UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant REGINALD H. NORWOOD
United States Air Force

ACM S32041

18 September 2013

Sentence adjudged 10 February 2012 by SPCM convened at Scott Air Force Base, Illinois. Military Judge: Michael J. Coco.

Approved Sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Dana D. Jacobson and Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

WIEDIE, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his plea, of indecent exposure, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged sentence consisted of a bad-conduct discharge, confinement for 2 months, and reduction to E-1. The convening authority approved the sentence as adjudged, but waived automatic forfeitures for the benefit of the appellant's dependents.

The appellant alleges that his trial defense counsel was ineffective during the sentencing phase of his court-martial because he elicited testimony from a sentencing witness that "opened the door" for the admission of evidence that had been previously excluded by the military judge. The appellant also alleges that the evidence was legally and factually insufficient to support his conviction for indecent exposure and that a bad-conduct discharge is inappropriately severe for the offense of which he was found guilty.[1]

Background

The appellant and Airman First Class (A1C) JMC were both assigned to the 437th Supply Chain Operations Squadron, Scott Air Force Base (AFB), Illinois. The appellant was a staff sergeant with over 9 years of active duty service, and A1C JMC was a 19-year-old, first-term Airman with less than a year on active duty.

A1C JMC first met the appellant when she arrived at Scott AFB. They were assigned to the same duty section and their cubicles were next to each other. The appellant introduced himself to A1C JMC when she first arrived and invited her to his church. Over time, the appellant began making inappropriate comments to A1C JMC. At physical fitness training, he told her and another Airman that they would look good mud wrestling together. He also told A1C JMC that she reminded him of a certain movie star that was sexy and with whom he wanted to have sex. In addition to the verbal comments, the appellant sent A1C JMC e-mails in which he discussed giving her hugs and wrote he would love to run his fingers over her abs. In response, A1C JMC told the appellant he had "crossed the boundaries" and that he had a wife and a child on the way.

On 1 December 2011, about two weeks after she told him he had "crossed the boundaries," A1C JMC noticed that something seemed to be bothering the appellant. She asked him if he was okay and if he needed anything. The appellant told A1C JMC that he was okay. Although their cubicles were right next to each other, the appellant began texting A1C JMC. He initially wrote that he should not tell her what was bothering him because of their last conversation about him "having a wife [and] baby." A1C JMC asked if he was having problems with his wife and baby. The appellant responded that he was having a "guy 'moment'" because he "needed" things but could not have them at that time. Not understanding what the appellant meant, A1C JMC asked if he was nervous about the baby.

Over the next 30 minutes, the appellant sent six texts to A1C JMC. In the texts, the appellant wrote that his "man" was exposed because of "pressure." He also texted that he was afraid someone would see and asked her not to tell anyone if she saw anything. A1C JMC was initially confused by the appellant's text messages and did not understand what he was trying to say. She eventually understood what he was saying and

[1] These issues were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

texted, "Like physically out?" When he texted back "yes" in answer to her question, she advised him to go to the bathroom.

After further text exchanges, the appellant eventually went to the bathroom. From the bathroom, he texted A1C JMC that he was shaking and asked her to walk him back to his cubicle. A1C JMC was away from her desk and did not respond to the request. When she returned, she texted the appellant to ask why he was shaking. At the same time, she received a text from the appellant that said he was at his desk and asked her to come there. When A1C JMC stepped over to the appellant's cubicle, the appellant was standing there with his erect penis exposed. A1C JMC immediately left and reported the incident to a friend who advised her to let her supervisor know what had happened.

In advance of trial, trial defense counsel made a motion in limine to prevent the Government from introducing evidence surrounding a 2009 incident in which the appellant allegedly asked another Airman if she wanted to see his penis. The military judge granted the motion under Mil. R. Evid. 404(b) and no evidence relating to this incident was received during the findings portion of the trial.

