UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARCUS K. MCLAURIN
United States Air Force

ACM S30371

30 June 2006

Sentence adjudged 12 March 2003 by SPCM convened at Keesler Air Force Base, Mississippi. Military Judge: Mary M. Boone and Dixie A. Morrow (*DuBay* Hearing).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-2.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Andrea M. DeCamara, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

The appellant was convicted, in accordance with his pleas, of one specification of violating a lawful regulation by engaging in unprofessional relationships with trainees and six specifications of communicating indecent language, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. He was convicted, contrary to his pleas, of two specifications of assault consummated by a battery and one specification of communicating indecent language, in violation of Articles 128 and 134, UCMJ, 10

U.S.C. §§ 928, 934. The special court-martial, consisting of officer and enlisted members, sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to E-2. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted three assignments of error for our consideration: (1) whether new post-trial processing needs to be completed because there is no evidence that the convening authority received three of the appellant's clemency submissions; (2) whether the appellant's pleas to communicating indecent language were improvident; and (3) whether the appellant was denied effective assistance of counsel. Finding no error, we affirm.

New Post-Trial Processing

This court reviews post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). Following the trial, the appellant submitted clemency matters, which included a memorandum from his trial defense counsel. This memorandum listed as an attachment "Sentencing Exhibits A – T." These were the same exhibits submitted during the presentencing portion of the appellant's trial. However, the record of trial does not contain Exhibits K, L, and T (two certificates of training and a family photograph) in the clemency submissions. In other words, while these exhibits are present in the defense sentencing evidence, they are not present in that part of the record which contains the clemency matters. The appellant argues that the convening authority did not consider all the matters he intended to present and that he should receive new post-trial processing.

We have considered the record and the appellate filings. These filings include an affidavit from a civilian member of the office of the staff judge advocate at Keesler Air Force Base (AFB). This individual states that at the time the appellant submitted his clemency matters, these three exhibits were missing from his submission. His affidavit is buttressed by an examination of the addendum to the staff judge advocate's recommendation, which lists as attachments "Sentencing Defense Exhibits w/ Index (A – J, & M – S)." The convening authority signed an indorsement to the addendum, in which he stated that he had considered "the attached matters" prior to taking action. Therefore, we find that the convening authority considered everything actually submitted by the appellant. *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989) (citing Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2), and Rule for Courts-Martial 1107(b)(3)(A)(iii)). *See also United States v. Foy*, 30 M.J. 664, 666 (A.F.C.M.R. 1990) (we can rely on the "presumption of regularity" with regard to a convening authority's exercise of his responsibilities on clemency). We hold that the appellant is not entitled to new post-trial processing.

Providence of the Pleas

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

The appellant pled guilty to six specifications of communicating indecent language. The elements of indecent language are as follows:

> (1) That the accused orally or in writing communicated to another person certain language;
>
> (2) That such language was indecent; and
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> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 89b (2005 ed.).[1]

> Language is "[i]ndecent" if it is:
>
> grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

MCM, Part IV, ¶ 89c. The relevant community standard is that of the military community. *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994).

The appellant contends that his pleas of guilty to these specifications are improvident because the military judge failed to establish an adequate factual predicate as to the indecent nature of the communications. The appellant relies on *Hullett* for this proposition. In that case the accused pled not guilty to, among other things,

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[1] This language is the same as that contained in the 2002 edition of the *Manual* which was in effect at the time of the appellant's trial.

communicating indecent language. The evidence adduced at trial established that *Hullett*, a noncommissioned officer, had addressed certain language to a junior enlisted member; specifically, he said to her, "if [she] gave him a chance, he'd make [her] eyes roll in the back of [her] head and [her] toes curl under." Our superior court held that this language was not indecent within the meaning of the law insofar as it was not "calculated to corrupt morals or excite libidinous thoughts." *Id.* at 192. In addition, the court held that the language was the sort of banter one might expect among soldiers and was not, therefore, prejudicial to good order and discipline or service discrediting. *Id.* at 193. The appellant contends that the case sub judice is similar. He asserts that the language in question was inappropriate but not indecent and that it exerted no effect on good order and discipline.

