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

Before
M.D. MODZELEWSKI, R.G. KELLY, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

GABRIEL A. MORA
INTERIOR COMMUNICATIONS ELECTRICIAN SECOND CLASS (E-5)
U.S. NAVY

NMCCA 201200335
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 March 2012.
Military Judge: CDR Colleen Glaser-Allen, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: LCDR S.J. Gawronski, JAGC, USN.
For Appellant: Capt Jason R. Wareham, USMC.
For Appellee: LT Ann E. Dingle, JAGC, USN; Capt Samuel C. Moore, USMC.

28 March 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.

MODZELEWSKI, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of rape and attempted rape, in violation of Articles 80 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 920. The military judge sentenced the appellant to confinement for four years and a dishonorable discharge. The convening authority

(CA) approved the sentence as adjudged and pursuant to a pretrial agreement (PTA), suspended confinement in excess of 42 months.

The appellant raises two assignments of error, both of which allege ineffective assistance by his trial defense team. First, he claims that trial defense counsel were ineffective in cross-examination of the victim during the sentencing hearing, in that counsel did not impeach the victim with her history of sexual relations with the appellant. Second, the appellant claims that his defense team was ineffective in that they did not attempt to suppress his initial confession and all that derived from it.

We granted the appellant's Consent Motion to Attach Documents, which consisted of his unsworn declaration under penalty of perjury outlining his complaints against his counsel. We have examined the record of trial, the appellant's assignments of error, his declaration, and the pleadings from the parties. 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. Arts. 59(a) and 66(c), UCMJ.

Factual Background

This is a case of spousal rape and attempted rape. In 2009, the appellant and his wife (MM) had been married for seven years, but were experiencing marital problems. MM told the appellant that she wanted a divorce. For financial reasons, they remained in the same house, but they slept in separate rooms, and ceased having consensual sexual relations by November 2009.

In February 2010, shortly before an extended deployment for training, the appellant raped his wife in her bedroom, using physical force to overcome her resistance. When he returned from his temporary duty in August 2010, he resumed his separate living arrangement in the family home. The following month, he again entered his wife's bedroom and attempted to rape her, but his wife was successful in physically resisting the rape.

Trial Proceedings

In pretrial motions, the defense counsel aggressively and successfully litigated the admissibility of the victim's sexual history with the appellant as an exception to the general

prohibition of MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This history included evidence that the couple engaged in occasional "rough sex" in the years prior to the sexual assaults, as well as evidence that the victim had consensual sex with the appellant following the two assaults during a six-month period of reconciliation. Other pretrial litigation included a motion to compel the production of an expert consultant and a motion to compel discovery of the victim's mental health records under MIL. R. EVID. 513; the defense team was successful on both. The defense counsel did not attempt to suppress the appellant's confession to a Naval Criminal Investigative Service (NCIS) agent, or any other statements that he may have made.

Ultimately, the appellant elected to plead guilty to the rape and attempted rape.[1] During the Government's sentencing case, MM testified emotionally about the two sexual assaults and their impact on her life. On cross-examination, the defense counsel asked MM questions about her plans for divorce, their son's progress at school, and the son's relationship with the appellant. The defense counsel did not cross-examine MM regarding the sexual history that had been the subject of the MIL. R. EVID. 412 motion.

Assertions of Ineffective Assistance

The appellant now asserts that his counsel were deficient in two regards. First, the appellant represents in his post-trial affidavit that he made an earlier confession to his chain of command, prior to his statement to the NCIS agent. He represents that, during his interview with his chain of command, he was verbally advised of "certain rights," but not told that he was "suspected of anything or that it would be used against me." Appellant's Declaration of 7 Sep 2012 at 1. After being "generally notified of my rights," the appellant was asked to tell them what happened. *Id.* The appellant represents now that he "took this to be an order to confess the details of my wife's allegations," and that he "did not feel as though I had an option not to respond." *Id.* He then recounted his recollection of the incidents to his chain of command. The appellant further asserts that, when he later spoke to the NCIS agent, he does not recall being told that his previous statement could not be used against him in court, and avers that, had he known, he doesn't "feel that [he] would have spoken to NCIS without counsel." *Id.*

[1] The appellant pled not guilty to an orders violation and two specifications of assault. Following acceptance of his pleas and announcement of sentence, those charges and specifications were withdrawn and dismissed.

He then made a full confession to NCIS, told NCIS about a journal entry he made in which he admitted to raping his wife, and turned that journal over to the investigators. The appellant states that he told his defense counsel about the meeting with his command, that they did not believe it could be successfully suppressed, and did not attempt to do so.

Secondly, the appellant complains that his defense counsel did not effectively cross-examine his wife during the sentencing hearing on their sexual relations after the assaults, or on her motivations for prosecution. *Id.* at 2. Both of these matters, he now asserts, "would have had a significant impact with regard to my sentencing . . . ." *Id.*

Law

We review ineffective assistance of counsel claims *de novo.* *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011).

The Government did not submit an opposing affidavit to counter the appellant's post-trial declaration, contending instead that the appellant's declaration and the record do not contain evidence that overcomes the presumption of competence. Appellee's Brief of 29 Jan 2013 at 13-14 (citing *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008)). We agree.

