

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**VADYM A. KOBZEV
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100059
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 September 2010.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding General, 3d Marine
Logistics Group, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol J.J. Murphy,
USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: Capt Paul Ervasti, USMC.

30 September 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of attempted wrongful sexual contact (as a lesser included offense of the original charge and specification alleging wrongful sexual contact), and two specifications of burglary in violation of Articles 80 and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 929. The appellant was

sentenced to confinement for 18 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the findings and sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The appellant raises two assignments of error. He first alleges that his trial defense counsel was ineffective in failing to raise an Article 13, UCMJ, motion based on the appellant's pretrial confinement. Second, he alleges per *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the specification of the Article 120 charge, of which the appellant was convicted of the lesser included offense of attempt, fails to state an offense. We have examined the record of trial, the appellant's assignments of error, and the pleadings. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Articles 59(a) and 66(c), UCMJ.

Background

The appellant was performing duties in the disbursing field, stationed in Okinawa, Japan. The offenses leading to this general court-martial occurred on two separate evenings in February and March of 2010, in an enlisted barracks occupied by both male and female Marines. During the February incident, the appellant entered a female lance corporal's barracks room while she was sleeping and briefly placed his hand in her pubic area, an area described as below the navel but above the labia. The specifics of the location of the contact were identified by the victim on an anatomical drawing, Appellate Exhibit VII. The victim awoke and a number of Marines were summoned, eventually locating the appellant and removing him from the victim's shower stall. The victim of the February incident initially declined to pursue the matter. In March, another female Marine awoke in her barracks room to discover the appellant alongside her in her bed, and proceeded to pummel him with various blows. The appellant fled and was eventually located by duty personnel. While awaiting trial, the appellant was placed in the brig in special quarters. By the time the case went to trial, the appellant had received confinement in this status for over two and a half months.

Decision Not to Litigate Pretrial Confinement per Art. 13

A military accused is entitled under the Constitution and Article 27(b), UCMJ, to the effective assistance of counsel. *United States v. Denedo*, 66 M.J. 114, 127 (C.A.A.F. 2008). An individual making a claim of ineffective assistance "must surmount a very high hurdle." *Id.* (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). Courts reviewing ineffective assistance claims, "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (quoting *United States v. Strickland*, 466 U.S. 668, 689 (1984)). As a general matter, appellate courts will not "second-guess the strategic or tactical decision of trial defense counsel, especially when the strategy used or tactics employed are not on their face unreasonable or unworkable." *United State v. Foster*, 35 M.J. 700, 704 (N.M.Ct.Crim.App. 1992) (citations and internal quotation marks omitted).

Styled as ineffective assistance of counsel, the essence of the appellant's first assignment of error is to take issue with trial defense counsel's tactical decision to leverage the appellant's pretrial confinement for consideration on sentence, rather than litigate the matter pursuant to Article 13, UCMJ. The court is in receipt of, and has appended to this record, an affidavit from brig personnel on Okinawa attesting to the appellant's request to remain in special quarters pretrial, rather than joining the general population and assuming institutional duties within the brig.

Taking the appellant's affidavit at face value, and assuming *arguendo* that the appellant was not in some way party to the continuation of his special quarters status, we are not persuaded he has stated any basis upon which relief is due, or that his counsel was somehow ineffective. The record before us reveals that trial defense counsel, aware of the confinement status of his client, chose to address the issue by introducing it during the appellant's unsworn statement. He then leveraged the issue, and its contemplative, if not rehabilitative, effect on the appellant in his argument on sentence.

We decide this assignment of error consistent with *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003), *United States v. Tanksley*, 54 M.J. 169, 177 (C.A.A.F. 2000) and *United States v. Southwick*, 53 M.J. 412, 416 (C.A.A.F. 2000). We decline to find error or otherwise find counsel ineffective for the tactical decision to use the pretrial confinement as a matter favoring a reduced sentence, rather than litigating its Article 13 merits.

Failure to State an Offense

The appellant's second assignment of error alleges that Charge 1, Specification 1 fails to state an offense. We disagree.

A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted). Whether a specification states an offense is a question of law, which this Court reviews *de novo*. *Id.* We are not persuaded by the appellant's contention that the use of the words "pubic area" failed to provide sufficient notice. After *de novo* consideration of the appellant's second assignment of error and applicable case law, we find no error.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court