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

Before
R.Q. WARD, B.L. PAYTON-O'BRIEN, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAVIER B. FUENTES
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201300006
GENERAL COURT-MARTIAL

Sentence Adjudged: 24 August 2012.
Military Judge: LtCol Gregory Simmons, USMC.
Convening Authority: Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA.
Staff Judge Advocate's Recommendation: Maj J.E. Ming, USMC.
For Appellant: LT Kevin Quencer, JAGC, USN.
For Appellee: CDR Christopher VanBrackel, JAGC, USN; LT Ann Dingle, JAGC, USN; LT Philip Reutlinger, JAGC, USN.

13 June 2013

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. **

PAYTON-O'BRIEN, Senior Judge:

A general court-martial composed of officers and enlisted members convicted the appellant, contrary to his pleas, of three specifications of violating a lawful general order, one specification of dereliction of duty, two specifications of making a false official statement, one specification of larceny, one specification of assault consummated by battery, two specifications of obstruction of justice, and two specifications of reckless endangerment in violation of Articles 92, 107, 121,

128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 921, 928, and 934. The members sentenced the appellant to confinement for one year and six months, forfeiture of $1,491.00 pay per month for one year and six months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, and with the exception of the punitive discharge, ordered it executed.

The appellant's sole assignment of error is that he received ineffective assistance of counsel from his trial defense counsel. We specified an issue regarding the failure of the court-martial to record the appellant's forum selection and pleas.

After careful consideration of the record, the pleadings of the parties, the appellant's unsworn statement under penalty of perjury, and the submissions of the trial defense counsel,[1] we conclude that following our corrective action, the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was a drill instructor at Recruit Training Regiment, Marine Corps Recruit Depot in San Diego, California. During the time period of November 2011 to January 2012, the appellant used inappropriate language toward recruits, stole more than $5,000.00 from recruits for books and DVDs that he never delivered, and kicked a recruit in the chest. The appellant also housed his dog, a pit bull, at the command and the dog bit two recruits during training.

After these events came to light, the appellant tried to impede the investigation into the dog bites by telling people to lie about what had occurred. The appellant also personally made false statements to authorities about some of the underlying events. Further facts necessary to the resolution of the issues are developed below.

Ineffective Assistance of Counsel

[1] On 12 April 2013, this court ordered the Government to secure affidavits from the appellant's two trial defense counsel in response to the appellant's allegations of ineffective assistance of counsel.

The appellant claims he received ineffective assistance of counsel. He claims his trial defense counsel failed to do the following: interview witnesses from his command who had favorable knowledge about the allegations; introduce evidence relating to an alibi; recall a witness who had withheld evidence from the defense; and call other favorable witnesses. We reject the appellant's assignment of error.

We review claims of ineffective assistance of counsel *de novo*. *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008). Claims of ineffective assistance of counsel are analyzed under the Supreme Court's test in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the appellant has the burden of demonstrating "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687) (additional citation omitted). There is a strong presumption of competence for counsel, and an appellant must meet this two-part test to overcome that presumption. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006).

As a general matter, we will not second-guess the strategic or tactical decisions made at trial by defense counsel absent a showing by the appellant of specific defects in his counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (internal quotation marks and citation omitted.)

To determine if the presumption of competence is overcome, we apply a three-part test:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for the lawyer's actions"?
> (2) If the allegations are true, did the lawyer's level of advocacy fall "measurably below the performance . . . (ordinarily expected) of fallible lawyers"? and
> (3) If defense counsel was ineffective, is there "a reasonable probability that absent the errors," there would have been a different result?

United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000) (citing *United States v. Polk*, 32 M.J. 150, 153 (C.A.A.F. 1991).

To begin, we find the appellant's allegations are insufficient to establish that his "counsel's performance was

deficient" under the first prong of *Strickland*. 466 U.S. at 687. Both trial defense counsel, in response to an order from this court, submitted detailed statements, one an affidavit and one under the penalty of perjury, explaining their actions relating to each allegation by the appellant. Trial defense counsel stated that they did interview personnel at the appellant's command, but that these individuals did not have any information pertinent to the charges against the appellant. Both counsel admitted that they did not interview some individuals at the command about a possible alibi for the appellant, but the timeframe of the alibi was not relevant to the factual circumstances of the charged misconduct.

