UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant THOMAS T.J. SCHAFF
United States Air Force

ACM 35385

28 February 2005

Sentence adjudged 31 July 2002 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 8 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

The appellant was tried at Grand Forks Air Force Base (AFB), North Dakota, by a military judge sitting as a general court-martial. Contrary to his pleas, the appellant was convicted of one specification of indecent acts on divers occasions with a child under the age of 16 years, three specifications of indecent liberties on divers occasions with a child under the age of 16 years, three specifications of communicating indecent language on divers occasions to a child under the age of 16 years, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was also convicted of one specification of assault on

divers occasions, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for 8 years, and reduction to E-1.

On appeal, the appellant asserts three errors: (1) The evidence is legally and factually insufficient to sustain the convictions for committing indecent acts, taking indecent liberties, and communicating indecent language to his daughter; (2) The evidence is legally and factually insufficient to sustain the conviction for assault consummated by a battery upon his daughter; and (3) He was denied the effective assistance of counsel in the post-trial phase of his court-martial. We affirm the findings as modified below and reassess the sentence.

Background

The appellant was on a remote tour to Osan Air Base, Republic of Korea, from November 1995 to November 1996, followed by an assignment to Grand Forks AFB. He had three children: a daughter, SS, who was 12 years old when the family moved to Grand Forks; a son, then 10; and another daughter, then 5. While the appellant was in Korea, the children stayed with their mother and her boyfriend in Florida. By all accounts, it was a horrific year of sexual abuse for SS and her brother at the hands of their mother and their mother's boyfriend. For SS, the move to Grand Forks brought additional sexual abuse. Her home life was characterized by regular sexual impropriety created or allowed by her father.

Charge I contained 15 specifications, some alleging the same acts by alternative theories. Charge II and its Specification alleged assault consummated by a battery. Every specification alleged acts that occurred on divers occasions. The military judge did a thorough job of culling through the evidence to arrive at his findings. In short, the appellant was convicted of indecent acts that involved SS touching the appellant with a "masturbator" (a glow-in-the-dark rubber vagina) and by rubbing his back and buttocks. He was convicted of a variety of acts that constituted indecent liberties, to include exposing himself to SS, masturbating in her presence, and instructing SS on how to masturbate herself. The indecent liberties also consisted of ordering vibrators with SS for her to use on herself, allowing her to view pornography on their home computer, allowing her to watch pornographic videos, and allowing her to view pornographic magazines, books, and collections of pictures. The appellant was convicted of communicating indecent language to SS by calling her a "slut" and a "whore," and by telling her how fast to move her hands when she used the "masturbator" on him. The appellant was convicted of assaulting SS by pulling her hair and hitting her with his hands.

The government's case rested on SS's credibility. She was vigorously cross-examined at trial and remains the focal point of the appellant's attack on the factual and

legal sufficiency of the evidence on appeal. During the cross-examination of SS, the trial defense counsel thoroughly explored a number of possible motivations for SS to make false allegations. Additionally, she challenged her ability to recall the timing of specific events at trial by pointing out SS's previous inability to recall the timing of those events in her testimony at the Article 32, UCMJ, 10 U.S.C. § 832, hearing, only three months before trial. The appellant characterizes SS as "fundamentally unreliable," emphasizing her admitted history of manipulative and dishonest behavior.

Legal and Factual Sufficiency

We may affirm only those findings of guilty that we determine are correct in law and fact and, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a rational factfinder could have found the appellant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

We conclude that the military judge's findings are correct in law; that is, we are convinced that a rational factfinder could have found the appellant guilty beyond a reasonable doubt of the elements of Specifications 1, 3, 7, 9, and 11 of Charge I, and the Specification of Charge II, as modified through the exceptions and substitutions by the military judge.

