UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain JAIME MARTINEZ
United States Air Force

ACM 37176

07 April 2009

Sentence adjudged 30 October 2007 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Gordon R. Hammock (sitting alone).

Approved sentence: Dismissal, confinement for 1 year, and a reprimand.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall and Major Shannon A. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, Major Donna S. Rueppell, Captain Ryan N. Hoback, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge sitting as a general court-martial found the appellant guilty of one specification of desertion terminated by apprehension, one specification of failure to obey a lawful order, one specification of assault consummated by a battery, one specification of engaging in conduct unbecoming an officer and a gentleman, and one specification of unlawful entry, in violation of Articles 85, 92, 128,

133, and 134, UCMJ, 10 U.S.C. §§ 885, 892, 928, 933, 934. The adjudged and approved sentence consists of a dismissal, one year confinement, and a reprimand.[1]

On appeal the appellant asks this Court to set aside the findings and the sentence. The basis for his request is that he asserts: (1) his conviction was obtained through vindictive prosecution, and (2) he was denied effective assistance of counsel.[2] Finding error in the Action, we affirm the findings and reassess the sentence.

Background

On 7 April 2006, the appellant was assigned to the Multi-National Security Transition Command Iraq (MNSTC-I), Baghdad, Iraq. On 5 March 2007, he left Iraq for a four-day pass at Camp As Sayliyah, Qatar.[3] Upon arriving at Camp As Sayliyah, the appellant met Corporal IM, then an administrative assistant assigned to Camp As Sayliyah. Over the next couple of days the appellant attempted to talk privately with Corporal IM but was unable because Corporal IM was busy. On 9 March 2007, the appellant, unrelenting in his desire to talk privately with Corporal IM, told her that he liked her and wanted to have sex with her. He also suggested coming to her room when she got off work, but she told him she might not be in her room.

The next morning, on three separate occasions, the appellant went to Corporal IM's room to talk to her. On two occasions he knocked on her door and departed after receiving no response. On the third occasion, the appellant knocked and, upon receiving no response, unlocked Corporal IM's door and entered her room. Upon entering her room, the appellant encountered Corporal IM, and she asked him why he was in her room. The appellant told Corporal IM he wanted to see her. He took off his shoes, crawled onto her bed, placed his arms around her and attempted to kiss her and fondle her breasts and between her legs. Corporal IM rebuffed the appellant's advances. The appellant grabbed and kissed her. Corporal IM told the appellant she had to leave for a meeting and departed.

On 21 March 2007, the senior ranking Air Force officer at MNSTC-I, having received word of the appellant's misconduct, ordered the appellant to proceed to Al Udeid Air Base, Qatar and to remain there pending the completion of an investigation into the appellant's misconduct. The appellant reported to Al Udeid Air Base as ordered but departed without authority on 29 March 2007. On 30 March 2007, agents with the Air Force Office of Special Investigations arrested the appellant as he disembarked from an airplane in Baltimore, Maryland.

---

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise to not approve confinement in excess of twelve months.
[2] The issues are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] Camp As Sayliyah is a United States Army rest and relaxation facility in Qatar.

Vindictive Prosecution

The appellant, for the first time on appeal, alleges vindictive prosecution because he identified problems with operating procedures, equipment, and standard of care within the MNSTC-I and, in so doing, raised the ire of the servicing staff judge advocate who, in turn, joined with the convening authority, the Article 32[4] investigating officer, the military judge, trial counsel, trial defense counsel, and a myriad of others to vindictively prosecute him. The government asserts in its brief that the appellant, by agreeing to waive all waivable motions at trial, is barred from making a claim of vindictive prosecution on appeal. They cite the Court's holding in *United States v. Gladue*, 65 M.J. 903, 905 (A.F. Ct. Crim. App. 2008) for this proposition.

"Criminal defendants can waive many rights." *Gladue*, 65 M.J. at 904 (citing *United States v. Mezzanatto*, 513 U.S. 196 (1995)). Included in these waivable rights is a claim regarding vindictive or selective prosecution. *United States v. Henry*, 42 M.J. 231, 234-35 (C.A.A.F. 1995). "Ordinarily, a failure to make such a motion at trial constitutes waiver." *Id.* at 235 (citations omitted). Such is especially the case where the appellant at trial has or should have, through the exercise of due diligence, the requisite facts necessary to make such a claim. *See United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993), *review denied* 39 M.J. 377 (C.A.A.F. 1994). Absent compelling circumstances, appellate courts are not the proper forum in which to litigate vindictive or selective prosecution motions for the first time. *Id.*

From a review of the appellant's vindictive prosecution claim, we find the appellant had or should have had the requisite facts necessary to make his vindictive prosecution claim at trial. He has failed to provide the Court with any extenuating circumstances for failing to make his vindictive prosecution claim at trial. Accordingly, we hold the appellant, by failing to raise this claim at trial, has waived his right to make this claim on appeal. Moreover, we hold that the appellant, by agreeing to waive all waivable motions at trial, has waived his right to make this claim on appeal. *Gladue*, 65 M.J. at 905-06.

