

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Staff Sergeant FRANK R. TAWNEY JR.
United States Air Force**

ACM 35676

13 January 2005

Sentence adjudged 9 June 2003 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: James L. Flanary.

Approved sentence: Dishonorable discharge, confinement for 9 years, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea, Major Antony B. Kolenc, and Captain Jennifer K. Martwick.

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

Before

ORR, MOODY, and CONNELLY
Appellate Military Judges

This opinion is subject to editorial correction before final revision.

CONNELLY, Judge:

In accordance with his pleas, the appellant was convicted of carnal knowledge on divers occasions, sodomy on divers occasions with a child under 16, and indecent acts upon a female under 16, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. A general court-martial composed of officer members sentenced the appellant to a dishonorable discharge, confinement for 9 years, and reduction to E-1. The convening authority approved the sentence, although mandatory forfeitures were waived for the benefit of the appellant's wife and three dependent children. The appellant alleges he received ineffective assistance of counsel.¹ We find no error and affirm.

¹ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). The appellant has the burden of overcoming the presumption that his counsel was competent. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). The Court of Appeals for the Armed Forces has adopted a three-pronged test for evaluating claims of ineffective assistance of counsel:

1. Are the allegations made by [the] 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 factfinder would have had a reasonable doubt respecting guilt?"

Sales, 56 M.J. at 258 (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (internal citations omitted)).

The appellant alleges that he was tricked into giving a confession to the Air Force Office of Special Investigations (AFOSI). He argues his counsel were ineffective because they advised him not to raise this issue. The appellant waived his right to move to suppress this evidence, however, as a part of his pretrial agreement with the convening authority. The evidence as to guilt was very strong and the probability of suppressing the appellant's statement was very low. The appellant signed both an acknowledgement and waiver of his rights before drafting a very detailed, highly incriminating four-page statement in his own handwriting. His allegation that he was tricked into giving a confession boiled down to his word against the AFOSI agents' word. Given these facts, the defense counsel acted in a reasonable manner by negotiating with the convening authority a 180-month cap on confinement in exchange for, inter alia, the waiver of the motion to suppress.

The appellant also alleges ineffective assistance of counsel because he was not informed that, by pleading guilty to committing an offense after 15 August 2001, he could be subject to Mandatory Supervised Release (MSR). This contention is speculative as placement on MSR would occur only if the appellant is not paroled. Additionally, even if not paroled, there is no guarantee the appellant will be placed on Mandatory Supervised Release. The Department of Defense Instruction (DODI) "[r]equires supervised release for prisoners not granted parole prior to their minimum release date *except when supervision is deemed inappropriate* by a Service Clemency and Parole Board." DODI 1325.7, *Administration of Military Correctional Facilities and Clemency*

and Parole Authority, ¶ 1.4 (17 Jul 2001)² (emphasis added). The conditions of supervision imposed on parole and MSR are similar, if not identical. The appellant has failed to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” *Strickland*, 466 U.S. at 687.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

² Incorporating Change 1, dated 10 June 2003.