In sentencing, the defense called the appellant's former supervisor, Technical Sergeant (TSgt) TMD, to testify as to her opinion of the appellant's rehabilitative potential. TSgt TMD testified that the appellant had a strong work ethic and was very loving, protective, and supportive of his family. Over defense objection, the military judge allowed the Government to ask TSgt TMD if she was aware of the 2009 incident in which the appellant had asked another Airman if she wanted to see his penis to test the basis of her opinion. TSgt TMD indicated that she was not aware of the incident. No further information was introduced concerning the incident. The military judge instructed the members that the question was permitted to test the basis of TSgt TMD's opinion, but that it could not be considered for any other purpose.

Ineffective Assistance of Counsel

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 15 April 2013) (No. 12-1113) (mem.) (citation omitted). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[2] and (2) that the deficient performance prejudiced the defense through

[2] U.S. CONST. amend. VI.

errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The deficiency prong requires that an appellant show that the performance of counsel "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In doing so, the appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (citing *Strickland*, 466 U.S. at 689). This is because counsel are presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Moulton*, 47 M.J. at 289). The "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Applying these standards, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing.

The appellant complains that he received ineffective assistance of counsel during sentencing because trial defense counsel opened the door to damaging questions about the prior incident by having TSgt TMD testify about the appellant's rehabilitative potential. Trial defense counsel was aware that calling TSgt TMD could open the door to the "did you know" questions prior to calling her as a witness. However, trial defense counsel had no other live military witnesses they could call and believed they needed to put on some live testimony to counteract the damaging testimony from A1C JMC, as well as the content of the text messages, in an attempt to save the appellant's career of almost 10 years.

TSgt TMD was a noncommissioned officer from the same unit as the appellant and A1C JMC, and she had a positive opinion of the appellant. Trial defense counsel believed the risk associated with calling TSgt TMD as a witness was offset by the strength of her testimony, the fact that the Government would be limited to asking "did you know" questions on cross-examination, and the limiting instruction the judge would provide the members with respect to the information related to the prior incident.

At times, trial defense counsel is faced with difficult choices. In this case, we are convinced trial defense counsel made an informed and calculated decision to present rehabilitation testimony in the hopes of salvaging the appellant's career. As explained in the trial defense counsel's affidavit, the strategic and tactical decision the defense made regarding this issue was not unreasonable under the facts of this case. The fact that this plan was not ultimately successful does not invalidate the defense strategy, and we give great deference to trial defense counsel's judgments in this area. *Mazza*, 67 M.J. at 474-75. In assessing the appellant's allegation, we find that the appellant has failed to establish that his counsel was deficient such that his performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. Because we find trial defense counsel was not deficient, we need not address the prejudice prong of *Strickland*.

Legal and Factual Sufficiency

The appellant argues that the evidence is legally and factually insufficient to support his conviction. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "The test for factual sufficiency 'is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325).

The elements of indecent exposure are: (1) That the accused exposed his genitalia; (2) That the exposure was in an indecent manner; (3) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than members of the accused's family or household; and (4) That the exposure was intentional. *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.b.(14) (2008 ed.).

The testimony of A1C JMC established that the appellant exposed his penis. The context of text messages as well as the fact that the appellant's penis was erect at the time of the exposure evidence the fact that the exposure was indecent. The exposure occurred at his cubicle in the work place where it could reasonably be expected to be seen by co-workers. The series of text messages preceding the exposure establish that the exposure was intentional. Applying the standards to the evidence as summarized above and making allowances for not having observed the witnesses, we find the evidence legally and factually sufficient to prove guilt beyond a reasonable doubt.

Sentence Appropriateness

The appellant also argues that a bad-conduct discharge is inappropriately severe for the offense of which he was found guilty. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of the offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant asserts his sentence is inappropriately severe given his lack of a previous disciplinary history. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. In this case, when the appellant, a noncommissioned officer, exposed his erect penis to a 19-year-old, first-term Airman, he clearly deviated from the standards of conduct expected of Airmen. We conclude that the adjudged and approved sentence was clearly within the discretion of the panel members and the convening authority, was appropriate in this case, and not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[3] Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] We note a clerical error in the Court-Martial Order and Action, both dated 28 March 2012. They both omit the word "paid" in addressing the payment of the waived forfeitures to the appellant's dependents.