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

Before
D.E. O'TOOLE, F.D. MITCHELL, J.F. FELTHAM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY J. MACKMORE, II
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800032
GENERAL COURT-MARTIAL

Sentence Adjudged: 24 July 2007.
Military Judge: LtCol Christopher Greer, USMC.
Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Col R.G. Sokoloski, USMC.
For Appellant: LT Dillon Ambrose, JAGC, USN.
For Appellee: LT Derek Butler, JAGC, USN.

17 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiracy to wrongfully distribute marijuana, violating a lawful order by wrongfully possessing drug paraphernalia, three specifications of wrongful distribution of marijuana, wrongful possession of marijuana with intent to distribute, possession of a firearm with an obliterated serial number, and wrongfully maintaining a dwelling to manufacture and distribute marijuana, in violation of Articles 81, 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 912a, and 934. The appellant was sentenced to confinement for 27 months,

reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have reviewed the record of trial, the appellant's two assignments of error, alleging a violation of his Sixth Amendment right to counsel and ineffective assistance of counsel, and the Government's response. We additionally considered the oral arguments by counsel and the appellant's supplemental brief. We conclude that the findings and 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.

Sixth Amendment Right to Counsel

In his initial assignment of error, the appellant contends that his Sixth Amendment right to counsel was violated when the military judge refused to provide him with substitute counsel, mid-trial, after he asserted that his relationship with his detailed defense counsel experienced a total breakdown in communication. He additionally avers that the military judge did not properly advise the appellant of his counsel rights after this disclosure. We disagree with both contentions.

Facts

The appellant rented a house with another Marine, Lance Corporal (LCpl) Morrison, in which they sold marijuana. Their drug-selling enterprise was discovered, investigated, and the two Marines were eventually apprehended by Naval Criminal Investigative Service (NCIS) agents and charged with a variety of drug-related offenses, including conspiracy to distribute marijuana. During the search of the residence by NCIS, two weapons, a .25 caliber and a .45 caliber handgun, were found in the residence. Each weapon had the serial numbers obliterated. They were additionally charged with possession of a weapon with obliterated serial numbers.[1]

The charges against the appellant and LCpl Morrison were separately referred for trial by general court-martial. LCpl Morrison's trial commenced on 15 July 2007, and the appellant's case started two days later. Four days into the appellant's trial, LCpl Morrison was convicted of some charges and was sentenced by his court-martial members to confinement for nine years and a dishonorable discharge. The appellant's detailed defense counsel discovered that LCpl Morrison had been found not guilty of possessing the

[1] The appellant was charged under the Assimilated Crimes Act with a violation of 18 U.S.C. §§ 922(k) and 924, and Article 134, UCMJ.

handguns confiscated from their residence. Further, during post-trial discussions with counsel, the members from LCpl Morrison's case indicated that, had the Government proved that LCpl Morrison was the owner of the handguns, they would have given him over 15 years confinement. Affidavit of Detailed Defense Counsel of 17 Sep 2007 at 5.

The aforementioned information was passed to the appellant by his detailed defense counsel, with a suggestion that they should again consider pleading guilty, and attempt to negotiate a pretrial agreement with the convening authority. According to detailed defense counsel, the appellant was initially receptive to this idea. On 23 July 2007, however, the appellant informed his detailed defense counsel that he no longer wanted that counsel to represent him in his case. The appellant and his detailed defense counsel informed the military judge of the appellant's desires in an Article 39(a), UCMJ, session that same morning. Record at 553. Later that day, the appellant, through the trial counsel, submitted a request for an individual military counsel, Lieutenant Colonel (LtCol) Scott Jack. There was some discussion on the record as to the availability of LtCol Jack, who was in the middle of another trial, and all indications were that he would not be available for at least one week. After being informed of his options by the military judge,[2] the appellant indicated that he had not hired a civilian attorney, and that he was ill-equipped to represent himself *pro se*. The appellant made it clear that he was not waiving his right to counsel by requesting that his current detailed defense counsel be dismissed from his case.

After listening to the reasons articulated by the appellant as to why he wanted to dismiss his detailed defense counsel and have substitute counsel appointed, as well as the detailed defense counsel's position that he was prepared and ready to continue as the appellant's counsel, the military judge denied the appellant's request, stating that the appellant had not provided an adequate basis for dismissing his detailed defense counsel. *Id.* at 566.

The Law

The Sixth Amendment to the Constitution of the United States, as well as Article 38 of the Uniform Code of Military Justice, establish that an accused service member has a right to counsel at court-martial. *See United States v. Hicks*, 47 M.J. 90, 92 (C.A.A.F. 1997). Military counsel will be provided to an accused for each general and special court-martial by the Government at no expense to the accused.

[2] Additional facts related to the military judge's explanation of counsel rights will be provided in our later discussion of the appellant's second assignment of error.

