UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman BRIAN A. WALL
United States Air Force

ACM 37705

11 December 2012

Sentence adjudged 4 May 2010 by GCM convened at Hill Air Force Base, Utah. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Erik N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Michael S. Kerr; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant pled guilty before a general court-martial composed of officer members to one specification of dereliction of duty by drinking underage, four specifications of larceny, three specifications of burglary, and one specification of housebreaking, in violation of Articles 92, 121, 129, and 130, UCMJ, 10 U.S.C. §§ 892, 921, 929, 930. The military judge convicted him in accordance with his pleas, and the court sentenced him to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence adjudged. Appellate defense counsel assert that the appellant was

denied effective assistance of counsel at trial based on his counsel's agreement to modify the underage drinking specification to include more than one occasion and his counsel's failure to raise a speedy trial motion.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011), reaffirmed that the de novo standard of review for ineffective assistance of counsel claims is "most deferential." *See also Strickland v. Washington*, 466 U.S. 668, 689 (1984) (citation omitted) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"), *quoted in United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). To determine if the presumption of competence of counsel has been overcome, our superior court applies a three-prong test:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?"; (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted)).

In an affidavit submitted in response to the ineffective assistance claim, trial defense counsel explained why he considered a speedy trial motion would have little chance of success or benefit to the appellant and why he chose to agree to the modification of the underage drinking specification. Based on the record and in consideration of counsel's thorough explanation, we find not only a reasonable explanation for counsel's performance but a highly effective trial strategy that greatly limited the appellant's punitive exposure for multiple dormitory thefts while presenting mitigating evidence of the appellant's alcohol abuse that resulted in a sentence to confinement of only 12 months when facing a maximum of 42 years. Having reviewed the issue de novo in accordance with the applicable standards, we find no merit whatsoever in the ineffective assistance claim.[1]

[1] The record of trial and appellate filings are sufficient to resolve the issue without an evidentiary hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] 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

LAQUITTA J. SMITH
Paralegal Specialist

[2] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.