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

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

UNITED STATES OF AMERICA

v.

JAMES C. WILKERSON
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201200438
SPECIAL COURT-MARTIAL

Sentence Adjudged: 2 July 2012.
Military Judge: LtCol Gregory Simmons, USMC.
Convening Authority: Commanding Officer, Marine Aviation Logistics Squadron 39, Marine Aircraft Group 39, Third Marine Aircraft Wing, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol K.C. Harris, USMC.
For Appellant: LCDR John Zelinka, JAGC, USN.
For Appellee: Maj Paul M. Ervasti, USMC; LT Ian MacLean, JAGC, USN.

30 April 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.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his plea, of one specification 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 three months, forfeiture of $994.00 pay per month for three months, and a bad-

conduct discharge. Pursuant to a pretrial agreement, the convening authority disapproved confinement in excess of time served, and approved the remaining sentence as adjudged.

After careful consideration of the record, the appellant's assignment of error that his trial defense counsel was ineffective during sentencing, the Government's response, and the affidavit filed by the trial defense counsel,[1] 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

On 16 March 2013, the appellant left his unit, Marine Aviation Logistics Squadron 39, located at Camp Pendleton, California, without authorization. The appellant remained on unauthorized absence (UA) for about four weeks; after returning to the base he stayed for a week in a barracks different from that to which he was assigned. The appellant's UA period ended on 20 April 2013 when he was discovered living in this other barracks.

During the sentencing proceedings, the Government sought to admit documentary evidence in aggravation. Prosecution Exhibit 1 contained the appellant's service record, which included the appellant's counseling chits for cheating on a physical fitness test and for receiving a civilian conviction for driving under the influence of alcohol or drugs. PE 2 contained the appellant's summary court-martial conviction for using spice and marijuana. The defense counsel objected to both documents on the basis of hearsay, so the trial counsel requested a recess to locate the proper foundational witness in an attempt to admit the documents into evidence. The record reveals that the recess lasted 25 minutes and at the end of it the defense counsel withdrew his hearsay objection for "strategic reasons to benefit" the appellant.[2] While the Government had not yet produced the necessary foundational witness during the short recess, the defense counsel informed the military judge that the Government would be able to produce the witness within an hour

[1] The appellant did not file an affidavit in support of his ineffective assistance of counsel claim. On 13 March 2013, this Court ordered the Government to secure an affidavit from the appellant's trial defense counsel in response to the appellant's allegations of ineffective assistance of counsel.

[2] Record at 36.

in order to admit the documents.[3] The military judge questioned trial defense counsel about the withdrawn objection. The trial defense counsel informed the military judge that he did not have actual concerns about the authenticity of PE 1 and 2, and did not believe the appellant's rights would be violated by stipulating to the authenticity of the documents.[4] The military judge thereafter admitted both exhibits. The Government then called two witnesses to discuss the appellant's behavior on base while he was UA.

The military judge informed the appellant as to his rights to present extenuation and mitigation evidence during the sentencing proceedings,[5] yet the defense called no witnesses and presented no evidence in sentencing. After the trial defense counsel indicated that the defense had no evidence to present in sentencing, the military judge confirmed with the appellant that he understood he was able to call witnesses on his own behalf and could provide a statement to the court (sworn, unsworn or in writing). The appellant indicated to the military judge that he made a conscious decision not to present evidence and that he did not desire to make a statement.

Discussion

The appellant claims he received ineffective assistance of counsel during sentencing because his trial defense counsel failed to present extenuation and mitigation evidence and failed to maintain his objection to the Government's documentary aggravation evidence. We conclude that the appellant's claim of ineffective assistance of counsel is without merit.

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). The appellant bears 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

[3] *Id.*

[4] *Id.* at 36-37.

[5] *Id.* at 34.

presumption. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). The *Strickland* test applies to all phases of the court-martial, including guilty plea and sentencing proceedings. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). In the guilty plea context, the first prong of the *Strickland* test remains the same – whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys. *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012). The second prong is modified, however, to focus on whether the "ineffective performance affected the outcome of the plea process." *Id*. (internal quotation marks and citation omitted). In this regard, the appellant "must also 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." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (internal quotation marks and citations omitted).

