

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Staff Sergeant **BENNIE C. MELSON**  
United States Air Force

ACM 36523 (f rev)

12 February 2009

Sentence adjudged 01 September 2005 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Major Donna S. Ruepell.

Before

WISE, BRAND, and HELGET  
Appellate Military Judges

UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of cocaine, one specification of assault, one specification of bigamy, and one specification of possession of drug paraphernalia,<sup>1</sup> in violation of Articles 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 912a, 928, 934, respectively. He was also convicted,

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<sup>1</sup> The appellant pled guilty to possession of drug paraphernalia by exceptions. He was convicted of all but one of the excepted items.

contrary to his pleas, of one specification of attempted voluntary manslaughter<sup>2</sup> and signing a false official record, in violation of Articles 80 and 107, UCMJ, 10 U.S.C. §§ 880, 907, and an additional charge of assault<sup>3</sup> and disorderly conduct, in violation of Articles 128 and 134, UCMJ. The sentence adjudged and approved consists of a dishonorable discharge, confinement for 12 years, and reduction to E-1.

This case is before our Court for the second time. In *United States v. Melson*, ACM 36523 (A. F. Ct. Crim. App. 14 Sept 2007) (unpub. op.), we affirmed the findings with the exception of Additional Charge I,<sup>4</sup> and reassessed the sentence to a dishonorable discharge, confinement for 11 years and 4 months, and reduction to E-1. Additionally, we awarded the appellant 142 days of credit against his sentence to confinement. On appeal, our superior court set aside our decision and returned the record to the Judge Advocate General of the Air Force for remand to our Court.

Our superior court directed that this Court reconsider Melson's claim of ineffective assistance of counsel, that this Court take into consideration the defense counsel's affidavit, and that we resolve this case in a manner consistent with *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) and *United States v. DuBay*, 17 C.M.A. 147, (1967), as applicable.

### *Discussion*

Originally on appeal, the appellant asserted four errors. Specifically, the appellant contended: (1) the military judge abused his discretion when he determined that the convening authority did not violate Articles 25 and 37, UCMJ, 10 U.S.C. §§ 825, 837, respectively, when detailing certain panel members to appellant's court-martial; (2) a state's application for a marriage license is not an "official statement" within the meaning of Article 107, UCMJ; (3) the evidence was factually and legally insufficient to convict the appellant of attempted voluntary manslaughter; and (4) the appellant received ineffective assistance of counsel when trial defense counsel failed to request relief for illegal pretrial confinement. We do not concur with the appellant on the first, third, and fourth issues. However, we do find that he is entitled to relief under the second issue.

### *Panel Selection*

At trial, the defense moved to dismiss the charges and specifications, alleging that the convening authority improperly selected the court members. The motion was based on the fact that the convening authority intentionally selected senior members to serve. Five of the ten members selected were colonels. Additionally, the convening authority also chose members from his headquarters staff, although the case was tried at a different

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<sup>2</sup> The appellant was charged with attempted murder.

<sup>3</sup> Although charged with pointing a firearm as part of the assault, that language was excepted in findings.

<sup>4</sup> Additional Charge I was a violation of Article 107, UCMJ, 10 U.S.C. § 907.

base. The convening authority testified at trial regarding his selection. His testimony indicated that he wanted to pick members whom he knew had the best judgment and experience. He also stated that this was the most serious case he had ever handled.

Whether a court-martial panel was improperly selected is a question of law reviewed de novo. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). A court-martial conviction should be set aside if it appears that panel members have been “hand-picked” by the government. *United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960). The appellant has the burden of establishing that panel members were improperly selected. *United States v. Townsend*, 12 M.J. 861, 862 (A.F.C.M.R. 1981), *pet. denied*, 13 M.J. 389 (C.M.A. 1982). This Court is bound by the military judge’s findings of fact unless they are clearly erroneous. *United States v. Benedict*, 55 M.J. 451, 454 (C.A.A.F. 2001).

The issue of member selection was exhaustively addressed at trial. There is ample evidence in the record to demonstrate that the convening authority used the appropriate criteria in determining the makeup of the panel. Although *Hedges* mentions “hand-picked” panels, the reality is that every panel is hand-picked by the convening authority. What is impermissible is for the convening authority to select members with a view toward influencing the outcome of the case. The convening authority must select members using the criteria specified in Article 25, UCMJ. In this case, the convening authority stated that he wanted officers with the requisite maturity and experience. He further stated that he looked at the serious nature of the charges and that the accused was facing life in prison without the possibility of parole. The military judge found that the convening authority selected the best qualified panel members under Article 25, UCMJ. We agree. The convening authority obviously gave a great deal of time and consideration to panel selection. It is obvious from the record that he did so in an attempt to ensure justice, not subvert it. The appellant has failed to carry his burden in establishing that the panel members were improperly selected.

