

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DANIEL J. WING
United States Air Force

ACM 36756

25 September 2007

Sentence adjudged 06 April 2006 by GCM convened at Ramstein Air Base, Germany. Military Judge: Gordon R. Hammock and Jack L. Anderson.

Approved sentence: Dishonorable discharge, confinement for 8 years, total forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Steven R. Kaufman, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his pleas, the appellant was convicted of one specification of rape and one specification of assault with a dangerous weapon, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928.¹ His approved sentence consists of a dishonorable discharge, confinement for 8 years, total forfeiture of all pay and allowances, and reduction to E-1.

¹ Consistent with his plea, the appellant was found not guilty of communicating a threat in violation of Article 134, UCMJ, 10 U.S.C. § 934.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts two issues on appeal.

Issues

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A MOTION TO SUPPRESS STATEMENTS THE APPELLANT MADE TO A1C [K], A PERSON WHO WAS QUESTIONING THE APPELLANT AS PART OF AN OFFICIAL LAW ENFORCEMENT INVESTIGATION.

II. WHETHER THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL: (1) FAILED TO INTERVIEW AND REQUEST, FOR TRIAL, POTENTIALLY EXCULPATORY WITNESSES TO THE ALLEGED ASSAULT (CHARGE II); (2) FAILED TO IMPEACH KEY WITNESSES FOR THE PROSECUTION; (3) ADVISED THE APPELLANT TO TESTIFY AT TRIAL DESPITE APPELLANT'S DESIRE NOT TO, RESULTING IN DAMAGING REBUTTAL BY A PROSECUTION WITNESS WHO [SIC] COUNSEL DID NOT THOROUGHLY INTERVIEW PRIOR TO TRIAL; (4) REQUESTED THE PRESENCE OF THE APPELLANT'S MOTHER AT TRIAL DESPITE THE APPELLANT'S DESIRE NOT TO HAVE HER PRESENT; (5) CALLED NO EXPERT WITNESSES IN THE APPELLANT'S DEFENSE; AND (6) KEPT THE APPELLANT GROSSLY UNINFORMED AS TO THE DEFENSE'S OVERALL TRIAL STRATEGY.

Abuse of Discretion

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). In determining whether rights warnings must be given, there is a two part test: (1) Is the questioner subject to the code and acting in an official capacity; and (2) Did the person being questioned perceive the inquiry as more than casual conversation? See *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981). In the case sub judice, the military trial judge made extensive findings and conclusions of law which were supported by the record of trial. He did not abuse his discretion in admitting the evidence in dispute.

Ineffective Assistance of Counsel

As to the second assignment of error, ineffective assistance of counsel, we have reviewed the record of trial, the assignment of error, the government's answer thereto, and the affidavits submitted by both parties. Service members 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)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. It is well established that the appellate courts will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C. M. A. 1993). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687.

There are three questions to be answered when analyzing a claim of ineffective assistance of counsel. They are: (1) If the appellant's assertions are true, is there a reasonable explanation; (2) Did the performance of the trial defense counsel fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers;" and (3) If counsel was ineffective, is there a reasonable probability that absent the errors there would have a different result? *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the 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, 481-82 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C. A. A. F. 1997). The appellant has failed to carry his burden on this issue, and we find the claim to be without merit. Further, assuming arguendo, there was ineffective assistance of counsel, there is not a reasonable probability the result would have been different.

Conclusion

The approved 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



STEVEN LUCAS, GS-11, DAF
Clerk of Court