UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class FABIAN PORTUNATO
United States Air Force

ACM 35245

26 July 2004

Sentence adjudged 17 May 2002 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Thomas W. Pittman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major John D. Douglas, and Major Shannon J. Kennedy.

Before

PRATT, GRANT, and CONNELLY
Appellate Military Judges

PER CURIAM:

On 17 May 2002, a general court-martial, consisting of a military judge alone, tried the appellant at Spangdahlem Air Base, Germany. In accordance with his pleas, the court-martial convicted the appellant of eight specifications alleging wrongful possession, use, distribution, and introduction of marijuana/hashish and psilocyn mushrooms in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 12 months and reduction to E-1. The convening authority approved the adjudged sentence.

The appellant alleges that he was denied effective assistance of counsel in that his counsel: (1) Failed to negotiate a pretrial agreement in a timely manner, resulting in the appellant spending 4 months in pretrial confinement and forcing the appellant to hire civilian defense counsel; and (2) Failed to properly advise the appellant regarding his

pleas in relation to the stipulation of fact.[1] The appellant submitted no affidavits to support these claims. Finding no merit to the appellant's allegations, we affirm the findings and the sentence.

We find that an evidentiary hearing to assess the veracity of the appellant's claims is unwarranted because even if his allegations are adequate to raise an issue of possible error by defense counsel, the record as a whole "compellingly demonstrates" the improbability of those allegations. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). The record contains evidence showing that the trial judge explained, in detail, the nature, import, and consequences of the appellant's guilty pleas; and the appellant answered the military judge's questions without apparent difficulty. Most importantly, the record contains a statement by the appellant that he was satisfied with his defense counsel.

When an appellant's post-trial claim of ineffective representation directly contradicts a statement he made at trial, we have the power to rely on the appellant's statements at trial unless he sets forth facts "that would rationally explain why he would have made such statements at trial but not upon appeal." *Ginn*, 47 M.J. at 248. The appellant has offered no reason why he would testify at trial that he was satisfied with his counsel's performance if this was not so. Therefore, we find that his statement in the record that he was satisfied with defense counsel, along with the rest of the record, compellingly demonstrates that the appellant's post-trial allegations are improbable.

In order for an individual to claim ineffective assistance of counsel he must overcome a strong presumption that defense counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). He must prove that counsel's performance was deficient and this deficiency prejudiced him. *Id.* at 691. The appellant has not offered any evidence that would overcome the presumption that his counsel acted reasonably. Additionally, the appellant has not shown how his counsel's performance prejudiced him.

[1] The issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We have examined the record of trial, the assignment of error, and the government's reply thereto and have concluded the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. 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

ANGELA M. BRICE
Clerk of Court