In *United States v. Lewis,* 42 M.J. 1, 6 (C.A.A.F. 1995), the Court of Appeals for the Armed Forces (CAAF) ruled that, when an appellant raises allegations of ineffective assistance of counsel, trial defense counsel "should not be compelled to justify their actions until a court of competent jurisdiction reviews the allegation of ineffectiveness and the government response, examines the record, and determines that the allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence."

The CAAF again addressed this issue in *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000), and reaffirmed the procedure established in *Lewis*. In *Grigoruk*, the appellant filed a post-trial affidavit alleging that trial defense counsel was ineffective in three distinct aspects of the trial. The Government did not submit a responsive affidavit from trial defense counsel, and the Court of Criminal Appeals denied the claims of ineffective assistance. On appeal, the CAAF examined the three allegations, determined that two could be rejected without inquiry of the defense counsel, but determined that one

of the allegations "met the *Lewis* threshold for compelling defense counsel to explain his actions." *Id*. at 315. We adopt the *Grigoruk* court's analysis in our consideration of the two issues presented by the appellant.

We analyze ineffective assistance of counsel claims under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687 (1984) and presume competence absent evidence to the contrary. *United States v. Cronic,* 466 U.S. 648, 658 (1984); *see also United States v. Gilley,* 56 M.J. 113, 124 (C.A.A.F. 2001). An appellant must demonstrate both that his counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland,* 466 U.S. at 687. In the guilty plea context, the first part of the *Strickland* test remains the same -- whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys. *Bradley*, 71 M.J. at 16 (citing *Hill v. Lockhart*, 474 U.S. 52, 56—58 (1985)). The second prong, however, is modified to focus on whether the "ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. "(T)o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

To determine if the presumption of competence has been overcome, we turn to a three-pronged test:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> (2) If the allegations are true, did defense counsel'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?

Grigoruk, 52 M.J. at 315 *(*quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

We will not second-guess strategic or tactical trial decisions of defense counsel absent the appellant's showing 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) (quoting *United States v. Perez,* 64 M.J. 239, 243 (C.A.A.F. 2006)). The appellant bears the burden "to establish a factual foundation for a claim of ineffective representation." *Grigoruk*, 52 M.J. at 315.

Discussion

Applying the above principles, we find that the appellant has not met the *Lewis* threshold on either complaint.

We turn first to the appellant's assertions regarding a failure to suppress his first confession and all derivative evidence. Other than the appellant's unsworn declaration, the record reveals no evidence that the appellant ever made a confession to his chain of command prior to his interview with the NCIS agent. The record contains ample evidence of the appellant's statement to the NCIS agent: his signed rights waiver and his statement to the NCIS agent were admitted into evidence without objection from the TDC (Prosecution Exhibit 1), and the pretrial agreement specifically references that the appellant waived any motion to contest the admissibility of that confession to NCIS. Appellate Exhibit XXX at 5.

In contrast, the record is entirely silent on any earlier statement by the appellant to his chain of command. Although the appellant claims now that he felt forced to speak to his chain of command, and that he would not have later spoken to the NCIS agent had he not previously confessed, the appellant does not establish a factual foundation for his claim. He is uncertain as to even the approximate date of his first "confession," unclear as to the participants, and obfuscatory as to his rights advisement. The appellant has failed to carry his burden to establish even the first prong of the *Polk* test - that his allegations regarding the first statement are true.[2]

Turning to the appellant's second complaint about his counsel's performance, we hold that failure to cross-examine the victim during the sentencing hearing about her sexual relations

[2] Moreover, the appellant has fallen far short of the test articulated in *United States v. Jameson*: "(W)hen a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious." 65 M.J. 160, 163-64 (C.A.A.F. 2007) (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)).

with the appellant during a period of reconciliation is not ineffective representation in the absence of evidence showing what that cross-examination might reasonably have accomplished. *See Grigoruk*, 52 M.J. at 315.

The record reveals several "reasonable explanation(s) for counsel's actions" in failing to cross-examine the victim on this particular issue. *Polk*, 32 M.J. at 153. First, this MIL. R. EVID. 412 evidence was sought, litigated, and admitted primarily in anticipation of a contested trial with a defense of consent or mistake of fact as to consent. Moreover, the cross-examination of the victim that the appellant now complains about, dovetailed completely with the clear defense theory of its sentencing case. Throughout its cross-examination of the victim and the defense's presentation of its own evidence, the trial defense team had a cogent, coherent theme: this victim was starting a new chapter of her life; she and their son were doing well; they enjoyed the strong support of the appellant's mother; the appellant was repentant, remorseful and focused on his rehabilitation; and, the appellant sought minimal confinement so that he could again assume his duties as a father to his son. In light of the clear defense theme during the sentencing hearing, as articulated by the appellant himself during his unsworn testimony, we fail to see what would have been accomplished by cross-examining the victim on aspects of her sexual relationship with the appellant.

Conclusion

Having reviewed the allegation of ineffectiveness and the Government's response, and having examined the record, we find that the allegations and the record do not contain evidence sufficient to overcome the presumption of competence. The findings and the sentence as approved by the CA are affirmed.

Judge KELLY and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court