We are also convinced the findings are correct in fact, subject to our modification of two of the specifications in Charge I. The finding of guilty to Specification 1 of Charge I is affirmed, excepting the word "forcing" and substituting the word "allowing." This modification conforms to the evidence and is consistent with the military judge's findings otherwise with respect to the alleged use of force. Specification 1 of Charge I will now read:

> Specification 1: In that MASTER SERGEANT THOMAS T.J. SCHAFF, United States Air Force, 319th Aircraft Generation Squadron, did, at or near Grand Forks Air Force Base, North Dakota, on divers occasions, between on or about 1 December 1998 and on or about 18 May 2000, commit indecent acts with the body of SS, a female under 16 years of age, not the wife of the said MASTER SERGEANT THOMAS T.J. SCHAFF, by allowing her to touch his penis with a masturbator and to rub his back

and buttocks with her hands, with the intent to gratify the sexual desires of the said MASTER SERGEANT THOMAS T.J. SCHAFF.

The finding of guilty to Specification 3 of Charge I is affirmed, excepting the words "and to wash out his masturbator after he ejaculated in it." There was evidence that SS cleaned the "masturbator" at the appellant's request, but we are not convinced the appellant acted with the requisite intent. Specification 3 of Charge I will now read:

> Specification 3: In that MASTER SERGEANT THOMAS T.J. SCHAFF, United States Air Force, 319th Aircraft Generation Squadron, did, at or near Grand Forks Air Force Base, North Dakota, on divers occasions, between on or about 1 December 1998 and on or about 18 May 2000, take indecent liberties with SS, a female under 16 years of age, not the wife of said MASTER SERGEANT THOMAS T.J. SCHAFF, by exposing to her his nude body and penis, masturbating himself in her presence, and having her undress herself and expose her genital area to him while he masturbated, with the intent to gratify the sexual desires of the said MASTER SERGEANT THOMAS T.J. SCHAFF.

The finding of guilty to Specification 9 of Charge I is affirmed, although the words "by purchasing for her use upon herself in his presence" are ambiguous with regard to the vibrator purchases. The evidence clearly established that the orders were placed jointly by the appellant and SS. Accordingly, we construe the specification to allege that the purchases were done in his presence and affirm the specification on that basis, particularly since the potential method of SS's use is of no legal significance to the offense charged.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense counsel failed to sufficiently communicate with him and zealously defend him during the post-trial clemency process. In particular, the appellant objects to the clemency letter submitted by his trial defense counsel, a letter the appellant says he did not see before it was submitted to the convening authority.

The post-trial submission consisted of two letters, one from the appellant and the contested letter from his trial defense counsel. The appellant contends he would have submitted other matters if his counsel had explained the process to him. He specifically states that he would have included "at least two positive character letters," "the many positive sentencing exhibits that were submitted at trial, [and] the portions of the record that showed [his] daughter's lack of credibility and inconsistent statements," in his clemency submission to the convening authority.

The crux of the appellant's complaint is that he did not see the letter his trial defense counsel wrote before it was submitted and, had he seen it, he would not have agreed to its use. Most objectionable to the appellant were three portions of his counsel's letter, which stated: (1) "Specifically, AB Schaff respectfully petitions you to remit his [sic] a portion of his confinement, reduction and Bad Conduct Discharge, R.C.M. [Rule for Courts-Martial] 1108"; (2) "[the appellant's] acts were albeit reprehensible, but they occurred within the confines of this [very dysfunctional] family dynamic"; and, (3) "With the treatment that AB Schaff is receiving he should be able to rejoin society." The appellant characterizes the first statement as a concession that a bad-conduct discharge was appropriate. Next, he objects to the characterization of his "alleged behavior" because it concedes his guilt and labels it "reprehensible." Finally, he suggests the statement that he "should be able to rejoin society" was not effective advocacy.

The test for ineffective assistance of counsel is whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Quick*, 59 M.J. 383 (C.A.A.F. 2004). Counsel are presumed to be competent and professional. *Quick*, 59 M.J. at 386; *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). "The right to effective representation extends to post-trial proceedings." *Lee*, 52 M.J. at 52 (citing *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997)). Defense counsel are responsible for post-trial tactical decisions, but counsel should act "after consultation with the client where feasible and appropriate." *Id.* (quoting *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994)). We conclude that we can resolve the assigned error without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) or *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