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, under the first prong of *Strickland*, we apply a three-part test:

> (1) Are appellant's allegations true, and 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 the lawyer was ineffective, is there a reasonable probability that, but for the lawyer's error, there would have been a different result?

United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000).

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. The trial defense counsel, in response to an order from this court, submitted a detailed affidavit explaining both the withdrawn objection and the lack of extenuation and mitigation

evidence. The factual assertions in the affidavit provide a "reasonable explanation for counsel's actions," *Grigoruk*, 52 M.J. at 315, which weighs against the appellant overcoming the presumption of competence. With regard to the withdrawn hearsay objection, trial defense counsel knew it would be a "simple fix" for the Government to produce a witness to admit the documents and it would take the witness roughly 45 minutes to arrive at court.[6] Under the terms of the pretrial agreement, the appellant was going to be released from confinement at the conclusion of the court proceedings, and the appellant's main concern at that time was getting out of the brig.[7] The trial defense counsel interviewed the proponent of the evidence, and after ensuring that the witness would be able to lay the proper foundation, trial defense counsel consulted with the appellant on the issue. The appellant agreed that withdrawing the objection and avoiding a 45-minute delay was the best course of action in order to hasten his release from confinement.[8]

With regard to the lack of extenuating and mitigating evidence, trial defense counsel indicated that throughout his representation of the appellant he repeatedly advised the appellant of the right to present evidence and requested that he provide information on possible sentencing witnesses.[9] The appellant failed to provide any information on character witnesses, and the trial defense counsel's independent investigation failed to turn up any extenuation or mitigation witnesses.[10] Trial defense counsel also stressed to the appellant the importance of a sworn or unsworn statement. The appellant also failed to give his counsel any input regarding a statement, and indicated he was not interested in presenting a statement to the court.[11] It is apparent from the trial defense counsel's affidavit, the appellant was mainly interested in getting out of the brig and being discharged from the Marine Corps, and thus showed no interest in aiding his trial defense counsel for sentencing. Additionally, not only did his counsel advise the appellant of the right to make a statement and

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[6] Affidavit of Captain CC, USMC, 25 Mar 2013 at 1-2.

[7] *Id.* at 2.

[8] *Id.* at 3.

[9] *Id.* at 4.

[10] *Id.* at 4-5.

[11] *Id.* at 5-6.

present evidence, so too did the military judge, and the appellant acknowledged that he understood those rights.

The factual assertions in trial defense counsel's affidavit directly contradict the appellant's current claim of ineffective assistance of counsel and give a reasonable explanation for both actions. Furthermore, the appellant has not submitted an affidavit or any other evidence to sustain his claim, even though he has the "burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citation omitted). We find that the appellant has not met his burden to show the presumption of competence was overcome, and therefore does not 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 provided no indication that possible extenuation and mitigation evidence even existed, let alone that it was not investigated or submitted at sentencing. Absent a showing of relevant evidence, the appellant cannot claim prejudice from the exclusion of non-existent information, and the appellant basically concedes this in his brief by stating, "in the absence of the Appellant providing an unsworn statement, the Court can never be aware if there is possible mitigation and/or extenuating ("E&M") circumstances . . . ." Appellant's Brief of 27 Dec 2012 at 7. Furthermore, the appellant has made no showing that the hearsay objection would have been effective if it had not been withdrawn. The appellant has failed to demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors," either "the result of the proceeding would have been different," *Gutierrez*, 66 M.J. at 331, or "that he would not have pleaded guilty and would have insisted on going to trial." *Tippit*, 65 M.J. at 76.

Finally, the Court of Appeals for the Armed Forces has ruled that a trial defense counsel violates no ethical or legal issues if he presents no sentencing evidence at the behest of the appellant. *United States v. Blunk*, 37 C.M.R. 422, 424 (C.M.A. 1967). Accordingly, the question before us is: Did the appellant decide for himself not to present matters in sentencing? We answer that question in the affirmative.

We find that the appellant has not met his burden to show ineffective assistance of counsel.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court