UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Master Sergeant GREGORY L. PARKER
United States Air Force

ACM 34430

7 October 2003

Sentence adjudged 18 December 2000 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Israel B. Willner.

Approved sentence: Confinement for 24 months, forfeiture of all pay and allowances, reduction to E-4, and a reprimand.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

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

STUCKY, Judge:

The appellant was convicted, pursuant to his pleas of guilty, by a general court-martial, of three specifications of wrongful use of cocaine, one specification of dishonorable failure to pay a just debt, one specification of dereliction of duty, and one specification of failure to go, in violation of Articles 112a, 134, 92 and 86, UCMJ, 10 U.S.C. §§ 912a, 934, 892, 886. He was sentenced to confinement for 24 months, forfeiture of all pay and allowance, reduction to E-4, and a reprimand. The convening authority approved the sentence as adjudged, but waived mandatory forfeitures for a period of six months, or until the appellant's release from confinement, whichever came sooner, for the benefit of the appellant's daughter, pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b.

The appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). He first asserts that he received ineffective assistance of counsel because his defense counsel failed to inform him that a later administrative discharge could prevent him from retiring with retired pay. He claims this adversely affected his decisions at trial. He further claims that subjecting him to the possible loss of retired pay at both a court-martial and an administrative discharge board violates the Double Jeopardy Clause of the United States Constitution.[1] In a supplemental assignment of error, he asserts that the adjudged forfeiture of all pay and allowances should be disapproved to ensure that the convening authority's decision to pay the mandatory forfeitures for the benefit of his daughter is not frustrated.

I. Background

At the time of his court-martial, the appellant had 23 years of service in the Air Force, a career marked by both significant achievement and repeated alcohol and drug problems.[2] In early 2000, he was superintendent of wing plans and scheduling at Cannon Air Force Base (AFB), New Mexico, and was in charge of scheduling maintenance for 72 F-16 aircraft. On 9 February 2000, the appellant was seen visiting a suspected "crack house" in Clovis, New Mexico, where local police had recently seized cocaine and drug paraphernalia. The Air Force Office of Special Investigations received search authorization to obtain a urine sample from the appellant, which tested positive for the metabolite of cocaine. Thereafter, on 1 June 2000, charges were preferred against the appellant for one specification of wrongful use of cocaine.

On 10 August 2000, the appellant's name appeared on a list of members randomly selected to provide urine specimens for drug testing. He provided a sample, which again tested positive for the metabolite of cocaine. Thereafter, on 18 August 2000, the appellant requested and was granted leave between 21 August 2000 and 8 September 2000 to attend a private drug rehabilitation clinic in Texas. He gave a leave address and phone number for his brother in Desoto, Texas. During this period, the appellant's first sergeant attempted to call him to tell him about the second positive urinalysis. The appellant's brother answered and stated that the appellant was not there and that he did not know the appellant's whereabouts. Repeated attempts to contact the appellant were unsuccessful. In fact, the appellant did not go to Texas, but spent the leave in his house in Clovis, New Mexico.

The appellant did not report to work on 11 September 2000, the first duty day after his leave ended. His first sergeant called the appellant at his house, but received no answer. He then drove to the appellant's house, knocked loudly on the door, but heard nothing. Later that morning, the first sergeant went back to the appellant's house

[1] U.S. CONST. amend. V.

[2] The appellant had four nonjudicial punishment proceedings in accordance with Article 15, UCMJ; 10 U.S.C. § 815, for drug and alcohol offenses during his career, although only one was admissible at trial.

accompanied by the squadron commander. They again knocked loudly, and yelled, waking the appellant up. The commander ordered the appellant to report for duty in 20 minutes, but the appellant failed to do so. That afternoon, the first sergeant went back to the house for a third time. The appellant was sleeping again, so the first sergeant woke him up. The appellant then began to perspire heavily and he coughed up dark fluid. The first sergeant surmised that the appellant had ingested some aspirin earlier and then vomited. The first sergeant called the local emergency medical technician, who responded and took the appellant to the hospital. Hospital personnel pumped the appellant's stomach out, and he remained in the intensive care unit for two days. Tests conducted at the hospital revealed the presence of cocaine in the appellant's body. A military magistrate gave search authorization, and a urine sample was obtained from the appellant at the hospital. This sample also tested positive for the metabolite of cocaine. The appellant's failure to provide a proper leave address and phone number and his failure to report for duty at the end of his leave were the basis for the charges and specifications under Articles 92 and 86, UCMJ.

