

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Steven M. RICE
Private (E-1), U.S. Marine Corps**

NMCCA 200700208

Decided 8 August 2007

Sentence adjudged 31 October 2006. Military Judge: B.E. Kasprzyk. Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, School of Infantry, Training Command, Camp Pendleton, CA.

LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel
CAPT DANIEL R. LUTZ, JAGC, USN, Appellate Government Counsel
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of three specifications of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 90 days and a bad-conduct discharge. In accordance with a pretrial agreement, the convening authority (CA) approved the sentence as adjudged and suspended all confinement in excess of 60 days for 12 months from the date of trial.

We have reviewed the record of trial, the appellant's sole assignment of error,¹ and the Government's response. We conclude

¹ THE APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEY FAILED TO PUT ON ANY EVIDENCE OF THE APPELLANT'S NONJUDICIAL PUNISHMENT FOR THE SAME ACT THAT CONSTITUTED SPECIFICATION 1 OF THE CHARGE.

that the appellant is entitled to *Pierce*² credit against his confinement. After application of that credit, we find that the findings and sentence are correct in law and fact and that no material prejudice to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

Background

On 7 February 2006, the appellant received nonjudicial punishment (NJP) for an unauthorized absence (UA) from 2 January 2006 until 2 February 2006. The punishment awarded was forfeiture of \$297.00 pay per month for one month, 14 days of restriction and 14 days of extra duty, with the restriction and extra duty to run concurrently. The appellant's commanding officer suspended the restriction and extra duties for one month. Staff Judge Advocate's Recommendation of 27 Nov 2006 at 2.

Approximately one month after his NJP, the appellant committed another UA, from 3 March 2006 until 21 June 2006. Shortly thereafter, the appellant again went UA, from 14 July 2006 until 5 September 2006, and was placed in pretrial confinement immediately upon his return. Charge Sheet.

The appellant negotiated a pretrial agreement which required the CA to suspend confinement in excess of 60 days. Pursuant to that agreement, the appellant pled guilty to the three periods of UA, including the same period for which NJP had already been awarded, which was charged in Specification 1 under the Charge. During sentencing, trial defense counsel neither informed the military judge of the appellant's receipt of NJP for the first period of UA, nor introduced any evidence of it for purposes of credit under *United States v. Pierce*. During sentencing argument, trial defense counsel argued that the appellant should not receive a bad-conduct discharge. The military judge sentenced the appellant to confinement for 90 days and a bad-conduct discharge, and credited him with 56 days of pretrial confinement.

The staff judge advocate (SJA), in his recommendation (SJAR) of 27 November 2006, advised the CA that the first period of unauthorized absence, for which NJP was imposed, was also charged at this court-martial. He also informed the CA that "neither the UPB entry for this NJP nor the accused's 'Legal Action 119 Remarks' page of the 3270 . . . were admitted into evidence." SJAR at 2. The SJA further noted that "the military judge was not able to consider that the accused had already received punishment for the same conduct that was before the court" in determining a sentence. *Id.*

The trial defense counsel submitted a request for clemency to the CA on 8 December 2006, in which he requested the CA to disapprove the adjudged bad-conduct discharge, but did not request the CA to award sentence credit for the prior NJP under

² *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

Pierce. Clemency Recommendation of 8 Dec 2006. On 5 January 2007, the CA took action on the appellant's case, but did not mention his consideration of *Pierce* credit. Rather, the CA approved the adjudged sentence and suspended a portion of the confinement in accordance with the pretrial agreement.

Ineffective Assistance of Counsel

In his sole assignment of error, the appellant contends that he was denied his Sixth Amendment right to effective assistance of counsel when his trial defense counsel failed to put on any evidence of his prior NJP for the same act which constituted Specification 1 of the Charge, during the pre-sentencing portion of his court-martial. Appellant's Brief and Assignment of Error of 26 Apr 2007 at 3-4. We conclude that the appellant received effective assistance of counsel, however, he is entitled to sentencing credit for the prior NJP.

1. Law

a. Ineffective Assistance of Counsel

We consider *de novo* whether trial defense counsel was ineffective and, if so, whether that error was prejudicial. *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999). Counsel are strongly presumed to have provided constitutionally adequate representation. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998). To rebut this presumption, an appellant must meet the two-pronged *Strickland* standard by demonstrating: (1) that counsel's performance was deficient; and (2) that he was prejudiced by such deficient performance. *Strickland*, 466 U.S. at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

As a general matter, appellate courts will not second-guess the strategic or tactical decisions made at trial by defense counsel. *United States v. Paxton*, 64 M.J. 484, 489 (C.A.A.F. 2007); *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). When viewing tactical decisions by counsel, the test is whether such tactics were unreasonable under prevailing professional norms. *See United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)(citing *Strickland*, 46 U.S. at 688-90). "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." *Scott*, 24 M.J. at 188.

b. Credit for Prior NJP

Article 15(f), UCMJ, provides that:

The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but **the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.**

Art. 15(f), UCMJ (emphasis added).