We have examined the record and have paid close attention to the providence inquiry. In each of the specifications, the military judge properly defined the elements of the offense. For the first specification of indecent language, she defined the relevant terms, including the meaning of indecent, and on each subsequent specification asked the appellant if he understood the definitions and needed them repeated. Each time he replied that he did not.

For each of the specifications, the appellant admitted all the elements and that the language in question was indecent. In addition, he described for the military judge the facts underlying each specification. In essence, the appellant admitted that he was an instructor and the women to whom he made the statements in question were trainees. The indecent communications took place while the appellant was actually providing the training. According to his admissions during the providence inquiry, he asked three of the women questions about their sexual history, whether he could touch their breasts, and whether they would pose nude with him for a painting or paint him in the nude. He asked one trainee if she would walk around the classroom nude, discussed phone sex with another and asked her if he could lick and smell her fingers, and to yet another he showed a pornographic drawing and wrote "good blow job" on an evaluation form, rather than simply "good job."

While the appellant never explained in detail why he believed these communications were indecent, on their face they appear calculated to incite lustful thoughts. *See MCM*, Part IV, ¶ 89c. We conclude that the appellant's admissions during the providence inquiry contain facts which objectively support his pleas as to all of the specifications in question. *See Faircloth*, 45 M.J. at 174. In addition, after the military judge accepted the pleas, the appellant entered into a stipulation of fact with the government concerning the facts underlying these specifications. The purpose of this stipulation was to provide the members with the facts underlying the pleas of guilty. While we have based our conclusions on this issue strictly on the appellant's answers during the providence inquiry, we note that the stipulation provides no reason to question the providence of these pleas. We hold that the military judge did not abuse her

discretion by accepting the appellant's pleas of guilty to these specifications. *See Eberle*, 44 M.J. at 375.

Ineffective Assistance of Counsel

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). The test for ineffective assistance of counsel is three-pronged:

> (1) Are [the] appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?";
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> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
>
> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004).

As stated above, the appellant was charged with two specifications of indecent assault. Both victims were military trainees, Airman (Amn) BS and Airman First Class (A1C) GS. These two women testified that the appellant had engaged in sexual banter with them on the date alleged, while he was providing formal instruction to them. This banter included the appellant advising Amn BS and A1C GS that he would like to judge a "breast contest" between them. According to the women, the appellant gave them each a massage, during which he touched the sides of their breasts. Both women testified that this was done without their consent.

During her argument on findings, the trial defense counsel argued vigorously that the evidence did not support a finding of guilt as to indecent assaults. She stated in part:

> It has to be all or none. As you deliberate today, those are the words I want you to take back into that room with you. All or none. . . . You listened to the judge's instructions today. She went through them detail for detail. And you heard the evidence put before you by the witnesses today. As you take that back and you consider the instructions, the elements that are supposed to be met, and the testimony of the witnesses, you'll see that [the appellant] cannot be found guilty of indecent assault upon [Amn BS and A1C GS]. Now, we will concede that [the appellant's] conduct

> towards [Amn BS and A1C GS] rises to the level of assault consummated by a battery, but again, he cannot be found guilty of indecent assault because all the elements have to be met and the evidence falls short of meeting those elements.

The trial defense counsel then vigorously attacked the sufficiency of the government's proof that the appellant acted with the intent to gratify his sexual desires. The members found the appellant guilty only of the lesser-included offense (LIO) of assault consummated by a battery for both indecent assault specifications.

The appellant alleges that he was unaware that the trial defense counsel intended to concede his guilt to simple assault in her sentencing argument. He stated in his appellate filings that "[s]he never mentioned that she would concede to the . . . charges that I pled not guilty to in her closing arguments. . . . It was never my intention to concede to these specifications."

The trial defense counsel, in an affidavit submitted by the government on appeal, disagreed, stating that she had discussed her trial strategy with the appellant and that he concurred with it. "During our discussions, I always asked if he was certain this is what he wanted to do and he always stated, 'yes.' I assumed that from his response, he understood what I was saying and that his intent regarding his pleas and/or concessions was consistent with my advice."