Finally, the appellant went on temporary duty in October and November 1999. During these trips, he charged a total of $2773.43 on his Bank of America government travel card. The appellant filed a travel voucher when he returned to Cannon AFB and the government paid him $1341.99 for his expenses. Between January 2000 and November 2000, the appellant paid the Bank of America a total of $24.00, despite numerous delinquency notices and his assurances to his first sergeant that he was paying off the debt. The appellant's indebtedness on his government credit card was $2749.43 from December 1999 to November 2000.

II. Ineffective Assistance Counsel

An appellant who asserts ineffective assistance of counsel has a difficult burden to carry. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), has set out a two-part test to determine whether the appellant's defense counsel was ineffective. The test in *Strickland* is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. In *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991), our superior court stated the test as follows:

> (1) Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
> (2) If they are true, did the level of advocacy "fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
> (3) If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt?"

Id. at 153 (citations omitted).

Here, the appellant asserts in a post-trial affidavit that his counsel did not inform him of the possible effects an administrative discharge could have on his retirement. The appellant admits he discussed the possibility of an administrative discharge with his defense counsel, but he maintains that he did not know a subsequent administrative discharge could deprive him of his retirement. He asserts that if he had known, he would have asked his defense counsel to argue for longer confinement to save his retirement.

Putting aside the inherent incredibility that a senior noncommissioned officer with 23 years of service did not know that engaging in serious misconduct could adversely impact a retirement application, the assertions made by the appellant simply do not meet the test for ineffective assistance of counsel.[3] He asked the members not to adjudge a punitive discharge, which they did not. At the same time, he enjoyed the protection of the 24-month cap on confinement in the pretrial agreement. The members sentenced the appellant to confinement for 24 months, so that portion of the pretrial agreement was not an issue. In view of this, the appellant has not made his case.

Even if we believed the appellant's assertion that his counsel did not explicitly tell him about the possible administrative consequences of his misconduct, he still has not shown any prejudice. A sentence of 24 months without a punitive discharge for these offenses by a senior noncommissioned officer is hardly excessive. *Cf. United States v. Baker*, 45 M.J. 538 (A.F. Ct. Crim. App. 1996), *aff'd*, 50 M.J. 223 (1998); *United States v. Barus*, 16 M.J. 624 (A.F.C.M.R. 1983); *United States v. Stokes*, 8 M.J. 694 (A.F.C.M.R. 1979), *aff'd*, 12 M.J. 229 (C.M.A. 1982). The appellant got precisely what he bargained for, and must show more than his remorse to demonstrate prejudice.

Finally, the appellant states that, if he had known of the potential adverse consequences, he "would have sought some guarantee against an administrative discharge." Needless to say, neither a court-martial nor a convening authority has the power to bind the Secretary of the Air Force in a conjectural administrative proceeding.

[3] This is not a case like *United States v. Davis*, 52 M.J. 201 (1999), which involved a special temporary statutory retirement authority that was the subject of legal confusion and controversy. The appellant's application for retirement was complicated only by his own misconduct.

We do not find ineffective assistance of counsel nor do we find that the appellant was prejudiced in any way by the outcome of this court-martial.

III. Double Jeopardy Clause

The appellant's second contention is that subjecting him to the loss of his retired pay at the court-martial and at a subsequent administrative discharge proceeding violated the Double Jeopardy Clause of the United States Constitution. U.S. CONST. amend. V. The appellant served his adjudged confinement and was then returned to active duty. In November 2001, an administrative discharge board was convened, which recommended his discharge under other than honorable conditions. On 6 March 2002, the appellant applied for retirement under 10 U.S.C. § 8914, which states that an enlisted member with over 20 but less than 30 years of service may be retired by the Secretary at his request. On 28 August 2002, the Secretary denied the appellant's application for retirement and directed that he be administratively discharged under other than honorable conditions.

