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

Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILSON M. SABERON
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200103
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 November 2011.
Military Judge: LtCol Chris Thielemann, USMC.
Convening Authority: Commanding General, 1st Marine Logistics Group, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol W.N. Pigott, USMC.
For Appellant: LT Kevin Quencer, JAGC, USN.
For Appellee: Maj William Kirby, USMC.

5 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.

PRICE, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of four specifications of violating a lawful general regulation and four specifications of larceny of greater than $500.00 in violation of Articles 92 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934 (2008).[1] The convening authority approved

[1] The military judge merged the four specifications of fraternization in violation of a lawful general regulation with the corresponding larceny specifications for sentencing purposes.

the adjudged sentence of confinement for a period of 24 months, reduction to pay grade E-1, and a bad-conduct discharge.[2]

The appellant raises two assignments of error: first, that the military judge abused his discretion by denying the appellant's request for a one-month continuance to allow him to assert his constitutional right to representation by civilian counsel of choice; and second, that military defense counsel provided ineffective assistance of counsel.[3]

After carefully considering the record of trial and the submissions of the parties, we are convinced 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 occurred. Arts. 59(a) and 66(c), UCMJ.

I. Background

The charges arise from the appellant's borrowing of a total of $13,500.00 from four subordinate Marines over a six-month period. In each instance the appellant approached a subordinate Marine that he knew well and solicited cash loans ostensibly to assist him in resolution of various personal difficulties. Also in each instance, after the junior Marines agreed to loan the appellant money, he instructed them on how to obtain the funds, requested the "loans" in cash, and arranged for transfer of the funds in private locations. He also promised repayment under a variety of terms and claimed an ability to pay off each "loan" upon receipt of a large income tax refund.

The appellant made several payments on three of the four "loans," but then stopped making payments. He then followed a similar pattern by avoiding contact with each Marine who had loaned him funds and, when confronted, persisted in his promise to make full payment upon receipt of the income tax refund. Word spread among the junior Marines in the appellant's command that he had solicited a number of subordinate Marines for "loans"; that several Marines had "loaned" him money; and that

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[2] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

[3] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

he was approaching the end of his active obligated service (EAS).

After repeated, unsuccessful efforts by the junior Marines to collect payment from the appellant in accordance with the terms of their loans, they filed a civil suit against the appellant. During the subsequent civil proceedings, the appellant denied requesting or accepting loans from those subordinate Marines.

At trial, the Government presented overwhelming evidence of the "loans" and of the appellant's larceny of the subordinate Marines' money. The evidence included the victims' testimony, bank records, loan agreements, phone records, texts, and the appellant's statements to the victims and others. The defense challenged the Government's evidence and extensively cross-examined the Government witnesses. The apparent defense theme was that the appellant intended to pay back any money that he had borrowed, but was unable to do so due to his poor financial management. The appellant presented no evidence on the merits.

There is a lengthy procedural history of the charged misconduct supported by matters attached to the record. Charges were originally preferred and referred to a special court-martial in September 2010, and then were withdrawn in October 2010. Record at 2-3, 41. Following an Article 32, UCMJ, investigation, those charges were referred to a general court-martial in December 2010, withdrawn from that court and referred to a special court-martial in April 2011 pursuant to a pretrial agreement (PTA), and then withdrawn and dismissed in June 2011, apparently after the accused "fired his detailed defense counsel and [individual military counsel on] the date he was supposed to render payment [in accordance with the PTA]." *Id*. at 3, 43-45, 79. In June 2011, identical charges were preferred and referred to a general court-martial, but those charges included four specifications under Article 134, UCMJ, which did not allege the terminal element of that offense and were withdrawn and dismissed on 18 August 2011 following the Court of Appeals for the Armed Forces (CAAF) decision in *United States v. Fosler*, 70 M.J. 225, 233 (C.A.A.F. 2011) (stating that in a prosecution under Article 134, UCMJ, "an accused must be notified which of the three clauses he must defend against . . . [therefore] the terminal element must be set forth in the charge and specification.").