In *Pierce*, our superior court clarified the relationship between Article 15(f), UCMJ, and the use of NJP records during sentencing, by stating that a service member cannot be "twice punished for the same offense" and the fact of the NJP cannot "be exploited by the prosecution at a court-martial for the same conduct." *Pierce*, 27 M.J. at 369; *see also United States v. Gammons*, 51 M.J. 169, 180 (C.A.A.F. 1999). In *Pierce*, the court provided a mechanism for appropriately crediting prior NJP. An accused who is convicted of the same offense at a court-martial for which he had earlier received NJP "must be given *complete* credit [at the court-martial] for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369.

This credit, however, is not automatic. *United States v. Bracey*, 56 M.J. 387, 388 (C.A.A.F. 2002). In applying *Pierce*, our superior court has emphasized that when an accused is court-martialed for an offense for which punishment has already been imposed under Article 15, UCMJ, the accused is the "gatekeeper" in determining when credit will be afforded for the prior punishment. *Gammons*, 51 M.J. at 179; *see also Bracey*, 56 M.J. at 388 (*Pierce* credit is not automatic, the accused must request it). In *Gammons*, the court established the framework concerning when and how an accused is to be afforded credit, depending upon when the appellant raises the issue. Specifically, the court in *Gammons* stated:

The accused may: (1) introduce the record of the prior NJP for consideration by the court-martial during sentencing; (2) introduce the record of the prior NJP during an Article 39(a), UCMJ, [citation omitted], session for purposes of adjudicating credit to be applied against the adjudged sentence; (3) defer

introduction of the record of the prior NJP during trial and present it to the convening authority prior to action on the sentence; or (4) choose not to bring the record of the prior NJP to the attention of any sentencing authority. In that regard, we note that an accused may have sound reasons for not presenting the record of the prior NJP to any sentencing authority. Absent a collateral issue, such as ineffective assistance of counsel, failure to raise the issue of mitigation based upon the record of a previous NJP for the same offense prior to action by the convening authority waives an allegation that the court-martial or concerning authority erred by failing to consider the record of the prior NJP.

Id. at 183.

In *United States v. Globke*, 59 M.J. 878, 881 (N.M.Ct.Crim.App. 2004), we further interpreted the *Gammons* framework, stating:

First, the accused can raise the issue before sentencing, and ask the sentencing authority to consider the former punishment in arriving at a sentence. If sentencing is before members, the accused can either have the military judge "instruct the members on the specific credit to be given [or] . . . simply ask that the panel give consideration to the punishment imposed at a prior NJP in adjudging a sentence." [citation omitted]. If sentencing is done by a military judge, "the military judge will state on the record the specific credit awarded for the prior punishment." [citation omitted]. **Second, the accused can raise the issue in an Article 39(a), UCMJ, session**, rather than asking that the prior punishment be considered by the sentencing authority while deliberating on the sentence. In that case, "the military judge will adjudicate the specific credit to be applied by the convening authority against the adjudged sentence in a manner similar to adjudication of credit for illegal pretrial confinement." [citation omitted]. **Third, the accused can wait, and raise the issue post-trial before either the convening authority or the appellate courts**, in which case either the convening authority or the appellate court "will identify any such credit." [Citation omitted]. Again, however, in applying credit, *Pierce* makes clear that the credit is to be "day-for-day, dollar-for-dollar, stripe-for-stripe." [Citation omitted].

Id. at 881-82 (emphasis added).

2. Analysis

a. Ineffective assistance of counsel

In raising the issue on appeal, the appellant only claims that the trial defense counsel was deficient in not raising the issue during sentencing. Curiously, the appellant does not challenge the effectiveness of trial defense counsel for failing to raise the issue during an Article 39(a), UCMJ, session, nor challenge the efficacy of counsel in not raising the issue before the CA prior to taking his action.

We do not have to look beyond the first prong of *Strickland* to conclude that the appellant has failed to overcome the presumption of effective assistance of counsel. The record establishes that the appellant committed his initial period of UA, for which his commanding officer imposed NJP, and partially suspended the punishment. Instead of learning from the experience and improving his behavior, the appellant instead chose to relapse into his misconduct by initiating another period of UA. After returning to duty following his second UA, the appellant's behavior continued to regress as evidenced by the initiation of a third period of UA. During the providence inquiry, the appellant testified he committed these offenses because he did not want to remain in the Marine Corps anymore, and that he wanted to be home.

Trial defense counsel negotiated a pretrial agreement in which the CA agreed to suspend all confinement in excess of 60 days, and by the date of trial, the appellant had already served 56 days of pretrial confinement. On these facts, the trial defense counsel could have reasonably concluded that the military judge would consider the appellant's failure to learn from the NJP as a lack of rehabilitative potential. As such, evidence of the NJP would have resulted in a higher probability that a bad-conduct discharge would be awarded. It is evident from the trial defense counsel's sentencing argument that the appellant preferred to be administratively separated rather than discharged with a punitive discharge. Consequently, for tactical reasons, the trial defense counsel may have wanted to avoid the issue, and chose not to put the evidence before the military judge at any time during the court-martial. On this record, it is clear that the appellant's trial defense counsel's failure to submit evidence of the prior NJP was not a deficient performance of his duties, but rather a reasonable and sound tactical decision. Thus, based on our review of the entire record, we are convinced that the defense counsel's performance was not deficient under *Strickland's* first prong.³

³ Similarly, we conclude that that the trial defense counsel appears to have made a reasonable and sound tactical decision not to raise the issue when requesting clemency from the CA, as such evidence would highlight for the CA the appellant's lack of rehabilitation and recidivism following the CA's imposition of NJP with a partially suspended sentence.