The appellant's contention is without merit. It is settled that Congress may impose criminal and civil or administrative sanctions for the same act or omission, because double jeopardy in the constitutional sense means punishing, or attempting to punish, twice for the same criminal offense. *Hudson v. United States*, 522 U.S. 93 (1997). Our superior court clearly recognized this principle. *See United States v. Vaughan*, 11 C.M.R. 121 (C.M.A. 1953). *See also United States v. Hennis*, 40 M.J. 865 (A.F.C.M.R. 1994); *United States v. Reed*, 33 C.M.R. 932 (A.F.B.R. 1963). Here, the appellant was denied retirement by an administrative action of the Secretary of the Air Force. The retirement of an enlisted member is not a right; it is discretionary with the Secretary. 10 U.S.C. § 8914; *Cedillo v. United States*, 124 F.3d 1266 (Fed. Cir. 1997). The Double Jeopardy Clause has no relevance to the appellant's situation, and any complaint he may have as to administrative due process with regard to the retirement application is one over which this court has no jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

IV. Mandatory Forfeitures

In a supplemental assignment of error, the appellant asks that we disapprove the adjudged forfeitures on the basis of the Court of Appeals for the Armed Forces' decision in *United States v. Emminizer*, 56 M.J. 441 (2002). In *Emminizer*, the Court held that before a convening authority can waive mandatory forfeitures for the benefit of the accused's dependents under Article 58b, UCMJ, he must defer, reduce, or suspend the adjudged forfeitures for the six-month period authorized, or until the appellant is released from confinement, whichever is first. *Id.* at 443. The appellant argues that if some action is not taken, he "could be required to repay the waived forfeitures." The government agrees that corrective action is needed, but states that it should be limited to remanding the case to the convening authority for a new action directing the suspension of adjudged forfeitures for six months.

On 19 January 2001, the convening granted the appellant's request to waive the mandatory forfeitures for a period of six months, or until he was released from confinement, whichever was sooner. The mandatory forfeitures were to be paid to a designated person for the benefit of the appellant's daughter. Those forfeitures were paid from 19 January 2001 until 8 May 2001, when the appellant's term of service expired. He was released from confinement on 1 February 2002, at which time his pay and allowances at his new grade of E-4 began. The mandatory forfeitures were again paid for the benefit of his daughter in February 2002 and March 2002, thus "completing" the six-month period.

In the present case, there is no ambiguity in the convening authority's action with regard to what he intended to accomplish. The convening authority's action,[4] in pertinent part, states:

> Pursuant to Article 58b automatic forfeiture of pay and allowances was waived 19 January 2001, for a period of six months or the member's release from confinement, whichever is sooner. The waived forfeitures were directed to be paid to Mrs. [IC], for the benefit of the accused's dependent daughter, [CP].

As we stated in *United States v. Medina*, ACM 34783 (A.F. Ct. Crim App. 11 Sep 2003):

> There is no need for this Court to disapprove the appellant's adjudged forfeitures where the convening authority clearly intended to waive the mandatory forfeitures, the action carried out such waiver in a manner compliant with the understanding of Article 58b, UCMJ, at the time, and the appellant's [dependent] received the pay at issue. *Cf. United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981) (holding that where the convening authority's action is subject to only one interpretation, a supervisory authority is not required to return the record of court-martial to the convening authority for clarification).

As we held in *Medina*, it is clear that that the convening authority intended to approve the waiver of forfeitures and that his action was effective to do so, even if it did not technically comply with *Emminizer*.

Additionally, there is nothing in the record that indicates that any action was taken, or has been initiated to recoup the forfeitures paid to the appellant's daughter after the appellant was released from confinement. The appellant's assertion that he "could be

[4] Article 58b, UCMJ, forfeitures are often referred to by different terminology. The convening authority's action referred to Article 58b, UCMJ, forfeitures as "automatic" forfeitures. We have followed our superior court's terminology in *Emminizer* and refer to Article 58b, UCMJ, forfeitures as "mandatory" forfeitures.

required to repay" the forfeitures is pure speculation. We see no need for this Court to order remedial action when the appellant has suffered no prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

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

OFFICIAL

HEATHER D. LABE
Clerk of Court