#### *Official Statement*

The facts giving rise to the false official statement charge also gave rise to the bigamy charge. The appellant married a woman while still married to another woman. In doing so, he gave information to a court clerk in order to complete a marriage license application in the state of Georgia. The government charged him with signing a false statement when he signed the application stating that he was not married.

Determination of what is an official statement is reviewed de novo. Article 107, UCMJ, defines an “official record” as one made in the line of duty. A “direct relationship to Appellant’s duties and status” is necessary to make a statement in the line of duty. *United States v. Teffeau*, 58 M.J. 62, 69 (C.A.A.F. 2003). A statement may also be official if the document is within the jurisdiction of a federal department or agency.

*United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988). Not every comment uttered or even written by a servicemember is within the line of duty. There must be a nexus between the servicemember's status and the statement. Although "line of duty" has not been specifically defined, in *Teffeau* our superior court held that the circumstances leading up to the statement, the circumstances surrounding the statement, whether there is a military interest in the subject matter, and whether there exists a clear and direct relationship to military duties are to be considered when determining whether a charged statement was within the "line of duty." *Teffeau*, 58 M.J. at 69. Most recently in *United States v. Day*, 66 M.J. 172, 174 (C.A.A.F. 2008), our superior court held the critical question is "whether the statement relates to the official duties of either the speaker or the hearer, and whether those official duties fall within the scope of the UCMJ's reach." *United States v. Cofer*, 56 M.J. 555, 557 (A.F. Ct. Crim. App. 2008).

In the instant case, the facts indicate that the statement on the marriage license was not "official," as it was not in the line of duty. The statement was not made to someone within the command and there is not a clear or direct relationship to the appellant's military duties. Furthermore, the appellant never turned in the false document for further use, such as to update the Defense Eligibility and Enrollment Reporting System or to obtain on-base military housing. Marriage is a matter within the purview of and regulated by the state. There is nothing in this case which causes the act to fall within the federal government's or the military's scope of interest. Additional Charge I and its specification must be set aside and the sentence reassessed.

At trial, the military judge merged the bigamy charge and the false official statement charge for the purposes of sentencing. In doing so, he used the greater maximum punishment authorized under Article 107, UCMJ, of confinement for five years rather than the confinement for two years authorized under Article 134, UCMJ, for bigamy. As a result, the appellant was exposed to three more years of confinement due to the erroneous conviction under Article 107, UCMJ. Accordingly, his sentence must be reassessed. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that by disapproving any confinement in excess of 11 years and 4 months, we will have assessed a punishment clearly no greater than the sentence the military judge would have imposed in the absence of error. *Id.* Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: dishonorable discharge, confinement for 11 years and 4 months, and reduction to E-1. Further, we find this sentence to be appropriate for the appellant and his crimes. *United States v. Peoples*, 29 M.J. 426, 427-28 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### *Legal and Factual Sufficiency*

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, as the prevailing party at trial, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. There is ample evidence in the record to support both the military judge's determination and our own independent determination that the appellant attempted to commit voluntary manslaughter. Although the evidence was not completely consistent as to who stood where, how many shots were fired, and all the little details that get confused when everyone's adrenaline is pumping, the evidence is clear that the appellant shot at his victim several times with a 12 gauge shotgun. The fact that the shell was loaded with birdshot is not persuasive. The evidence was clear that birdshot can be lethal to more than just birds. The appellant shot from a range likely to hit his intended target. Although his victim was also armed and returned fire, there is insufficient evidence to support a claim of self-defense. There is sufficient evidence to support that the appellant intended to inflict great bodily harm. He did so while upset over the victim criticizing the appellant's assault on a mutual friend. We find the evidence factually and legally sufficient to support a finding of guilty to attempted voluntary manslaughter.

### *Ineffective Assistance of Counsel*

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). 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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Counsel is presumed to be competent. *Id.* We will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and if so, whether that deficiency 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 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). Vague

or general intimations about the particular nature of materials the appellant would or could have submitted to support a clemency request are insufficient to show prejudice. *Key*, 57 M.J. at 249 (citing *United States v. Pierce*, 40 M.J. 149, 151 (C.M.A. 1994)).

At the heart of this issue is a claim by the appellant of illegal pretrial punishment. This Court has the first opportunity to consider the appellant's claim because it was not raised at trial. Normally, this issue would be waived on appeal absent plain error. *United States v. Inong*, 58 M.J. 460, 461 (C.A.A.F. 2003). However, since the issue forms the basis of the ineffective assistance of counsel claim, it is necessary to examine the claim to the extent necessary to resolve the assigned error.

