UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DANIEL M. BLAIR
United States Air Force

ACM S32028

13 August 2013

Sentence adjudged 16 February 2012 by SPCM convened at Hurlburt Field, Florida. Military Judge: Joshua E. Kastenberg (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of $500 pay per month for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn and Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HARNEY, SOYBEL, and MITCHELL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The military judge sentenced the appellant to a bad-conduct discharge, confinement for 9 months, forfeiture of $500.00 pay per month

[1] In early November 2011, the appellant bought some cocaine from a civilian named "G." He used the cocaine to help calm his anger over his wife drinking alcohol. About eight hours after using the cocaine, the appellant's squadron had a unit-wide urinalysis. The appellant tested positive for cocaine.

for 9 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

This was appellant's second court-martial. On 27 October 2011, a panel of officer members sitting as a special court-martial convicted the appellant of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, and sentenced him to hard labor without confinement for 3 months, restriction to the limits of Hurlburt Field for 2 months, forfeiture of $822.00 pay per month for 6 months, reduction to E-2, and a reprimand.

On appeal, the appellant argues ineffective assistance of counsel and sentence severity.[2] We affirm.

Ineffective Assistance of Counsel

The appellant argues that his trial defense counsel was ineffective when he failed to advise him about his options for waiver and deferment of forfeitures. We disagree and find that trial defense counsel was not ineffective during his post-trial representation of the appellant. An additional fact-finding hearing is not necessary for us to resolve this issue. *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997).

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The right to effective representation extends to post-trial proceedings. *United States v. Cornett*, 47 M.J. 128, 133 (C. A.A.F. 1997). Defense counsel is responsible for post-trial tactical decisions but should act "after consultation with the client where feasible." *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994). Defense counsel may not submit matters over the client's objection. *United States v. Hood*, 47 M.J. 95, 97 (C.A.A.F. 1997).

We need not decide if defense counsel was deficient during post-trial representation if the second prong of *Strickland* regarding prejudice is not met. *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005). Our superior court has held that errors in

[2] Both issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

post-trial representation can be tested for prejudice. The appellant need only make a "colorable showing of possible prejudice." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999).

The appellant has not made a colorable showing of possible prejudice. Instead, we find that the appellant's trial defense counsel properly advised the appellant about his options for deferment or waiver of forfeitures. The record shows that on 15 February 2012, the appellant signed a form entitled "Post-Trial and Appellate Rights Advisement." Paragraph four of that document outlines the appellant's rights for deferment or waiver of forfeiture of pay. On page five, the appellant's defense counsel signed the document attesting that he fully counseled the appellant, both orally and in writing, about his post-trial and appellate rights. The appellant also signed the form attesting that he read and understood those rights. The record also shows that the appellant answered in the affirmative when asked by the military judge if his counsel had explained those rights to him.

Moreover, trial defense counsel confirms in his affidavit that he reviewed the post-trial rights with the appellant. He states that he explained to the appellant the possibility of deferment or waiver of forfeitures for his wife, and encouraged the appellant to set up a bank account for this purpose. The appellant did not follow his advice, and indicated to his counsel that he did not wish to request deferment or waiver of forfeitures. The same defense counsel also represented the appellant in his first court-martial in October 2011, and states that he advised the appellant about deferment or waiver of forfeitures as part of that proceeding. The appellant opted not to seek any deferments or waivers. Based on advising the appellant twice about these rights, trial defense counsel avers that the appellant's decision to forego his rights was voluntary and fully informed. We agree.

Sentence Severity

The appellant next argues that his sentence consisting of a bad-conduct discharge is inappropriately severe. To support his claim, the appellant cites his lengthy service, multiple deployments, and ongoing medical treatment for injuries sustained on active duty. We find the sentence appropriate.

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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). 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, 287-88 (C.A.A.F. 1999).

We next consider whether the appellant's sentence was appropriate "judged by 'individualized consideration' of the [appellant] 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). 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. This was the appellant's second court-martial for wrongful use of cocaine. His first court-marital ended four months earlier and resulted in a sentence without a punitive discharge. About two weeks after his first court-martial adjourned, the appellant knowingly and voluntarily used cocaine again. Under these circumstances, we find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was 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 appellant occurred. Article 66(c), UCMJ. Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court