UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DEVIN R. GERDES
United States Air Force

ACM S32091

14 November 2013

Sentence adjudged 3 August 2012 by SPCM convened at McConnell Air Force Base, Kansas. Military Judge: Natalie D. Richardson.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of $994.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Jane E. Boomer; Major Ja Rai A. Williams; and Captain Travis K. Ausland.

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

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

MITCHELL, Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The court-martial sentenced him to a bad-conduct discharge, confinement for 60 days, forfeiture of $994.00 pay per month for 2 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant avers two issues: (1) He was denied effective assistance of counsel when his civilian counsel slept during substantial portions of his court-martial;

and (2) He was denied effective assistance of counsel when his counsel (a) failed to conduct adequate research on factual matters regarding photographs and Facebook messages admitted into evidence and failed to call certain witnesses, (b) did not request a mental capacity or mental responsibility inquiry pursuant to Rule for Courts-Martial (R.C.M.) 706, (c) did not challenge a member who slept during the trial, and (d) advised the appellant not to testify.[1] We disagree on both issues and affirm the findings and sentence.

Background

On 3 November 2011, the appellant and his girlfriend, Senior Airman (SrA) SR, went to her parent's home for dinner and then travelled to a casino hotel about 30 minutes away, in Catoosa, Oklahoma. The appellant had previously reserved a room there as part of a surprise birthday getaway for SrA SR. At the casino they met with SrA SR's best friend, Ms. AE, and her boyfriend. After the two couples had drinks and dinner, the other couple departed. At that time, SrA SR did not have any injuries.

In the hotel room, SrA SR and the appellant consumed a bottle of wine together, took a shower, and engaged in sexual activity. SrA SR lay down in the bed to go to sleep. She told the appellant he had had too much to drink and needed to go to sleep as well, but he insisted on staying up and consumed a second bottle of wine. He then took the blanket off of SrA SR and put his hands on her arm and throat. She tried to move away and fought him until she got off the bed. At that point, he grabbed her head and slammed it into the night stand. When she tried to move towards the bathroom, he hit her repeatedly with a closed fist, head-butted her, and bit her chin.

SrA SR retreated to the bathroom and locked herself in. She called her parents and asked them to come pick her up. The appellant had also called SrA SR's parents and told them SrA SR had locked herself in the bathroom and he didn't know why. To refute the appellant's implicit assertion that he had not hit her, SrA SR sent a photo of her injuries to her parents. While her parents were en route, SrA SR also had electronic communications with two friends and sent them the same photo of her injuries.

SrA SR's parents arrived and noticed the hotel room was in disarray and that their daughter was injured. SrA SR drove home with her parents. Despite her father's suggestion that she notify law enforcement, SrA SR did not report the assault and battery. She and her mother took additional pictures of her injuries the next day.

The appellant later apologized to SrA SR's parents for hitting and hurting her. He blamed his actions on the alcohol he had consumed and stated he would never drink again. The appellant also sent apologies by Facebook to SrA SR's friends.

[1] While both issues allege ineffective assistance of counsel, the second issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Ineffective Assistance of Counsel

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 deficiency prong requires the appellant to show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id.* at 688. The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In doing so, the appellant "must surmount a very high hurdle." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (quoting *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)); *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998). This is because counsel are presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *Alves*, 53 M.J. at 289 (citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). Giving due deference to trial defense counsel's judgments, 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).

To determine whether the presumption of competence has been overcome, our superior court has set forth a three-part test:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions . . . ?
>
> 2. If [the allegations] 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?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (citations, internal quotation marks, and alterations omitted). "[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *Polk*, 32 M.J. at 153). When there is a factual dispute, appellate courts determine whether further fact-finding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If, however, the facts alleged by the defense would not result in relief under *Strickland*, the Court may address the claim without the necessity of resolving the factual dispute. *See Ginn*, 47 M.J. at 248.

I. Sleeping Civilian Defense Counsel

At trial the appellant was represented by civilian counsel, Mr. JS, and detailed military defense counsel, Captain (Capt) EH. The trial counsel filed a motion in limine to exclude evidence of text messages between SrA SR and the appellant. Mr. JS argued against the motion. Trial counsel also filed a motion seeking to pre-admit the Facebook messages containing the appellant's apologies. Mr. JS cross-examined A1C SB and argued in opposition to the admissibility of the messages. Mr. JS conducted the voir dire of the members and made the opening statement. Mr. JS cross-examined SrA SR, Mr. TR, A1C SB, and Ms. AE. Mr. JS objected during the trial counsel's examination of witnesses. For the defense case-in-chief, Mr. JS called SrA SR as a witness and conducted her direct. Mr. JS and Capt EH were both active in addressing instructions with the military judge. Mr. JS gave the closing argument. After findings were announced, Capt EH conducted most of the sentencing case. He cross-examined the government's witnesses, conducted a question-and-answer format unsworn with the appellant, and delivered the defense sentencing argument.