The appellant's assigned error is that his trial defense counsel was ineffective in that she failed to raise the issue of illegal pretrial punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813. This Article prohibits the government from: (1) punishing an accused before guilt is established at trial and (2) imposing pretrial confinement that is more rigorous than circumstances require to ensure an accused's presence at trial. See *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006); *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005); *Inong*, 58 M.J. at 463; *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000). If an appellant can establish that either prohibition was violated, he is entitled to sentence relief. Rules for Courts-Martial 305(d), 905(c)(2), and 906(c)(2); *Inong*, 58 M.J. at 463 (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)).

In a declaration submitted to this Court, the appellant asserts that he was subjected to "conditions that made my life humiliating and embarrassing, physically painful, extremely frustrating, and left me unable to get in touch with people in the military that could help me out." Specifically, the appellant states that he was repeatedly harassed by a guard, subjected to extreme temperatures both in the summer (in excess of 100 degrees) and in the winter (due to "terribly poor" heating units) in a jail with broken windows, provided only thin suits to wear, and refused access to socks and any undergarments. The appellant also states that he was not allowed to change into "non-prisoner" clothes when he was taken to base for appointments. The appellant adds that he had a back injury and requested to see a doctor on several occasions, but his request was never processed by jail personnel. Finally, the appellant states that he was not given any access to legal resources. In his declaration, the appellant asserts that he informed his trial defense counsel about all these conditions at the first opportunity, but was told "there wasn't anything that could be done about it." She never asked for any details about the conditions or whether the appellant was being punished. When the military judge inquired at trial about any Article 13, UCMJ, punishment, only trial defense counsel responded and in the negative.

In response to this declaration, the government argues that the conditions of the appellant's pretrial confinement are unsubstantiated and even if they did exist, the

conditions do not constitute illegal pretrial confinement. Originally, the government provided no additional information, but merely argued in its brief why counsel believes the appellant's assertions are not credible. After this Court decided the issue, the government requested reconsideration and leave to file an affidavit from the trial defense counsel. We denied their request.

In analyzing the appellant's claims and the government's response thereto, this Court relied upon the guidance in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), which outlines the principles to be applied in most instances in which an appellant files an affidavit in support of a claim of ineffective assistance of counsel. In that case, our superior court provided six principles to apply.

The first and second principles state that this Court may reject a claim if the facts as alleged, if true, would not result in relief or if the claim is not factual, but is merely speculative or conclusory. The third principle states that "if the affidavit is factually adequate on its face to state a claim of legal error and the [g]overnment either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the [C]ourt can proceed to decide the legal issue on the basis of those uncontroverted facts." *Ginn*, 47 M.J. at 248. The fourth principle provides that, "if the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts, the Court may discount those factual assertions and decide the legal issue." *Id.* The fifth principle is that if the claim of ineffective assistance of counsel contradicts a matter within the record of a guilty plea, the [C]ourt may decide this issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and the appellant's expression of satisfaction with the counsel at trial) unless the appellant provides a rational explanation for making such statements at trial. *Id.* Finally, principle six is that the Court should "order a factfinding hearing only when the above-stated circumstances are not met." *Id.*

Some of the appellant's assertions are corroborated (co-mingling of prisoners, lack of socks and undergarments, and lack of legal resources at the facility), others are contradicted (lack of medical treatment and lack of any legal resources), and others are merely speculative or conclusory (extreme temperatures, harassment by a security guard, and being transported in prison garb).

Reviewing the record of trial, we find the appellant did not raise the issue of illegal pretrial punishment when the defense counsel was questioned by the military judge. Nor did he bring it up in his oral or written unsworn statements. The appellant went on to further state that he was satisfied with his counsel and her advice.

Returning to the *Strickland* test for ineffective assistance of counsel, we find the appellant has failed to meet his burden and the trial defense counsel was not ineffective. Assuming trial defense counsels' conduct was deficient, we find no prejudice. The test

for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

On remand, we "can only take action that conforms to the limitations and conditions prescribed by the remand." *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001) (quoting *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989), *modified and aff'd*, 56 M.J. 551 (A.F. Ct. Crim. App. 2001), *aff'd in part and rev'd in part*, 58 M.J. 305 (C.A.A.F. 2003)). In our previous decision, we awarded the appellant 142 days of credit for illegal pretrial punishment. We decline to do so on remand. See *United States v. Conley*, 28 M.J. 210, 211 (C.M.A. 1989).

### Conclusion

The approved findings, with the exception of Additional Charge I, are correct in law and fact and no error prejudicial to the substantial rights of the appellant was committed. Additional Charge I and its Specification are set aside. The sentence, as reassessed to a dishonorable discharge, confinement for 11 years and 4 months, and reduction to E-1, is appropriate. The approved findings, as modified, and the sentence, as reassessed, 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, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF  
Clerk of the Court