Lastly, even if we had not applied waiver to this issue, the appellant's claim still fails. The burden of persuasion on a claim of vindictive or selective prosecution is on the moving party. *See* Rule for Courts-Martial (R.C.M.) 905(c)(2)(A). To support a claim of selective or vindictive prosecution, an appellant bears a "heavy burden" of showing that: (1) "others similarly situated" have not been charged; (2) "he has been singled out for prosecution"; and (3) "his 'selection . . . for prosecution' was 'invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.'" *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985),

[4] Article 32, UCMJ, 10 U.S.C. § 832.

quoted in United States v. Hagen, 25 M.J. 78, 83 (C.M.A. 1987)). Prosecutorial authorities and convening authorities are presumed to act without bias, and the appellant has the burden of rebutting that presumption. *Id.* (citing *Hagen*, 25 M.J. at 84).

We have carefully examined the record of trial, the appellant's brief, and the appellant's 1166-page submission to this Court, a submission the bulk of which is of questionable relevancy to the issues before this Court. We find the appellant has failed to present a prima facie case of vindictive or selective prosecution. Not only is there no evidence that "others similarly situated" have not been charged, there is no evidence that the appellant has been singled out for prosecution and that his selection for prosecution was invidious or in bad faith. Put simply, the appellant loses on all three prongs of the vindictive or selective prosecution test, the failure of which to meet any one prong results in a finding of no vindictive or selective prosecution.

Ineffective Assistance of Counsel

Service members unquestionably 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 under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel is presumed to be competent, and we will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 409-10 (C.M.A. 1993).

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 States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant asserts then-Captain GB, one of his trial defense counsel, was ineffective because rather than defend him, she spent all of her time trying to convince him that he was guilty. The appellant also asserts Mr. PM, his other trial defense counsel, was ineffective because he: (1) tried to protect Captain KH, a former student and one of the prosecutors in the case, by failing to move to dismiss the charges after she inadvertently reviewed notes the appellant had taken to assist with his defense; (2) forced the appellant to attend a sanity board; (3) requested the appellant be brought to Shaw Air Force Base, South Carolina for trial against his wishes; and (4) put forth no evidence with which to defend the appellant.

In response to the appellant's ineffective assistance of counsel claim, the government submitted post-trial affidavits from Captain GB and Mr. PM. In her affidavit, Captain GB asserts she had frank and open discussions with the appellant about the evidence, the evidence presented a series of challenges, the government continued to investigate other potential misconduct, and when confronted with these realities, the appellant decided to submit a pretrial agreement and plead guilty. Under the facts of this case, we do not find Captain GB's conduct to be deficient.

In his affidavit, Mr. PM asserts: (1) the military judge's actions in removing Captain KH and her co-counsel from the case and instructing them not to discuss the case with others was the proper remedy for the inadvertent disclosure of the appellant's notes and that he did not believe a motion for a dismissal was warranted, and (2) he and Captain GB were ready and willing to zealously defend the appellant if the appellant had pled not guilty but that the appellant signed a pretrial agreement and pled guilty. In his request for a change of venue and request for a sanity board, Mr. PM alleges: (1) he requested a sanity board because the appellant's words and conduct caused him and Captain GB to question the appellant's mental competency and mental responsibility, and (2) he requested the appellant be tried near his hometown of Atlanta, Georgia rather than in Qatar to ensure the appellant received a fair trial. We find Mr. PM made tactical decisions: (1) not to move to dismiss the appellant's charges; (2) to request a sanity board; and (3) to request a change of venue stateside. Such tactical decisions do not amount to ineffectiveness of counsel. Moreover, assuming trial defense counsel's conduct was deficient, we find no prejudice.

Action

In the Action, dated 25 February 2008, the convening authority approved the sentence as adjudged. Although not raised on appeal, we note that there is no reprimand language in the Action, the promulgating order, or any other document in the record. A reprimand, if approved, must be in writing in the convening authority's Action. R.C.M. 1003(b)(1) and 1107(f)(4)(G). Accordingly, we do not affirm that portion of the sentence consisting of a reprimand. *United States v. Casey*, 32 M.J. 1023 (A.F.C.M.R. 1991).

Conclusion

We affirm only so much of the sentence as provides for a dismissal and confinement for one year.[5] The approved findings and the sentence, as modified, are correct in law and fact and no error prejudicial to the substantial rights of the appellant

[5] The Court notes that the Court-Martial Order (CMO), dated 25 February 2008, incorrectly identifies the Additional Charge as a violation of Article 92, UCMJ, 10 U.S.C. § 892, rather than Article 133, UCMJ, 10 U.S.C. § 933. The Court further notes that the CMO incorrectly spells the appellant's first name as "JAIMES" instead of "JAIME." The Court orders the promulgation of a corrected CMO.

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 approved findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court