On 12 August 2005, this Court directed that a post-trial hearing be conducted concerning the appellant's assertions of ineffective assistance of counsel. *See United States v. DuBay,* 37 C.M.R. 411 (C.M.A. 1967). This hearing took place on 3 February 2006 at Keesler Air Force Base, Mississippi. The military judge heard testimony from the appellant and his trial defense counsel and considered several pieces of documentary evidence, including a card that the appellant gave to the trial defense counsel after the conclusion of his trial, thanking her for her work on his case. The card stated, "No one else could have done a better job."

The military judge made numerous findings of fact. In addition, she conducted a detailed analysis of the ultimate issue, concluding that the trial defense counsel had been ineffective. While we give due consideration to the military judge's opinion on this matter, we will consider as binding on us only those factual findings which are not clearly erroneous. *Wean*, 45 M.J. at 463. These findings include:

- The trial defense counsel determined that the appellant "could and would plead guilty to the LIO of assault consummated by a battery."

- The United States rejected an offer for a pretrial agreement in which the appellant would plead to the above referenced LIOs.

- The trial defense counsel advised the appellant to plead not guilty to the specifications in question, but to concede guilt to the LIOs.

- The trial defense counsel testified that the appellant agreed with this proposed course of action.

- The appellant testified that he was not aware that his counsel was going to concede to the LIOs.

- The military judge concluded that the appellant really did not understand the significance of the concessions until his discussions with his appellate counsel.

- The military judge concluded, however, that the trial defense counsel "was motivated to and fully intended to act in her client's best interest, and genuinely believed that she had obtained the result he wanted."

We have examined the record of trial, the appellate filings, and the record of the *DuBay* hearing. Despite the views of the military judge that the trial defense counsel was ineffective, we conclude that her advocacy did not fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers." *See Grigoruk,* 56 M.J. at 307 (citing *Polk*, 32 M.J. at 153). The decision to concede a LIO is often a reasonable strategy, enabling an accused to secure credibility with the finder of fact. *See United States v. Hennis*, 40 M.J. 865, 868 (A.F.C.M.R. 1994). We have paid particular attention to the testimony of the victims in this case, finding them to be consistent with one another and believable. In light of this fact, we conclude that the decision to concede the LIO was reasonable, providing the members with an alternative to convicting the appellant of the greater offenses of indecent assault.

We note the military judge's finding that the appellant did not actually understand the strategy at issue here. However, the trial defense counsel was clear and precise in her testimony at the *DuBay* hearing that she explained the strategy to her client and that he appeared to agree. The military judge did not find that her testimony was untruthful. We conclude that the trial defense counsel did indeed explain the strategy and that she reasonably believed the appellant agreed with it.

The military judge further opined, that, even if she explained her strategy, the trial defense counsel's cross-examination of the victims raised the issue of their consent to the touching in question. This, in the judge's view, should have resulted in the trial defense counsel discarding her strategy of conceding the LIOs and arguing for a full acquittal on the specifications in question. The appellant makes a similar argument in his brief on appeal. However, this is more apparent in hindsight than it would have been at the time of trial. We do not find the issue of consent to have been so clearly and powerfully raised

by the testimony of the victims that it calls into question the wisdom of the trial defense counsel's strategy. *See Hennis*, 40 M.J. at 868 (citing *Strickland*, 466 U.S. at 693) ("The reasonableness of counsel's actions are evaluated from counsel's perspective at the time"). All in all, we conclude that the trial defense counsel provided a reasonable explanation for her actions at trial. *See Grigoruk,* 56 M.J. at 307.

Assuming, however, that the trial defense counsel's performance fell measurably below the standard expected of lawyers, we conclude that there was no prejudice to the appellant. We have examined the criteria set forth in *United States v. Cronic*, 466 U.S. 648 (1984), and conclude that this is not a case in which we should presume prejudice.

The appellant pled guilty to numerous instances of communicating indecent language but was acquitted of the more serious offenses of indecent assault. We find no basis to conclude that, had the trial defense counsel attempted an outright acquittal on the assault charges she would have been successful, given the nature of the testimony against her client. In light of the above we hold that the appellant has not been denied effective assistance of counsel.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator