UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JAKE L. SCHWEIKERT
United States Air Force

ACM 37553

07 February 2011

Sentence adjudged 30 September 2009 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Frank R. Levi, Major Shannon A. Bennett, and Major Marla J. Gillman.

Appellate Counsel for the United States: Colonel Don M. Christensen, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Pursuant to his pleas, a general court-martial composed of a military judge alone convicted the appellant of one specification of willfully disobeying a superior commissioned officer on divers occasions, one specification of wrongful distribution of a controlled substance (psilocybin), one specification of wrongful distribution of a controlled substance (Hydrocodone) on divers occasions, and one specification of wrongful distribution of prescription medication on divers occasions, in violation of Articles 90, 112a, and 134, UCMJ, 10 U.S.C. §§ 890, 912a, 934. The adjudged sentence consists of a bad-conduct discharge, 9 months of confinement, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. On

appeal, the appellant raises three issues for our consideration: 1) his trial defense counsel was ineffective; 2) the military judge erred in permitting a witness to testify about the impact appellant's missed deployment had on another Airman, and 3) his sentence was inappropriately severe.[1] We find no error that materially prejudices a substantial right of the appellant and affirm.

Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Servicemembers 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 by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Davis*, 60 M.J. at 473 (analyzing (1) whether the trial defense counsel's conduct was deficient and, if so, (2) whether the counsel's deficient conduct prejudiced the appellant). Our superior court has applied the *Strickland* test by answering three basic questions:

> (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 the allegations are true, "did the level of advocacy 'fall[ ] measurably below the performance ... [ordinarily expected] of fallible lawyers?'"; and (3) "If ineffective assistance of counsel is found to exist, 'is ... there ... a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?'"

United States v. Miller, 63 M.J. 452, 456 (C.A.A.F. 2006) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)) (citations omitted) (interpolations in original).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *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). The law presumes counsel to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). To prevail on a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (internal citation omitted).

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

To support his claim, the appellant provided an affidavit asserting a litany of alleged errors made by his defense counsel, Captain (Capt) L. In particular, appellant claims Capt L submitted erroneous documentation and failed to properly review or adequately represent his position to the separation authority to support an administrative discharge in lieu of courts-martial; failed to maintain adequate contact with him after his Article 32, UCMJ, 10 U.S.C. § 832, hearing; failed to properly introduce his mental health records into evidence; failed to obtain a mental health evaluation on his behalf prior to trial; failed to review phone records essential to his defense; and failed to properly prepare for his trial.

The appellate filings and record as a whole "compellingly demonstrate" the improbability of the appellant's claim. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). It is evident to this court that Capt L was well prepared for trial and her decision not to seek a mental health examination for the appellant or introduce the appellant's mental health records was made for sound tactical and strategic reasons. Furthermore, we are convinced Capt L maintained sufficient contact with the appellant following the Article 32, UCMJ, investigation to adequately apprise him of what was taking place, as evidenced by the pretrial agreement and a provision which required the government to dismiss an Article 112a, UCMJ, specification for wrongful use of a controlled substance. We find no basis whatsoever to conclude that Capt L's actions fell outside the prevailing norms expected of competent counsel, and we conclude the appellant has not been denied effective assistance of counsel.[2]

Admission of Master Sergeant (MSgt) L's Testimony

Under Article 59(a), UCMJ, 10 U.S.C. § 859(a), an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *See also United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). Rule for Courts-Martial 1001(b)(4) provides that "trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

During sentencing, over defense counsel objection, trial counsel elicited the testimony of MSgt L, appellant's first sergeant, who testified that Airman (Amn) M was required to deploy in place of the appellant because the appellant was facing disciplinary problems and unable to leave. MSgt L further opined that Amn M suffered marital problems as a result of the deployment.

[2] We note Captain L did make an error in her memorandum to the separation authority concerning appellant's request for an administrative discharge in lieu of courts-martial. She inaccurately stated the appellant had been charged with a single use of cocaine rather than the actual charges referred to trial. Notwithstanding this mistake, it is clear the remainder of her submission was tailored to appellant's situation and she made a commendable argument designed to assist her client.

Assuming, without deciding, that MSgt L's testimony was not directly related to the offenses for which the appellant was convicted, specifically the portion discussing Amn M's possible marital problems, we find the appellant suffered no prejudice as a result of possible error. MSgt L's testimony concerning Amn M was brief and innocuous and endangered no reasonable probability of unduly influencing the military judge's sentencing decision. As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F.1997)). We see no reason to deviate from this presumption under the facts of appellant's case.

Sentence Severity

Appellant contends that his sentence is inappropriately severe when compared to other unnamed individuals who, in his view, committed more serious crimes but received the same or less punishment. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. The appellant bears the burden of making this showing. *Id.* Having reviewed the appellant's submissions, we find he has not met his burden of showing highly disparate sentences in any closely related cases.

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. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is 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 appellate occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court