As to the issue of not recalling a witness who allegedly withheld evidence, trial defense counsel stated they already had received the same evidence from another witness before trial. Not only was the evidence not helpful to the appellant, it was actually damaging, and therefore trial defense counsel did not introduce it at trial. Lastly, trial defense counsel made a tactical decision to not produce certain witnesses, and the appellant agreed with the strategy at the time. The factual assertions in the affidavits provide a "reasonable explanation for counsel's actions," *Grigoruk*, 52 M.J. at 315, which weighs against the appellant overcoming the presumption of competence, and thus we find that the appellant has failed to meet the first prong of *Strickland*.

Even if we were to assume that trial defense counsel's performance was deficient, we find that the appellant also has not satisfied the second *Strickland* prong because he has not shown any prejudice. The appellant has failed to demonstrate there is a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gutierrez*, 66 M.J. at 331 (quoting *Strickland*, 466 U.S. at 694). In this case, there was extensive testimony from numerous witnesses that was corroborated by cell phone and bank records. The appellant has made no showing that either information from other witnesses or the allegedly withheld evidence would have negatively impacted the Government's case, especially considering that both trial defense counsel state that this information was either irrelevant or downright harmful to the defense. We find that the appellant has not met his burden to show ineffective assistance of counsel.

Failure to Enter Pleas and Forum Selection on the Record

At the appellant's arraignment on 21 June 2012, after appropriate advisements by the military judge, pleas and forum selection were reserved.[2] The judge ordered written notice of pleas and forum selection due on 6 August 2012. Record at 8, Appellate Exhibit I.

On 26 July 2012, the next Article 39(a), UCMJ, session began with a newly detailed military judge. Pleas and forum selection were still reserved.[3] The due date for those elections had been delayed to 13 August 2012. Record at 12.

A subsequent Article 39(a) session was held on 10 August 2012. The military judge noted that the court had received the defense notice of pleas and forum selection though he did not discuss with the appellant the specific document that had been

---

[2] The military judge who handled the arraignment had the following exchange with the appellant concerning his forum rights:

> MJ: . . . You have the right, Sergeant Fuentes, to be tried by a court-martial composed of members, including, if you request, at least one-third enlisted persons. If you're found guilty of any offense, those members would determine the sentence. Do you understand that?
> ACC: Yes, sir.
>
> MJ: You're also advised that you may request to be tried by military judge alone; and if that request is approved, the military judge would determine your guilt or innocence; and if you were found guilty of any offense, the military judge would determine the sentence. Do you understand that?
> ACC: Yes, sir.
>
> MJ: Have you discussed those choices with your attorneys?
> ACC: Yes, sir.
>
> MJ: Do you wish to be tried by a court-martial composed of members, a court-martial composed of members with enlisted representation, or by military judge alone?

At this point in the proceeding, Captain C, one of the detailed defense counsel, indicated, without objection from the trial counsel, that the defense wished to reserve forum selection "according to the trial milestones." The military judge granted the defense request. Record at 6. Pleas were also reserved. *Id.* at 10.

[3] The new military judge queried the trial defense counsel as follows:

> MJ: Captain [C], his forum selection and pleas are still reserved, are they not?
> DC: Yes, sir.

Record at 12.

submitted. Record at 85. Appellate Exhibit XXIX, dated 6 August 2012, titled "Notice of Pleas, Forum, and Certain Defenses", indicated the appellant intended to plead not guilty to all charges and specifications and that he requested trial by court-martial comprised of members with enlisted representation. The document is signed by detailed defense counsel, Captain C, and not by the appellant.

The appellant did not personally elect the forum or enter pleas at that session of court. However, the military judge was proceeding at that time as if pleas of not guilty had been entered by the appellant, and that the appellant had elected trial by members with enlisted representation. He instructed the Government to obtain a modified convening order to include the enlisted members, and there was no objection from the defense. Record at 85.

On 20 August 2012, the court-martial proceeded as if the appellant had pled not guilty to all charges and specifications. In fact, before the court was assembled on the first day of trial, in the presence of counsel and the appellant, the military judge stated that the appellant previously "entered pleas of not guilty to all charges and specifications . . . ." *Id.* at 86. This statement was in agreement with the written election submitted to the court by detailed defense counsel, and also in full accordance with the appellant's legal presumption. *See United States v. Jackson*, No. 200900427, 2010 CCA LEXIS 65, n.1, unpublished op. (N.M.Ct.Crim.App. 25 May 2010) (finding no error where pleas and forum selection were reserved at arraignment but never entered onto the record by the appellant); *United States v. Gilchrist*, 61 M.J. 785, 787 n.2 (Army Ct.Crim.App. 2005) (finding no error where the court-martial proceeded as if no guilty plea had been entered). While it was error not to enter the appellant's pleas on the record, there was no prejudice in this case.