The appellant now alleges that his civilian defense counsel was ineffective as he was asleep during portions of his court-martial. On appeal, the appellant declares in his affidavit: "I noticed Mr. [JS] sleeping repeatedly during my court-martial. Specifically, Mr. [JS] was sleeping on 3 August 2012 while Captain [EH] was cross-examining individuals. I had to wake him up at least three times on this day by asking him questions to keep him awake." The bailiff provided an affidavit stating he "witnessed [Mr. JS] with his head tilted back and hanging as to the appearance of sleeping while the judge was speaking to the defense during a portion of the hearing." SSgt DS, a coworker of the appellant, attended the trial and reports: "I was sitting behind [Mr. JS] who also appeared to be sleeping and uninterested with the trial." The appellant's girlfriend, SSgt AD, writes: "[Mr. JS] was extremely uninterested and sleeping on and off both days of the trial. SrA Gerdes asked him repeatedly to wake up." Ms. TC, the appellant's mother, attended the court-martial and states, "I also observed [Mr. JS] sleeping as well during the trial and sentencing phase of the trial."

Upon the government's motion, this Court ordered affidavits from both Mr. JS and Capt EH. Mr. JS provided an affidavit in which he declared that he did not agree with the assertion that he was asleep during the trial. He explained, "I did, and do, frequently shut my eyes when I was deep in thought. It may be a bad habit, but for me, it drowns out all other distractions and allows me to process whatever issue, or issues, that needs to be addressed." Capt EH wrote, in his affidavit, "I never witnessed Mr. [JS] sleeping in court. . . . I would not have permitted trial to continue with a sleeping co-counsel nor do I think it possible that Judge Richardson would have allowed him to sleep during the trial." Capt EH also wrote that the courtroom at McConnell Air Force Base, where the court-martial occurred, has the military judge seated on a raised platform with a direct view of defense counsel and a good view of the court members who are seated to the front and left of the military judge.

This Court may discount factual assertions in post-trial affidavits when "the appellate findings and the record as a whole compellingly demonstrate the improbability of those facts." *Ginn*, 47 M.J. at 248 (internal quotations marks omitted). The allegation that Mr. JS was sleeping during findings is improbable. The record as a whole compellingly demonstrates that Mr. JS was active throughout the entire findings portion of the court-martial. It is improbable that he was asleep while he was objecting, cross-examining witnesses, addressing the members in voir dire, and making opening statement and closing argument. We conclude that Mr. JS was not asleep during findings, the appellant's allegations are untrue, and he has failed to meet his burden.

Mr. JS was less active during the sentencing portion of the trial. The record demonstrates that Capt EH was the lead for the defense during this portion of the court-martial. In our experience, it is not unusual to have co-counsel divide responsibility of the court-martial in this fashion. We are confident that the record compelling demonstrates the improbability that Mr. JS was asleep while the military judge was addressing the defense counsel, even if Capt EH was the lead during the sentencing portion of the trial. The military judge's view of the defense counsel was not obstructed and we do not believe that the military judge would have allowed a defense counsel to be asleep when she was addressing either him, his co-counsel, or both counsel.

The affidavits create a factual dispute regarding whether Mr. JS was asleep during other portions of the sentencing proceedings. "If the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis." *Ginn*, 47 M.J. at 248. There is no factual dispute that Capt EH was awake, alert, and actively representing the appellant during the sentencing proceedings. Capt EH capably and competently defended his client during the sentencing proceedings. Given Capt EH's competent representation of his client during this portion, even if Mr. JS fell asleep during portions of the sentencing proceedings, the appellant has not shown that there is a reasonable probability that there

would have been a different result. Therefore, the appellant's claim fails on the third prong of *Polk*.

II. Failure to Call Witnesses and Challenge Evidence

Appellant alleges his counsel failed to conduct adequate research on factual matters regarding photographs and Facebook messages admitted into evidence. The record of trial indicates that his counsel objected to the admission of these exhibits and challenged their authenticity. Even after their objections were overruled, the trial defense counsel cross-examined the witnesses, calling into question the weight to be given the evidence. He developed on direct examination that the photographs were only recently produced and had been saved to different electronic formats which change some of the dates associated with the photographs. These questions raised the possibility that it was SrA SR and not the appellant who sent the Facebook messages from his account. In regards to the photographs, the trial defense counsel faced five witnesses who saw either the photograph or the victim shortly after the incident. All of the witnesses who saw the photographs of the injuries that night testified that the photo admitted was the same that they saw that night. We do not find the counsel's performance on this issue to be deficient and conclude that appellant has failed to meet his heavy burden of showing that his trial defense counsel were not effective.