Also on 18 August 2011, the subject charges were referred to a general court-martial. These charges and underlying specifications are identical to those withdrawn and dismissed

that same date, with the exception of the addition of terminal elements in the specifications alleged under Article 134. The appellant was arraigned on 25 August 2011 and indicated that he desired to be represented by both his detailed defense counsel and individual military counsel. Record at 7. The appellant also indicated that he was "speaking with a civilian counsel" but had not retained civilian counsel. *Id*. The parties had previously agreed to trial dates of 7-13 September 2011 on the essentially identical charges withdrawn and dismissed on 18 August 2011. The parties agreed to proceed to trial on the current charges on 31 October – 4 November 2011. Appellate Exhibit VII.

The court did not conduct an Article 39(a), UCMJ, session scheduled for 6 October 2011, but addressed pending matters in a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), conference. Included among those matters was a defense requested continuance of trial dates from 31 October – 4 November 2011 until 15-18 November 2011 and then a defense request to accelerate the trial dates by one day to 14 November 2011. Record at 39. In addition, the military judge and counsel conducted an R.C.M. 802 conference on 13 November 2011 to discuss trial matters.

On 14 November 2011, the date trial was scheduled to begin, the military judge was informed of the appellant's desire to retain a civilian attorney, Mr. Phillips. *Id*. at 34-35. The military judge then indicated that the appellant would need to show good cause why a continuance should be granted "to allow Mr. Phillips to join the case." *Id*. at 35.

In response to questions by the military judge, the appellant asserted that he wanted to be represented by Mr. Phillips, and confirmed that he had been advised of counsel rights during the 25 August 2011 Article 39(a) session, and at an earlier session with respect to charges that had been withdrawn. *Id*. at 36-37.

Trial defense counsel indicated that the appellant had received funds to hire a civilian attorney early on 14 November 2011. He then "move[d] to continue the case beyond 12 December [2011]" to allow the appellant to "complete the retention of his desired civilian counsel and allow that counsel the opportunity to prepare and become available to try the case." *Id*. at 38. He also indicated he was "not sure [that the appellant] had 100-percent confidence in his detailed defense counsel and individual military counsel, which is why he has been so

insistent on hiring civilian counsel." *Id*. at 51. The military judge discussed the appellant's rights to assistance of counsel with the trial defense team and provided the appellant an opportunity to discuss taking the stand "for the limited purpose of this [matter]." *Id*. at 51-53, 73-76. Following an almost 30 minute recess defense counsel informed the military judge that the appellant would not be taking the stand. *Id*. at 76-77.

The prospective civilian counsel, Mr. Phillips, testified telephonically that the appellant contacted him during the preceding week, and that they had discussed financial arrangements two days prior to the scheduled trial date. *Id*. at 60. He testified that he had not been retained by the appellant pending the outcome of the court hearing. *Id*. at 56. He acknowledged that he had not filed a notice of appearance and indicated that the appellant "told me that he wired the money" on the morning of 14 November 2011. *Id*. He also testified that he had "been in court all morning" and had not confirmed receipt of the appellant's payment. *Id*. at 58. He then discussed his busy trial schedule, including three trials docketed over the ensuing three weeks, and commented that he "would be available to represent [the appellant] from December 12 on." *Id*. at 55, 59. Mr. Phillips testified that he rarely requests continuances if he gets the trial date requested. *Id*. at 59.

Additional facts necessary to resolve the assigned errors are included herein.

II. Continuance Request to Retain Civilian Counsel

The appellant asserts that the military judge abused his discretion when he denied the appellant's request for a continuance to secure civilian counsel. We disagree.

A. The Law

"A military judge's decision to grant or deny a continuance must be tested for an abuse of discretion even where failure to grant a continuance would deny an accused the right to a civilian counsel." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (citing *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986). "An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice[.]" *Id.* at 358 (quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)) (internal quotation marks omitted).

At trial, it was the appellant's burden, by a preponderance of the evidence, to show "reasonable cause" for the continuance request. Art. 40, UCMJ; *United States v. Allen*, 31 M.J. 572, 620 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). At stake for the appellant was his Constitutional right to counsel of choice, which improperly denied "is not subject to harmless-error-analysis." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). Determining whether that right to counsel of choice was infringed, however, can amount to a balancing of interests, including the needs of the court calendar, and that trial courts have "wide latitude" to do so. *Id*. Though "the right to counsel of choice is not absolute," *Thomas,* 22 M.J. at 59, "'[i]t ought to be an extremely unusual case when a man is forced to forego civilian counsel and go to trial with assigned military counsel rejected by him.'" *Miller*, 47 M.J. at 358 (quoting *United States v. Kinard*, 45 C.M.R. 74, 77 (C.M.A. 1972)).

