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

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BASSA CISSE
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200900072
GENERAL COURT-MARTIAL

Sentence Adjudged: 01 October 2008.
Military Judge: LtCol David Oliver, USMC.
Convening Authority: Commanding General, 1st Marine Aircraft Wing, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol J.R. Woodworth, USMC.
For Appellant: LT Gregory Manz, JAGC, USN.
For Appellee: Capt Robert Eckert, Jr., USMC.

30 November 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 U.S.C. § 919.[1] The appellant was

[1] The appellant was charged with unpremeditated murder in violation of Article 118, UCMJ, pleaded guilty to the lesser included offense of negligent homicide, and was convicted of involuntary manslaughter. *See* Arts. 118, 119, and 134, UCMJ.

sentenced to eight years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings and the sentence as adjudged, but suspended confinement in excess of seven years for a period of 68 months. He also waived automatic forfeitures and suspended adjudged forfeitures for six months.

The appellant raises four assignments of error: (1) that the sentence is inappropriately severe; (2) that trial defense counsel was ineffective by instructing him to admit that he believed his daughter's death was the natural and probable consequence of his action; (3) that trial defense counsel was ineffective by failing to present certain evidence during sentencing, and (4) that the military judge erred by allowing the members to read transcripts of his videotaped statements to the Naval Criminal Investigative Service as the videos were played in court.[2]

We have examined the record of trial, the appellant's assignments of error, the Government's answer, and the affidavits submitted by 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.

Background

The appellant was convicted of involuntary manslaughter in the death of his six-year-old daughter, [NC]. She was the appellant's daughter from a premarital relationship, and had been raised in the Ivory Coast with French as her primary language. She joined the appellant, his wife and two children in Okinawa approximately six weeks prior to her death. Record at 418-20. She was unable to perform at grade level, primarily due to language difficulties, and was transferred from first grade to kindergarten. The appellant, previously a teacher in the Ivory Coast, became heavily involved in [NC's] education after learning that she was experiencing academic difficulties. *Id*. at 384, 403-04, 425-26. He was frustrated by her academic progress, and, if he thought she was being disobedient, would sometimes discipline her using spanks or slaps. *Id*. at 150.

On 21 October 2007, the appellant watched [NC] in their assigned quarters, while his wife braided a customer's hair in an adjacent bedroom. He questioned [NC] about why she had defecated while fully clothed the evening before; during the

[2] Assignments of error II through IV were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

conversation she cried and defecated again. Prosecution Exhibits 3, 4. The appellant directed [NC] to clean herself and her clothing in the bathroom. A short while later he entered the bathroom. Upset by a perceived lack of effort, the appellant slapped her face with the back of his hand. *Id.* After she cleaned her clothing, he directed her to dry her previously soiled clothing on the balcony. Again upset by a perceived lack of effort, the appellant admitted hitting [NC], knocking her to the concrete deck of the balcony and stepping on her as he reentered the quarters. *Id.*

[NC] lost consciousness a short while later, lost a large quantity of blood, and showed no signs of life. The appellant attempted to revive her, but she was subsequently pronounced dead at the Naval hospital. At trial, a forensic pathologist testified that [NC] died from a "combination of head injuries and blunt force injuries of the torso." Record at 299; PE 6.

Sentence Appropriateness

The appellant asserts that a sentence which includes eight years confinement when the maximum authorized punishment was 10 years "is inappropriately severe in light of [his] otherwise strong character," "the overwhelming amount of mitigation evidence presented by [his] family and friends, the fact that he was suffering from PTSD at the time of the incident, and his demonstrated success at rehabilitation through therapy." Appellant's Brief of 13 Apr 2009 at 8-9.

A court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964). Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

The appellant was convicted of killing, through culpable negligence, his six-year-old daughter. At trial, he admitted hitting "her with a tremendous amount of force" that caused her to fall down and hit her head on the concrete balcony of their quarters, and then "stepp[ing] on her back" after being angered by her soiling of her clothes and failure to clean them in the

manner he prescribed. Record at 139-47. In an unsworn statement to the members during the presentencing hearing, he acknowledged that [NC] died as a result of a physical beating he administered prompted by his frustration with her soiling of her clothing, because "[he] was unable to control [his] emotions." *Id.* at 551.

The forensic pathologist was unable to determine which specific injuries caused [NC]'s death as the injuries sustained to her head and torso "were both probable life threatening injuries." *Id.* at 299. Her injuries included a fractured skull, multiple brain injuries, a fractured rib, multiple liver lacerations and laceration of the urinary bladder. *Id.* at 277-300, 302-03; PE 6 at 2; PE 7 at 4-13. The forensic pathologist also testified that, "an accidental stepping on somebody [was] unlikely to have caused these type[s] of injuries. If somebody were to put their entire weight in a forceful manner very quickly on somebody, that's certainly possible." Record at 297.