Appellant alleges his trial defense counsel were not effective because they failed to interview and call certain witnesses. He alleges these witnesses would have been able to testify that he was living in SrA SR's apartment after the assault and while she was deployed. He claims that this would have refuted her claim that he did not live with her after the assault on 3 November 2011. However, SrA SR admitted she and the appellant continued to be involved after the assault, that she believed she was in love with him, and that he had suggested they get married before she deployed. She also stated the appellant had possession of her truck keys, house keys, and everything she owned while she was deployed. The defense counsel's alleged failure to call witnesses to "rebut" this minor collateral issue was a reasonable determination. Because there is no reasonable probability that the result of the trial would have been different if these witnesses were called,[2] the appellant has failed to establish prejudice under *Strickland*. *See United States v. Green*, 68 M.J. 360 (C.A.A.F. 2010).

III. Failure to Request R.C.M. 706 Inquiry

Appellant alleges that his counsel did not request a mental capacity or mental responsibility inquiry pursuant to R.C.M. 706. However there is no indication in the record that the appellant suffered from a severe mental disease or defect that prevented him from understanding the wrongfulness of his acts or that prevented him from assisting

[2] We are not convinced that the military judge would have allowed this evidence under Mil. R. Evid. 402 and 403.

in his own defense. Capt EH wrote that he "never had any concerns of mental illness affecting [the appellant's] ability to defend the case." Furthermore, appellant's post-trial claims of possible lack of mental responsibility is undermined by the appellant's actions in calling the victim's parents in an effort to forestall them from seeing her injuries on the night of the assault and his later in-person apology to them when he took responsibility for the assault with promises to never drink alcohol again. We also note that the appellant has not requested this court to order a post-trial R.C.M. 706 inquiry. Based on the totality of the evidence in the record, to include the post-trial affidavits, trial defense counsel's determination that there was not good cause to request a hearing pursuant to R.C.M. 706 was reasonable. Appellant has not established the truth of the factual allegation, that is there was or is good cause to request a R.C.M. 706 inquiry, and therefore this claim is without merit. *See Tippit*, 65 M.J. at 76.

IV. Advice to Appellant Not to Testify

The appellant alleges that his counsel were at fault and deficient when they advised him not to testify. Capt EH explains that he advised the appellant not to testify as the version of events he earlier provided to law enforcement was not believable and that there was substantial uncharged misconduct that was likely to be admissible if he testified. There is no factual dispute that trial defense counsel advised the appellant not to testify. Trial defense counsel's advice to an appellant not to testify was based on sound tactical reasons and was not ineffective. *See United States v. Dewrell*, 55 M.J. 131, 135 (C.A.A.F. 2001).

V. Sleeping Court-Member

In his post-trial sworn declaration, the appellant states he saw First Lieutenant (1st Lt) BB, a court member, fall asleep "multiple times" and when he saw 1st Lt BB had his eyes closed for a period of time he told Capt EH who laughed and told him not to worry. SSgt DS wrote that she "observed a Lt in the second row of the jury, who appeared to be in and out of sleep throughout the day the verdict was given." SSgt AD, the appellant's girlfriend, declared she was a spectator at the proceeding and "observed a jury member, Lt [BB], sleeping during the second day of the trial." The appellant's mother, Ms. TC, declared she "observed a Lieutenant, a juror, falling [sic] and was obviously not paying any attention to the testimony." Capt EH declared that he never witnessed a panel member sleeping and would have brought it to the attention of the military judge if he had.

"An appellant or his trial defense counsel may not sew a defect into the proceedings by failure to bring the inattentiveness of a court member to the trial judge's attention." *United States v. Robertson*, 7 M.J. 507, 510 n.3 (A.C.M.R. 1979) (citing *United States v. Groce*, 3 M.J. 369, 371 (C.M.A. 1977)). The lack of evidence on the record of a sleeping or inattentive member and "the failure of the civilian defense

counsel, military defense counsel, or appellant to bring a sleeping or inattentive court member to the attention of the military judge is significant" and is "strong evidence that no member was inattentive or asleep during the trial." *United States v. Norment*, 36 M.J. 1156, 1160 (A.C.M.R. 1993), *aff'd*, 39 M.J. 58 (C.M.A. 1993). When there is evidence on the record that a member is asleep or inattentive, the defense counsel's failure to object does not constitute waiver; however this does not eliminate the requirement for "prudent defense counsel action upon notice of a juror's inattentiveness." *Groce*, 3 M.J. at 371. The transcript of the trial does not include any reference to any court member being inattentive or falling asleep. *Cf. Id.* at 370 (military judge on the record asked a court member to wake up another court member). The military judge in this case was seated on a raised platform with a "good view of the member's panel" seated to the front and left of the military judge.

Further fact-finding is not required when the record as a whole compellingly demonstrates the improbability of facts alleged in an affidavit. *Ginn*, 47 M.J. at 248. We find that the record as a whole compellingly demonstrates that no member of the panel was asleep. We also note that appellant tries to circumvent the issue of the lack of evidence on the record by redirecting the argument as one of ineffective assistance of counsel. We are similarly convinced that the record as a whole compelling demonstrates that counsel were not ineffective as the appellant's allegation that a member was asleep are not true. Therefore his allegation fails the first prong of *Polk*.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court