UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRENDEN W. VER MILYEA
United States Air Force

ACM 37766

18 April 2012

Sentence adjudged 20 August 2010 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Scott E. Harding (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Thomas A. Monheim; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, a general court-martial composed of a military judge convicted the appellant of one specification of attempted wrongful disposition (sale) of military property, one specification of wrongful disposition (sale) of military property in excess of $500.00, two specifications of larceny of military property in excess of $500.00, and one specification of larceny from an insurance company in excess of $500.00, in violation of Articles 80, 108, and 121, UCMJ, 10 U.S.C. §§ 880, 908, 921. The adjudged sentence consisted of a bad-conduct discharge, confinement for 19 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority reduced the appellant's confinement

period to 18 months. He disapproved the forfeitures and approved the remaining sentence as adjudged.

On appeal, the appellant raises one issue for our consideration: whether his trial defense counsel was ineffective when he failed to object to trial counsel's comments during sentencing regarding the potential operability of one of the stolen items, a Berretta 9mm service pistol.[1] In a post-trial affidavit, the appellant argues that the trial counsel misled the military judge by implying that the service weapon was fully operational even though it had been "red-tagged."[2] The appellant claims that he raised this issue with his counsel and asked him to object to the mischaracterization or address it during argument, but his counsel neglected to do so. The appellant requests that the findings and sentence be set aside.

Ineffective Assistance of Counsel

We review de novo claims of ineffective assistance of counsel. *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)). 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)). Claims of ineffective assistance of counsel are reviewed by applying the two-pronged test the Supreme Court set forth 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 (2) if so, whether the counsel's deficient conduct prejudiced the appellant). Our superior court applies *Strickland* by analyzing 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) (citations omitted).

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*

[1] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] According to the appellant, a "red-tagged" weapon is one that has been rendered inoperable.

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, 409–10 (C.M.A. 1993) (citing *Strickland*, 466 U.S. at 689; *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).

We have examined the record of trial, the assignment of error, and the Government's reply thereto. We are convinced that the appellant's trial defense counsel acted completely within the prevailing norms expected of competent counsel and conclude that the appellant's assertion of error is without merit.

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
Clerk of the Court