Art. 27(a)(1), UCMJ. Where an accused requests a change in detailed defense counsel mid-trial, it is the military judge's responsibility to balance the interests of the Government, with the basis for the accused's request for substitute counsel. A request for substitute counsel is not usually granted where the record shows a difference of opinion on trial tactics and strategy, and expressed frustrations between the trial defense counsel and the accused, but does not reflect an irreconcilable conflict or a breakdown in communication between them. *United States v. Lindsey*, 48 M.J. 93, 98 (C.A.A.F. 1998)(quoting United States v. *Swinney*, 970 F.2d 494, 499 (8th Cir. 1992)). The decision to delay the trial for an accused to get substitute counsel is within the sound discretion of the military judge and will not be overturned absent an abuse of that discretion. *United States v. Young,* 50 M.J. 717, 721 (Army Ct.Crim.App. 1999)(citing *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997)). An abuse of discretion exists where the reasons and the 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*. (quoting *Miller*, 47 M.J. at 358).

Analysis

The appellant articulated five reasons as to why he no longer desired to have his detailed defense counsel represent him: (1) his counsel did not intend to call a witness the appellant thought relevant to his case; (2) he felt his counsel was unprepared during trial; (3) his counsel displayed a "nonchalant" attitude about his case; (4) his counsel had urged him to plead guilty and ask for mercy from the court; and, (5) his counsel discussed his case in the presence of his mother and grandmother. These were obviously points of consternation for the appellant.

We now consider the appellant's complaint, as well as the record of trial, to determine the degree to which any conflict between the appellant and his detailed defense counsel resulted in a total breakdown of communication. The appellant acknowledged that for the six months leading up to trial, he and his detailed defense counsel had no communication problems or conflicts. Record at 568. He additionally acknowledged that the he did not think that his attorney had been inadequate in the courtroom, but conversations outside the courtroom where his attorney advised the appellant that he "had fought the good fight" and that he could get "20 years confinement" led the appellant to believe that his counsel had given up on his case. *Id.* at 555. When questioned by the military judge to see if there was a total breakdown in communication or any irreconcilable conflicts that would impede his representation of the appellant, the detailed defense counsel indicated that the appellant was "no longer willing

to assist me in his defense." *Id.* at 554. The detailed defense counsel further stated that he was "prepared to go to trial and willing to continue with the trial." *Id*.

The appellant's right to counsel, "does not involve the right to 'meaningful relationship' between an accused and his counsel." *United States v. Machor*, 879 F.2d 945, 952 (1st Cir. 1989). The issue boils down to this: whether the relationship between the appellant and his counsel was so tenuous as to constitute a total breakdown of communication, thereby preventing the appellant from receiving an adequate defense.

The appellant was facing a maximum of 102 years of confinement for the charges for which he was being tried. From everything we have been able to discern from the record, the appellant and his detailed defense counsel maintained an amicable and productive relationship up until the time counsel told the appellant of the results in the companion case against LCpl Morrison, who received nine years confinement notwithstanding the fact that he was found not guilty of possessing the handguns. At this point in the appellant's trial, at least one witness, LCpl Lawson, placed the .45 caliber handgun in the appellant's possession. Additionally, and tactically, over the appellant's objection, the detailed defense counsel did not want to call the latent fingerprint expert as a witness because, even though this witness could attest to the fact that the appellant's fingerprints were not on the weapon, because the expert possessed other information, potentially damaging to the appellant's case, that might be disclosed to the members through his testimony. Finally, detailed defense counsel's advice to rethink their strategy and consider pleading guilty in exchange for a pretrial agreement because the appellant "could get 20 years confinement," in all likelihood added to the appellant's frustrations. These disagreements in strategy notwithstanding, we do not find, nor does the record reflect, a total breakdown in communication or an irreconcilable difference between the appellant and his detailed defense counsel that would entitle the appellant to substitute counsel. This is further evidenced in the record by the obvious collaboration required to complete the trial, including presentation of detailed information that could only have resulted from the cooperation of the appellant with detailed defense counsel. The continuing productive relationship was highlighted by the appellant's unsworn statement in the form of a question-and-answer interchange with his detailed defense counsel. We conclude that the military judge did not abuse his discretion in denying the appellant's mid-trial request for substitute counsel. We, therefore, decline to grant relief.

Related to this issue is the appellant's contention that the military judge gave him only two options when he

requested to have his detailed defense counsel dismissed from his case: (1) to keep his detailed counsel on the case or (2) to represent himself *pro se*. The appellant contends that this error violated his right to counsel. A more thorough reading of the record discloses that the appellant was well-aware of his counsel rights.

The appellant was arraigned on 30 April 2007, at which time the presiding military judge, Major V.C. Danyluk, USMC, explained to the appellant his counsel rights. The appellant acknowledged that he understood these rights. Record at 5. After arraignment, Major Danyluk was replaced by LtCol C.M. Greer as the presiding military judge. *Id.* at 12. At a post-arraignment Article 39(a) session, LtCol Greer reviewed counsel rights with the appellant. The appellant again informed the military judge that he desired to be represented by his detailed defense counsel. *Id.* at 29-30.