At trial, the appellant presented a comprehensive case in extenuation and mitigation, including evidence of post-traumatic stress disorder and partial lack of mental responsibility, multiple affidavits and letters reflecting his performance in Iraq, good military character and other pertinent character traits, commitment to family, and portions of his service record. The crux of the defense sentencing evidence was the appellant's remorse, cooperation with investigators, impact of two Iraq deployments including at least one life-threatening experience on his mental well-being, rehabilitative potential, familial commitments, and impact of lengthy confinement on his family. The appellant also provided an unsworn statement.

After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395; *Snelling* 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Ineffective Assistance of Counsel

The appellant asserts that trial defense counsel was ineffective for two reasons: (1) by instructing him to admit that he believed his daughter's death was the natural and

probable consequence of his actions, and (2) by failing to present certain evidence during presentencing.

"This Court analyzes claims of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984) . . . and considers (1) whether counsel's performance fell below an objective standard of reasonableness, and (2) if so, whether, but for the deficiency, the result would have been different." *United States v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008)(citations omitted). The appellant has the burden of demonstrating both deficient performance and prejudice. *Id.*

To demonstrate prejudice, the appellant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). The United States Court of Appeals for the Armed Forces developed the following three-pronged test to determine whether an appellant has overcome the presumption of competence:

> (1) Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case? (2) If they are true, did the level of advocacy "fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers"? (3) If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

United States v. Christian, 63 M.J. 205, 209 (C.A.A.F. 2006)(quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). We have for consideration the record of trial, the appellant's brief, the appellant's affidavit, and the affidavits of the appellant's individual military defense counsel and civilian defense counsel. Since this is a post-trial claim based on conflicting affidavits, we will apply the principles enunciated in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

A. Improperly advised the appellant to admit death was the natural and probable consequence of his action

In his post-trial affidavit, the appellant asserts that his trial defense counsel "had me answer a [providence] question

against my wishes . . . 'Do you believe that [NC]'s death, not just the injuries, but her death was a natural and probable cause [sic] outcome of [your] acts?' . . . I did not want to answer that question because it suggested that I knew that my daughter's death would be the result of my actions. Although I admit I acted negligently, I never intended my daughter's death nor did I know her death would necessarily occur." Appellant's Affidavit of 10 Jul 2009. The appellant asserts that this alleged deficiency resulted in a harsher sentence. *Id*.

The individual military counsel and civilian defense counsel stated that the appellant was fully prepared for the providence inquiry, and answered truthfully. Affidavit of Lieutenant Colonel David M. Jones, USMC of 17 Jul 2009 at 3-7; Affidavit of Neal A. Puckett of 22 Jul 2009.

The following colloquy, which occurred during the military judge's inquiry into the basis for the appellant's plea of guilty negligent homicide included:

> MJ: Do you believe that her death, not just the injuries, but her death was a natural and probable cause [sic] outcome of those acts?
>
> ACC: Yes, sir.

Record at 147.

Applying the first *Ginn* factor and assuming the facts alleged in the appellant's affidavit to be true, his affidavit alleges no error that would result in relief. *Ginn*, 47 M.J. at 248. The appellant neither alleges that his response to the question in issue was untruthful, nor that counsel advised him to answer untruthfully. Instead he notes that he "did not want to answer the question because it suggested that [he] knew that [her] death would be the result of [his] actions." Appellant's Affidavit at 2.

Contrary to the inference the appellant chooses to draw, we conclude that his affirmative response to the military judge's question neither indicates that he intended to kill [NC], nor that he believed her death would occur. Moreover, this was in response to the military judge's providency inquiry into his plea of guilty to negligent homicide, an offense requiring neither knowledge, nor intent. Also of note, the appellant was convicted of involuntary manslaughter, which includes neither an intent nor knowledge element. He was acquitted of the two offenses which include specific intent or knowledge as an

element; (1) unpremeditated murder (intent to kill or inflict great bodily harm), and (2) murder while engaging in act inherently dangerous to other (intentional act - knew that death or great bodily harm was a probable consequence).

Assuming without deciding the appellant raises an error that could result in relief, we will analyze this issue under the fifth Ginn factor. *Ginn*, 47 M.J. at 248. After review of the entire record, including the appellant's admissions made during the plea inquiry at trial, and in the absence of any facts that rationally explain why he would have made such an admission at trial if untrue, we conclude that further fact-finding is not required and reject this claim of ineffective assistance of counsel.

B. Failed to present evidence during presentencing

In his post-trial affidavit, the appellant asserts three perceived deficiencies in his defense team's performance during presentencing including: (1) failure to call two additional school teachers who would have testified as to his daughter's happiness and his dedication; (2) failure to call his wife's hair-braiding customer, who was in another room in his quarters the morning of his daughter's death to testify that [NC] was happy that morning, that the incident resulting in her death occurred suddenly, and countering the Government's argument that he beat his daughter for 90 minutes; and (3) failure to submit family photographs that demonstrated he was a dedicated family man.