In *Miller*, the court stated that "[w]here a military judge denies a continuance request made for the purpose of obtaining civilian counsel, prejudice to the accused is likely." 47 M.J. at 359. The overarching question is whether the accused was "accorded the opportunity to secure counsel of his choice." *Id*. at 358. "The factors used to determine whether a military judge abused his or her discretion by denying a continuance include 'surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.'" *Id*. (quoting Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* § 18-32.00 at 704 (1991).

B. Discussion

The military judge cited to *Miller* and applied many of the *Miller* factors in his ruling. Record at 81-85. We have reviewed his findings of fact, and finding no clear error, adopt them as our own.

1. Surprise, timeliness and prior notice. We agree with the military judge's decision to weigh surprise and timeliness against the appellant. *See United States v. Oliver*, 56 M.J. 695, 701-02 (N.M.Ct.Crim.App. 2001) (appellant could not claim surprise where the scheduled trial date was known well in

advance and the motion for continuance was untimely filed the same morning trial was to start), *aff'd*, 57 M.J. 170 (C.A.A.F. 2002).

The appellant's untimely request for a continuance to obtain a civilian defense counsel on the morning trial was scheduled to commence surprised the court and Government counsel. The appellant's case had been docketed for trial for more than 2 1/2 months including a defense requested continuance of two weeks. In addition, the appellant communicated with Mr. Phillips several days prior to the scheduled trial date and apparently decided to retain him two days prior to trial, but did not notify the court until the morning trial was scheduled to begin. The military judge also noted the lengthy procedural history of the appellant's case, during which he was advised of counsel rights on at least three separate occasions. The record also reveals that the appellant understood and exercised counsel rights with respect to detailed defense counsel and individual military counsel (IMC) on two separate occasions, apparently discharging one detailed defense counsel and one IMC for reasons not disclosed on the record. Record at 7-8, 44, 48, 69, 76, 82.

In the appellant's favor, he expressed his interest in hiring a civilian attorney as early as June 2011, when he identified two other potential civilian counsel, and again in August 2011, when he indicated prior to arraignment on the subject charges that he was "still speaking with a civilian counsel as of this time," but he had "not retained him." *Id*. at 7, 62. However, on balance, surprise and timeliness weigh against the appellant.

2. Availability of Witnesses. The military judge called this "one of the more compelling factors in this case," because the Government would be required to rearrange travel for nine of its own witnesses and four defense witnesses who had been produced to testify at the appellant's trial. *Id*. at 82-83. This included the four victims who were no longer in the Marine Corps including three full-time students with final examinations scheduled during the earliest dates proposed by the defense. *Id*. at 79, 82-83. A fourth witness earned hourly wages and would have to miss more work to return in the future, although the Government indicated that he would be willing to make the trip. *Id*. at 78, 83.

The military judge appeared to weigh this factor against the appellant as much or more out of concern for the victims than because of the administrative inconvenience to the

Government. *Id*. at 83. This approach is consistent with *dicta* in a Supreme Court decision, where the Court also showed concern for the effect of continuances on the victims:

> [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities.

Morris v. Slappy, 461 U.S. 1, 14 (1983).

3. Length of the continuance. The military judge was somewhat equivocal about this factor. He noted that a continuance of 30 days "does not seem to be unreasonable and seems appropriate in almost every case." Record at 83. However, he appeared skeptical that the civilian defense counsel could be prepared for trial in 30 days, as Mr. Phillips had not yet been retained, conducted an investigation, or made other preparations for trial. The military judge's skepticism as to the length of any delay was supported by Mr. Phillips' trial schedule, which included three scheduled trials over the succeeding three-week period. Furthermore, the Government's witnesses would be taking final exams during the discussed timeframe, which would likely result in further delay. Record at 80.