The remaining question is whether the lack of formal election of forum by the appellant, either on the record or personally in writing, constitutes more than procedural error. Based upon the record as a whole, we are confident that the appellant desired a panel of officer and enlisted members for his court-martial.

The record reveals that the original convening order General Court-Martial Convening Order (GCMCO) 1-12, dated 23 February 2012, contained all officer members. This order was modified by GCMCO 1a-12, dated 13 August 2012, which deleted

some officer members and added enlisted members. Both the appellant and the Government submitted *voir dire* questions and proposed instructions for members relating to findings in advance of trial, which indicates both sides were preparing for a contested court-martial involving members. AE XXXI and XXXIII. Court-martial member questionnaires completed by both officers and enlisted members were submitted to the court in advance of trial. AE XXXII.

During the Article 39(a) session immediately before the start of trial, the military judge conducted discussions with the parties, in the presence of the appellant, concerning members' questionnaires, *voir dire* procedures, and questions. No objection was registered by the appellant at that time to any of these *voir dire* procedures. Lastly, just prior to the court's assembly, the military judge stated on the record, in the presence of the appellant and all counsel, that the appellant previously "elected to be tried by enlisted members." Record at 86. It is apparent from this record, that members were present in the courthouse and the parties were preparing for a panel of members. *Voir dire* was then conducted by the military judge, trial counsel, and defense counsel, in the presence of the appellant. The defense registered five challenges for cause (of both officer and enlisted members), for which the military judge granted four of the challenges. Each side then exercised their sole peremptory challenge. Certainly, if there was a surprise as to the enlisted members being impaneled in the courtroom, we would have expected the defense counsel to object if his client did not desire such a panel. Although no official election was made by the appellant, he proceeded through *voir dire* and trial, to include findings instructions, and sentencing without objection. The appellant had numerous opportunities to voice his objection to having enlisted members on his panel, and none was made, even on appeal.

The appellant received plenty of notice that the court-martial was proceeding as a members' trial with enlisted representation and he never objected to this forum. While there was no explicit oral statement by the appellant, the record as a whole supports an inference that the appellant was tried by a panel of his choosing. This conclusion is especially clear when considering the defense written election of 6 August 2012, which was submitted after the first military judge had advised the appellant of his forum selection rights. We find that the military judge's failure to capture the appellant's forum election orally was merely a procedural error that did not

materially prejudice the substantial rights of the appellant. *See United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005); *United States v. Morgan*, 57 M.J. 119, 122 (C.A.A.F. 2002); *United States v. Altier*, No. 201000361, 2011 CCA LEXIS 102, at *15-16, unpublished op. (N.M.Ct.Crim.App. 26 May 2011).

Accordingly, while we find that the failure to record pleas and forum selection orally on the record was a procedural error, no prejudice resulted, and thus there is no reason to question the findings.

Court-Martial Order Errors

Although not raised as error, the appellant is entitled to have his official records correctly reflect the results of this proceeding. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). First, the court-martial order fails to include all of the offenses on which the appellant was arraigned on 21 June 2012.[4] *See* RULE FOR COURTS-MARTIAL 1114(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Next, the court-martial order does not reflect as to Specification 1 of Charge IV and Specification 3 of Charge V that the appellant was charged with committing these offenses "on divers occasions." In discussions with the counsel after presentation of evidence as to the failure of proof as to the "on divers occasions" language, the military judge dismissed the language. Record at 532, 541. The court-martial order should reflect this ruling by the military judge. However, since there was a failure of proof, the military judge should have found the appellant not guilty of the language, vice merely dismissing the language. The appellant having neither been found guilty of nor sentenced based upon the language dismissed by the military judge, no corrective action is required.

[4] The court-martial order fails to reflect the many charges and specifications that were not withdrawn by the Government until 3 August 2012.

Conclusion

The supplemental court-martial order shall correct the deficiencies noted above. The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge WARD and Judge McFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court