During an R.C.M. 802[3] conference after the appellant requested substitute counsel, the military judge was informed that the appellant had submitted an IMC request for LtCol Jack and that it was with the trial counsel for forwarding to the convening authority. Additionally, the appellant's detailed defense counsel told the military judge that there had been some discussions with his client with regards to hiring a civilian defense counsel. Record at 559. In an Article 39(a) session, the military judge went on the record and asked the appellant if he had hired civilian counsel. The appellant responded in the negative and stated, "No, sir. Not at this point, sir." *Id*. The military judge additionally informed the appellant that he understood the appellant had submitted an IMC request and that was an issue the military judge had to consider. *Id.* at 562. Although the military judge could have advised the appellant more clearly regarding his right to counsel at that point in the trial, the record clearly shows that the appellant knew his rights, and had affirmatively explored all of them. As a result, the appellant has suffered no prejudice based on the manner in which the military judge discussed the appellant's choices mid-trial. As already discussed, the appellant was well-aware of his right to privately retained counsel, but did not avail himself of this right. He also knew he had a right to an IMC and he did request one. Though the military judge specifically made no ruling on an IMC, indicating that it was premature to do so, the appellant did not pursue the appointment of LtCol Jack, and did not present a Government denial to the military judge for resolution; neither has the appellant preserved any such denial as a matter of record for consideration on appeal. In any event, the record is clear that the appellant was well-aware of his counsel rights.

[3] RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

The military judge also explained to the appellant all of the ramifications of his request to dismiss his detailed defense counsel, including the fact that dismissing his detailed defense counsel could, in effect, waive his right to counsel, and result in his proceeding *pro se*. *Id.* at 559-63. Obviously convinced that the appellant's complaint did not provide an adequate basis for discharging his detailed defense counsel and substituting another attorney to represent the appellant mid-trial, the military judge wanted the appellant to understand that he could at any time dismiss the detailed defense counsel from his case. However, the military judge correctly advised that his doing so without justification could result in his waiving his right to counsel when the appellant had not retained civilian counsel and, though he had submitted an IMC request, LtCol Jack had not yet been detailed and might be unavailable. We conclude, and the record reflects, that the appellant was well-aware of his counsel rights and that the military judge did not misinform or confuse the appellant regarding these rights. Accordingly, the appellant is not entitled to relief on this assignment of error.

Ineffective Assistance of Counsel

In his second and final assignment of error, the appellant avers that he was denied effective assistance of counsel. Similar to his initial assignment of error, the appellant specifically contends that his detailed defense counsel was deficient because: (1) he did not call the latent fingerprint expert as a witness to show that the appellant's prints were not on the handguns; (2) his counsel was unprepared during trial; (3) his counsel displayed a "nonchalant" attitude about his case; and, (4) his counsel discussed his case in the presence of his mother and grandmother.

In order to prevail on a claim of ineffective assistance of counsel, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id*. at 687. To meet the deficiency prong, the appellant must show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. *Id*. To show prejudice, he must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id*.; *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). In reviewing allegations of

ineffective assistance of counsel, we conduct a *de novo* review. *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999).

Contrary to the appellant's assertions, the detailed defense counsel's affidavit, taken in context with the record of trial, reveals that the appellant received zealous representation by his detailed defense counsel and that counsel was adequately prepared for trial. When the appellant asked the military judge for substitute counsel because he was dissatisfied with his detailed defense counsel, the military judge specifically asked the appellant where he thought his counsel had been inadequate in the courtroom. Record at 555. The appellant responded, "not really in the courtroom. From what he's told me personally." *Id*. The record does not reflect that the appellant's detailed defense counsel was unprepared for, or was inadequate at, trial. We find this argument unpersuasive.

The appellant next contends that his detailed defense counsel was ineffective because he did not call the latent fingerprint expert as a witness to show that the appellant's prints were not on the handguns. This decision made by detailed defense counsel was tactical in nature and, generally, appellate courts will not second-guess strategic or tactical decisions made at trial by defense counsel. *United States v. Paxton*, 64 M.J. 484, 489 (C.A.A.F. 2007). Additionally, we note that evidence of the lack of the appellant's fingerprints on the weapons was placed before the members. NCIS Agent Sonja Carmical testified that the weapons confiscated from the appellant's residence did not have any fingerprints on them to her knowledge. Record at 599. It follows that the appellant has not shown any prejudice as a result of counsel's decision not to call the fingerprint expert. We find this aspect of his argument unpersuasive.

The appellant's remaining arguments are similarly unpersuasive and not worthy of additional comment. We find that the appellant was zealously and competently represented by counsel, and he has manifestly failed to overcome the presumption of adequate assistance to which his trial defense counsel is entitled. Based upon our review of the record, we find that even if the trial defense counsel's performance was deficient, the appellant has not demonstrated that he was prejudiced. Accordingly, we grant no relief.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

Chief Judge O'TOOLE and Senior Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court