There are references in the record to multiple defense-requested continuances at earlier stages of the related proceedings, but the military judge only explicitly named one prior continuance (from 31 October to 14 November) as a factor for his consideration. *Id*. at 83-84. In *Oliver*, the military judge approved two separate two-week continuances (for a total of 30 days) before denying a third. 56 M.J. at 700-01.

Given the prior continuances, the appellant's knowledge of his rights, the last-minute nature of the request, and the ambiguous wording of the defense request to "move to continue the case beyond 12 December [2011]," the military judge's refusal to grant an additional continuance does not appear to be an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Slappy*, 461 U.S. at 11-12 (citation and internal quotation marks omitted).

4. Prejudice to the opponent. The military judge didn't explicitly consider this factor, but did express concern about the effect on the victims, particularly those who would be taking final exams in 30 days' time. He also considered an independent right of the prosecution "to effective . . .

administration of justice," although it is unclear what weight (if any) this "right" had on his decision. Record at 83.

5. Good faith and reasonable diligence of moving party. The military judge did not analyze good faith separately from reasonable diligence, but he asked the trial counsel about "the perception that this may be gamesmanship or manipulation of the system." *Id*. at 79. In response, the trial counsel observed that the appellant had previously fired two military defense counsel immediately before a deadline to compensate the victims that was specified in a pretrial agreement, and now sought to retain civilian defense counsel immediately before trial. *Id*. This explanation was unrebutted.

The military judge paid particular attention to the appellant's financial diligence, addressing the defense's main argument that the delay was attributable to the appellant's lack of resources to retain counsel and the recent charity of others. He found that argument unsupported by the evidence. He noted that it was the appellant's burden to prove his claim of hardship by showing the particulars of his financial situation and, what efforts, if any, he made to obtain funds from other sources. *Id*. at 84. The appellant put on no evidence to prove his claim of hardship and declined to testify for the limited purpose of the motion, notwithstanding the military judge's direct query to counsel regarding whether the appellant would do so. *Id*. at 76-77. The only relevant evidence offered by the defense came from Mr. Phillips, who testified that the appellant had informed him that he had the money, but Mr. Phillips could not confirm whether he had actually received payment from the appellant. *Id*. at 58, 60. Thus, it was unclear whether the appellant had truly been diligent in his efforts to obtain the money by the date of trial. Not even the appellant's prospective civilian attorney would confirm this critical fact. *Id*. at 71. The military judge also found the absence of a representation agreement and Mr. Phillips' failure to file a notice of appearance compelling.

6. Possible impact on verdict. The military judge did not explicitly mention this factor, but it would appear to weigh against the appellant. The military judge noted that the appellant was represented by two counsel who had strong reputations within the circuit, and there was nothing about Mr. Phillips' resume that suggested he was significantly more qualified. *Id*. at 84-85. Mr. Phillips was also unprepared on the date of trial, unlike the two uniformed counsel, who proffered that they were ready that day. *Id.* at 53, 68. *See also Slappy*, 461 U.S. at 12 ("In the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial, it was far from an abuse of discretion to deny a continuance").

7. Nature of the evidence involved and availability of substitute evidence. The military judge did not consider these factors to be applicable; we agree. *See Miller,* 47 M.J. at 358.

C. Conclusion

The military judge identified and applied the appropriate legal framework in his decision making process, the *Miller* factors, in ruling on the appellant's motion for a continuance. Record at 81-85. The record reflects no "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay . . . ." *See Slappy*, 461 U.S. at 11-12 (citation and internal quotation marks omitted). Moreover, the record reflects that the appellant was "accorded the opportunity to secure counsel of his choice." *Miller,* 47 M.J. at 358. That the appellant failed to secure that counsel of choice in a timely manner is relevant to the military judge's "wide latitude" in the balancing of interests, but it is not dispositive. *Gonzalez-Lopez*, 548 U.S. at 151. Considering the *Miller* factors and the entire record, we conclude the military judge did not abuse his discretion in denying the defense motion to continue the case from 14 November 2011 until "on or about 12 December or thereafter." Record at 85; *Miller,* 47 M.J. at 358.