Turning to the appellant's first and third assertions, the individual military counsel and civilian defense counsel state that they interviewed a counselor and first grade teacher and that their testimony supported the Government's theory regarding the appellant's frustration with his daughter's challenges learning English, and that any potential testimony was cumulative with that of Ms. Russell, [NC]'s kindergarten teacher. Affidavit of Lieutenant Colonel David M. Jones, USMC at 3-7; Affidavit of Neal A. Puckett. In addition, they decided not to admit family photographs, because [NC] was not present in any of the pictures, and because the appellant was concerned about alienating the panel members, as he and his family were dressed in traditional Muslim attire.

We note, Ms. Russell testified, as a defense witness, that [NC] was "happy," "focused," and "a delightful student," and that the appellant clearly loved her and was interested in her academic success. Record at 405-08. The appellant's wife also

testified regarding his devotion to, and love for [NC], and the appellant's unsworn statement conveyed the depth of his emotion and remorse. *Id*. at 549-50; 551-52.

Applying the first two *Ginn* factors, we conclude that the appellant's assertions that the period of confinement awarded would have been reduced is speculative, and may be denied on that basis alone. *Ginn*, 47 M.J. at 248. However, given the unrebutted testimony of Ms. Russell, and Mrs. Cisse, the appellant's unsworn statement, and cumulative nature of the proffered testimony, and even assuming any factual discrepancy were resolved in the appellant's favor, we conclude the facts alleged would result in no relief.

The appellant's second assertion, that the defense counsel's failure to call his wife's hair-braiding customer constituted ineffective assistance, is similarly unpersuasive. He indicates she would have testified that [NC] was happy that morning and countered the Government's argument that he beat [NC] for 90 minutes prior to her death. The appellant's trial defense team indicate that they did not call his wife's customer because they did not want to highlight how long the appellant was alone with [NC] that morning or the events that preceded the incidents on the balcony, but instead wanted the focus at trial on the events on the balcony. Affidavit of Lieutenant Colonel David M. Jones, USMC, at 3-7; Affidavit of Neal A. Puckett.

Applying the first two *Ginn* factors, we conclude that the appellant's assertions that the period of confinement awarded would have been reduced is speculative, and may be denied on that basis alone. *Ginn*, 47 M.J. at 248. Even assuming any factual discrepancy were resolved in the appellant's favor, we conclude the facts alleged would result in no relief. Specifically, the trial defense team's explanation as to why they did not call Mrs. Cisse's customer as a witness is consistent with their theory of the case on both findings and sentencing. In addition, the Government's argument that [NC] was subjected to a 90-minute beating before her death, was in support of the Government's theory that she was murdered. Record at 505-06, 518-19. Again, the appellant was acquitted of the murder offenses which include specific intent or knowledge elements, and convicted of involuntary manslaughter which requires only culpable negligence.

Given the appellant's pretrial admissions and the physical evidence, the defense strategy of pleading guilty to negligent homicide, the lowest level of homicide available as a lesser-included offense, and efforts to narrow the fact finders focus

were eminently reasonable actions, and clearly do not fall below the performance level expected of trial defense counsel. Contrary to the appellant's assertions, his conviction was consistent with the defense theory of negligence, vice intentional or knowing activity. *Id.* at 513-18.

We are satisfied that the appellant's trial defense team provided effective assistance throughout the trial. They successfully focused the fact finders on the events on the balcony, the appellant's love for his daughter, and his mental health, vigorously cross-examined the Government's witnesses, and advanced their own theory of the case, which the members essentially accepted through their findings. Their efforts resulted in reducing the appellant's exposure from a potential maximum of confinement for life to 10 years. They presented a comprehensive case in extenuation and mitigation, and forcefully argued his remorse and rehabilitative potential during presentencing. *Id.* at 561-65. After trial, the detailed defense counsel submitted a credible clemency request to the convening authority, requesting clemency on confinement, which the convening authority partially granted by suspending one-year of confinement.

We conclude that further fact-finding is not required and reject this claim of ineffective assistance of counsel.

Members reading of transcripts of the appellant's videotaped statements as the videos were played in court

The appellant asserts that he was prejudiced by the military judge's allowing the members to read transcripts of his videotaped statements to the Naval Criminal Investigative Service as the videos were played in court and that this procedure conveyed a harsher impression of the incident than review of the videos alone. Appellant's Brief at 11.

The Government argues that the military judge's "decision to allow the members to utilize a transcript of the interviews [as an aid] was completely reasonable given [the appellant's] thick French accent." Government's Answer of 19 Jun 2009 at 15. The Government also notes that the military judge provided a limiting instruction requested by the defense counsel, and that in the absence of objection at trial, the military judge's ruling admitting the evidence should not be reversed on appeal, absent plain error. *Id.* at 14-15.

We conclude the military judge properly exercised his discretion by allowing the members to read portions of the

transcript, to assist their understanding of the appellant's heavily-accented, videotaped statements to NCIS. Record at 244, 257-58. He made clear that the transcripts were not evidence, that they were provided only to assist understanding of the videotaped statements, and that the videotape was the evidence — and determinative in the event any conflict between the transcripts and the videotape. In addition, he collected the transcripts immediately after the playing of the videotape. *See United States v. Craig*, 60 M.J. 156, 162 (C.A.A.F. 2004).

Conclusion

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

Senior Judge VINCENT and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court