We find the record does not support the appellant's general claim that his trial defense counsel failed to explain the post-trial process. The appellant acknowledged, in writing, the receipt of a four-page Post-Trial Rights Advisement memorandum from his trial defense counsel, dated 25 July 2002. Referring to that advisement at trial, the appellant told the military judge that his trial defense counsel had explained his post-trial and appellate rights, and the appellant said that he did not have any questions about those rights. Apart from the advisement from counsel, on 31 July 2002, the appellant also acknowledged receipt of a two-page memorandum from the trial counsel that explained his right to submit matters to the convening authority. On 4 September 2002, the appellant acknowledged receipt of the staff judge advocate's recommendation to the convening authority, which included a cover memorandum to the appellant summarizing his right to submit matters for the convening authority's consideration.

We turn next to the appellant's contention that his trial defense counsel failed to sufficiently communicate with him, primarily by not allowing the appellant a chance to review his counsel's letter to the convening authority. There is nothing in the record to contradict the appellant's assertion that he did not see the letter before it was submitted.

To the extent trial defense counsel can show the client what he or she intends to submit to the convening authority, this particular post-trial issue can be avoided. However, we recognize that may be difficult as a practical matter, given time constraints and the relative locations of counsel and the accused. In any event, there is no general requirement for trial defense counsel to show intended submissions to his or her client. *United States v. Hicks*, 47 M.J. 90, 93 (C.A.A.F. 1997). The appellant's counsel communicated with him and submitted the letter the appellant prepared. In this case, the appellant's trial defense counsel was not deficient in his performance by not showing his own letter to his client before submitting it to the convening authority. *See Strickland*, 466 U.S. at 687.

Lastly, we have considered the challenged portions of appellant's counsel's letter and find they were reasonable tactical representations to the convening authority. We do not read the letter as conceding the appropriateness of a punitive discharge, but rather, as simply a summary of what the appellant asked for in his own letter ("alleviate my sentence to a lesser degree, rewarding me part if not all of my pay and rank and minimizing my time in prison").[1] The characterization of the appellant's conduct as "reprehensible" was strong, but it was consistent with trial defense counsel's pre-sentencing argument and the appellant's unsworn statement ("I do now realize that my behavior at that time was wrong."). In short, we do not find that trial defense counsel's level of advocacy fell "measurably below the performance . . . [ordinarily expected] of fallible lawyers." *United States v. Grigoruk*, 56 M.J. 304, 307 (C.A.A.F. 2002) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Applying the *Strickland* test to the facts of this case, we do not find counsel's performance deficient. Even if we were to assume deficiency of counsel, the appellant has not made a "colorable showing of possible prejudice." *Lee*, 52 M.J. at 53 (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). *See also Ginn*, 47 M.J. at 248 (first principle). He does not identify the character references he would have submitted, and his pre-sentencing exhibits do not illuminate what he might have done, since he submitted no character statements at trial. *See United States v. Hood*, 47 M.J. 95, 98 (C.A.A.F. 1997); *Ginn*, 47 M.J. at 248 (second principle). The appellant contends that he would have challenged SS's credibility, but he does not explain why he failed to raise the issue in his own clemency letter. In any event, concerns with SS's credibility would not have come as a surprise to the convening authority; he was informed of the circumstances of the case even before he decided to refer the charges to trial. R.C.M. 601(d).

Reassessment

[1] It does appear that the appellant's trial defense counsel did not carefully proofread the sentence that referred to a bad-conduct discharge. We believe counsel meant to say "dishonorable discharge," not bad-conduct discharge.

Having modified the findings, we next consider whether we can reassess the sentence. 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 are confident that we can reassess the sentence in accordance with the established criteria. The modifications we have made are minor, although our findings as to Specification 3 of Charge I lessen the appellant's guilt. Given the extent and seriousness of the appellant's conduct otherwise (the maximum period of confinement was 32 years), the deletion of the one allegation from Specification 3 has a negligible effect. We are certain that, absent the error, the sentence would not have been less than a dishonorable discharge, confinement for 8 years, and reduction to E-1. We also conclude the sentence, as reassessed, is appropriate. Article 66(c), UCMJ.

Conclusion

The approved findings, as modified, and 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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court