III. Ineffective Assistance of Counsel

The appellant asserts that trial defense counsel were ineffective for three reasons: (1) by failing to inform the military judge that he was seeking to raise funds to pay for a civilian defense counsel; (2) by failing to present any case in defense and failing to admit exculpatory documents; and (3) by failing to follow his direction to request clemency from the convening authority in the form of deferment and waiver of forfeitures for his family.

We analyze claims of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, "an appellant must demonstrate both (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). In reviewing for ineffectiveness, the court "'looks at the questions of deficient performance and prejudice *de novo*.'" *United States v. Datavs*,

71 M.J. 420 (C.A.A.F. 2012) (quoting *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

When assessing *Strickland's* first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. To establish Strickland's second prong, an appellant must demonstrate "a reasonable probability that, but for counsel's [deficient performance], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." *Id.* at 694-95.

After careful consideration of the record of trial, the parties' pleadings, the appellant's affidavit, and the affidavits of the appellant's individual military counsel and detailed defense counsel, we conclude that the appellant's claims of ineffective assistance of counsel are without merit.

First, the appellant's claim that trial defense counsel failed to inform the military judge that he was seeking to raise funds to pay for a civilian defense counsel is undisputed. However, the record reflects that the appellant informed the military judge that he was considering, but had not retained civilian counsel more than 2 1/2 months prior to trial. The record also indicates that the appellant's interest in retaining civilian counsel persisted, and that the appellant did not inform his military defense counsel or the Court that he had obtained funding necessary to retain a civilian defense counsel until the morning trial was scheduled to commence. Record at 7-8, 34, 36-38; Affidavit of Captain C. Henderson, USMC; Affidavit of Captain M. Harris, USMC. Also undisputed in the record, or by the appellant's affidavit, is that he was financially incapable of paying a civilian attorney's fee prior to the date trial was scheduled to begin. Record at 32, 40; Affidavit of Captain C. Henderson, USMC; Affidavit of Captain M. Harris, USMC.

Although it may have been prudent for trial defense counsel to inform the military judge of the appellant's ongoing interest in retaining civilian defense counsel, the appellant has failed to establish that failure to do so was deficient, and that this deficiency resulted in prejudice. *See Strickland*, 466 U.S. at 687. The appellant has not demonstrated that absent this alleged deficiency that either the military judge's ruling on

the continuance or the outcome of the trial would have been different. Given the alleged last minute materialization of funds to retain a civilian counsel and the appellant's untimely notice of his desire to retain Mr. Phillips, we conclude the military judge's application of the *Miller* factors would have remained essentially unchanged.

Second, we find the appellant's assertions that counsel's failure to present a defense and to admit exculpatory documents unsupported by the record and insufficient to establish that his "counsels' performance was deficient." *Strickland*, 466 U.S. at 687. The appellant does not identify a defense that should or could have been presented, nor does he explicitly identify any exculpatory documents or provide evidence of same that should have been admitted at trial. Although in an affidavit he asserts that his military defense counsel failed to show that he was experiencing financial hardships, citing a credit report that showed his eviction and car repossession as evidence of those financial hardships, the appellant has provided insufficient evidence to establish either *Strickland* prong.

In fact, at trial the appellant's financial difficulties were central to the defense theory of the case that he intended to repay any loans, made efforts to repay those loans, had personal relationships with the Marines that loaned him money and that each was generally aware of his financial difficulties at the time of the loans, and that he was unable to repay the loans due to financial challenges. This theory was apparent and consistent from opening statements to cross-examination of the Government's witnesses to closing argument.

Under these circumstances, the appellant's bare assertions, unsupported by evidence, are insufficient to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" or to establish prejudice under *Strickland*. 466 U.S. at 689, 694. Assuming without deciding that the appellant has established deficient performance by counsel, he has failed to demonstrate "a reasonable probability that, but for counsel's [deficient performance], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Finally, assuming that the appellant's assertion that counsel failed to follow his direction to request clemency on forfeitures is accurate, he has failed to establish prejudice. *Id*. The appellant was beyond his EAS and therefore ineligible to receive pay or allowances while confined. Thus, the

appellant could receive no practical benefit of any potential deferment or waiver of automatic forfeitures by the convening authority.

IV. Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court