UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ERIC W. PARKER
United States Air Force

ACM 37482 (f rev)

09 March 2011

Sentence adjudged 28 April 2009 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Charles G. Warren, Captain Scott C. Jansen, Capt G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

In accordance with his pleas, the appellant was found guilty by a military judge of one specification of wrongfully and knowingly possessing visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a dishonorable discharge, confinement for two years, and reduction to E-1.

On 12 May 2010, this Court returned the case to The Judge Advocate General for remand to the convening authority for a new staff judge advocate recommendation (SJAR) and action.[1] On 2 August 2010, the convening authority withdrew the previous action in accordance with our decision and substituted a new action that same date.

The issue on appeal is whether appellant's trial defense counsel provided ineffective assistance by not submitting any evidence to the military judge or the convening authority of the loss of the appellant's potential retirement benefits when appellant had over 19 years of service at the time of trial?[2] Finding no error, we affirm.

Background

In October 2005 while stationed at Hickam Air Force Base (AFB), Hawaii, the appellant purchased a 20-day subscription to a website containing child pornography. Between 11-13 November 2005, the appellant downloaded in excess of 5,000 files from the website. The appellant would look at the images "because he could not control what he found sexually intriguing." He would masturbate to the images and videos. "The [appellant] found the children to be pure and without stretch marks, unlike adult women." In September 2006, when the appellant was re-assigned to Mountain Home AFB, Idaho, he took his computers, including the one with the child pornography. After the computers were seized, searched and analyzed, it was determined that at least 963 files matched hash values stored in the National Center for Missing and Exploited Children database.

During the presentencing phase of the appellant's trial, evidence of the appellant's entire career, which spanned over 19 years, was presented through the Stipulation of Fact, the Personal Data Sheet, the appellant's enlisted performance reports, the appellant's oral and written unsworn statements, and the arguments of counsel before the military judge.

The sentence in the appellant's court-martial was adjudged on 28 April 2009. The SJAR was completed on 2 June 2009, and served on the trial defense counsel on 8 June 2009 and on the appellant on 18 June 2009. On 12 June 2009, a clemency submission was made before required. The focus of that submission was to request enrollment into the Return to Duty Program (RTDP). Before the expiration of time to submit matters, the trial defense counsel submitted additional matters on 25 June 2009, including letters from the appellant's commander and the military judge recommending the RTDP. There was

[1] On initial review, there was no evidence that the convening authority reviewed trial defense counsel's timely clemency addendum.

[2] The issue as to the evidence to the convening authority is moot, in light of the appellant's supplemental submissions, dated 16 July 2010, which included the missing clemency addendum as well as actuarial charts with retirement information. Appellant now argues that the military judge was not provided any actuarial evidence so he was denied the opportunity to review the impact of such a loss when deciding upon an appropriate sentence and again when he made a clemency recommendation to the convening authority.

also a favorable letter from one of the computer forensics experts. In the Addendum to the SJAR, dated 29 June 2009, there was no mention of the additional matters and no evidence that the convening authority saw them, hence our order remanding the case.

The second time around, the SJAR was completed on 23 June 2010, and served on the new trial defense counsel and appellant on 24 and 29 June 2010, respectively. This time, the appellant submitted a new letter; a supplemental letter from the new trial defense counsel; numerous trial documents; the original request for clemency; the previously missing clemency addendum containing letters from the unit commander, the military judge and the expert; and actuarial retirement pay charts. The new Addendum to the SJAR was completed on 26 July 2010 and all the previously submitted documents were reviewed, along with the supplement, including the retirement pay charts. Now, apparently, the appellant seeks to retire as a Technical Sergeant (TSgt) without participation in the RTDP.

Discussion

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Without question, 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)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Davis*, 60 M.J. at 473. Counsel are presumed to be competent, and 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).

The appellant bears the burden of establishing that his trial defense counsel was ineffective.[3] *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). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687.

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). At the conclusion of the appellant's trial the military judge stated on the record, "Well, it's a difficult case trying to balance what was a strong career against the sheer volume and

[3] Two affidavits were submitted from the appellant's trial defense counsel, one on 9 March 2010 and one on 14 May 2010. None were submitted by the appellant.

explicit nature of the images in the case and the length of time that the images were possessed . . . ."[4] He went on to say:

> I also recognize that clemency is a separate process from the determination of sentence and the court would certainly not object to any clemency the Convening Authority or higher authority might choose to grant. And I would encourage Defense Counsel, if you would like, to contact me to let me know if there are any additional matters that are presented in a clemency package, which for whatever reason weren't presented at trial and I will consider whether to provide a clemency recommendation to the Convening Authority based on such additional matters, which might range from psychological reports; whatever. Things I don't have in determining this. So at any rate I just mention that to show the difference between a sentence for a crime and the broader application of the clemency power of a Convening Authority.

After announcing the sentence, the military judge reiterated, "again, just keep me in mind when you're putting together your clemency package, if there are any additional matters that you would like for me to consider in whether or not to provide a clemency recommendation particularly in regard to the dishonorable discharge." The military judge did in fact provide a clemency letter in which he stated that, based upon "observations of TSgt Parker at trial, the evidence presented, and my review of clemency matters, I concur in [the unit commander's] recommendation that TSgt Parker be offered the opportunity to enter the AF RTDP."[5]

The trial defense counsel used common sense and relied on the military judge to use it and his knowledge of the ways of the world to determine an appropriate sentence. The military judge was quite clear that he had determined the appropriate sentence in the appellant's case under the circumstances in front of him, which included the fact the appellant had over 19 years of service. The military judge is presumed to know the law and the physical presentation of the charts to a military judge would have had little effect. He made it obvious that he had weighed the appellant's time in the service against the nature and extent of his crime. The military judge did in fact recommend clemency in the form of enrollment into the RTDP.[6] The trial defense counsel was not ineffective.[7]

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[4] The appellant was charged with possession of child pornography from on or about 11 November 2005 until on or 13 December 2007.

[5] The retirement charts were not included in this information.

[6] In his clemency submissions the second time, there is no mention of the Return to Duty Program. The appellant requests no reduction in rank and that the dishonorable discharge not be approved so that he may be allowed to seek retirement.

[7] The cases cited by the appellate defense counsel reference cases where the military judge, in trials with members, did not permit evidence of the effect of a sentence on the appellant's potential retirement. This is a judge alone case.

Even assuming trial defense counsel's 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 694. The probability does not exist in this case.

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

STEVEN LUCAS
Clerk of the Court