Assuming, *arguendo*, that the trial defense counsel's failure to raise the issue during sentencing was deficient performance, we do not find any prejudice to the appellant. First, the appellant's claim that the evidence "would have factored into the military judge's deliberations and would have lessened Appellant's awarded sentence" is entirely speculative. Appellant's Brief at 5. Under the facts of this case, we believe it more likely that the appellant could have been prejudiced by the trial defense counsel submitting the evidence of the prior punishment to the military judge. Given the defense argument, presentation of the NJP evidence would have been contrary to the appellant's goal of being administratively discharged rather than punitively discharged. This goal is further evidenced by the appellant's clemency request in which trial defense counsel again argues for a suspended bad-conduct discharge and administrative separation for his client. Accordingly, we find that the appellant has failed to demonstrate either deficient performance or prejudice.

b. Equivalent Punishment Credit

On appeal, we are not required to identify sentence credit resulting from a prior NJP, absent the appellant's request. *Gammons*, 51 M.J. at 184. The appellant, as the "gatekeeper" of prior NJP evidence, has chosen to present his issue as one of ineffective assistance of counsel rather than directly request sentencing credit from this court. We will, however, treat the appellant's claim of ineffective assistance of counsel as a request for this court to order credit against his court-martial sentence. Taking such action will also serve to eliminate any possible prejudice that could have resulted from a failure to raise the issue below. See Art. 59(a), UCMJ.

We will credit the appellant for the equivalent of the forfeitures awarded at NJP to assure that the appellant is not twice punished for the UA charged in Specification 1 under the Charge, but we decline to grant the appellant his requested relief of setting aside the bad-conduct discharge. Following the lead of our superior court in *Pierce* and *Gammons*, we will utilize the Table of Equivalent Punishments, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 Revised ed.), ¶¶ 127c(2) and 131d, as a useful guide in applying *Pierce* credit to court-martial sentences. See *Gammons*, 51 M.J. at 183-84; see also *Pierce*, 27 M.J. at 369. That table states that one day of forfeiture is the equivalent of one day of confinement.

The appellant received forfeiture of \$297.00 of pay for one month at NJP. According to the conversion examples in the 1969 Manual, a two-third's forfeiture of pay for one month is the same as 20 days of forfeiture. Here, the appellant was entitled to \$1,273.50 of base pay per month, which converts to \$42.45 per day. Charge Sheet. His \$297.00 of NJP forfeitures, therefore, is the

equivalent of seven days of total forfeiture.⁴ Using the day-for-day equivalency, the appellant is entitled to seven days of credit against his confinement.⁵ We must decide, however, whether the seven days of confinement should be credited against the 90 days of adjudged confinement or the 60 days of confinement negotiated in the pretrial agreement.

Our superior court has determined that when there is a pretrial agreement, pretrial confinement credits shall be applied against the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement. *United States v. Spaustat*, 57 M.J. 256, 264 (C.A.A.F. 2002).⁶ For example, if a CA agrees to disapprove all confinement in excess of 60 days, the confinement credit would be applied against the 60 days rather than a higher adjudged confinement. To hold otherwise would result in an accused serving more confinement than the parties agreed could be approved. *See United States v. Rock*, 52 M.J. 154, 157 (C.A.A.F. 1999). However, if the parties agree that the CA can approve the confinement as adjudged but must suspend a portion of that confinement, the confinement credit will be credited against the adjudged confinement absent an agreement to the contrary. *Id.*

Here, the parties agreed that the CA was authorized to approve all confinement as adjudged but was obligated to suspend confinement in excess of 60 days, and the agreement is silent on how to credit other confinement. Appellate Exhibits II and III. Under these circumstances, the adjudged confinement of 90 days is the maximum confinement that the appellant may be ordered to serve, and, therefore, the seven days of confinement credit should be applied against the adjudged confinement. *See Globke*, 59 M.J. at 883. Accordingly, we will apply the seven days of equivalent confinement against the 90 days of adjudged confinement.

⁴ \$297.00 divided by \$42.45 per day equals 6.996 days.

⁵ Since the appellant does not claim that he ever served the suspended restriction or performed the suspended extra duties, we deem that he is not entitled to credit for these suspended punishments.

⁶ Although *Spaustat* dealt with credit for actual pretrial confinement or restriction tantamount to confinement, we find our superior court's analysis equally applicable to applying *Pierce* credit. *See Globke*, 59 M.J. at 882 (holding "there are no rational or logical reasons to apply *Allen* and *Pierce* credits differently").

Conclusion

We affirm the findings and only so much of the sentence as provides for a bad-conduct discharge and 83 days of confinement.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge FREDERICK participated in the decision of this case prior to detaching from the court.