretion. *Id.* Applying this standard, we find no error in the trial judge's denial of the request to delay the trial until after action on the RILO.

Although it was not alleged as error by the appellant, we have reviewed this case with respect to the applicable standards for ineffective assistance of counsel, as well. The appellant alleges that Capt R gave him incorrect advice as to the existence of a policy that confinement would be automatically deferred pending resolution of the RILO. He further asserts that he would not have requested trial if he had known that the advice was erroneous.

An appellant seeking to establish ineffective assistance of counsel has a heavy burden to carry. Under *Strickland v. Washington,* 466 U.S. 668, 688 (1984), he must show that counsel's performance was deficient and that the deficient performance prejudiced him. There is a strong presumption that counsel are competent. *Id*. at 689; *United States v. Cronic*, 466 U.S. 648 (1984). To overcome that presumption, an appellant must show, first, that his allegations are true, and that there is no reasonable explanation for counsel's actions; second, that counsel's level of advocacy fell measurably below the level of performance ordinarily expected of lawyers; and, third, that there is a reasonable probability that the result would have been different absent the errors. *United States v. Grigoruk,* 56 M.J. 304, 307 (2002) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

The fundamental problem with the claim of ineffective assistance of counsel is that even assuming Capt R's performance was deficient, there is no evidence of prejudice to the appellant in the record. He states that knowledge of the result of the trial by headquarters United States Air Force operated to deny him any chance that the RILO would be approved, and implies that elements in the Air Force conspired to delay action on the RILO until the trial was over. There is absolutely no evidence to support either assertion. The record reflects that the RILO reached the Secretary of the Air Force's General Counsel's office on 12 May 2001, only 9 days before the trial. The attempt to find prejudice in an e-mail communication between the General Counsel's office and the Secretary of the Air Force's designee, which simply informs the designee of the findings and sentence, is wholly insufficient. The fact is that every level of command and every headquarters office, which indorsed the appellant's RILO, recommended that it be denied, in view of the seriousness of his crimes. His chances of getting an approved RILO were very small, and he has in no way demonstrated that any error by Capt R prejudiced him or that there was any prejudice in the processing of the RILO.

The appellant utterly betrayed his professional responsibilities as a physician and his oath as an officer to suborn trusting friends and co-workers into maintaining his

addiction. The appellant authorized his civilian defense counsel to argue for a dismissal. The authorized confinement for the offenses to which he pled guilty was 80 years. The trial counsel argued for 15 years. The members sentenced him to 3 years and the convening authority cut that to 18 months' confinement. The appellant's assertion that his sentence is "harsh" is undercut by the facts. Any error by Capt R did not in the least prejudice the appellant.

III. Conclusion

The approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator