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

Before
E.E. GEISER, D.O. VOLLENWEIDER, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MIGUEL A. PABON
INFORMATION SYSTEMS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY

NMCCA 200900077
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 December 2008.
Military Judge: LtCol Paul J. Ware, USMC.
Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LCDR J.M. Levy, JAGC, USN.
For Appellant: Capt Kyle Kilian, USMC.
For Appellee: Capt Robert Eckert, Jr., USMC.

16 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of larceny, one specification of impeding an investigation, and two specifications of receiving stolen property, in violation of Articles 121 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 934. The appellant was sentenced to confinement for seven months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant alleges that his trial defense counsel's representation was ineffective because counsel failed to properly present extenuation and mitigation evidence during sentencing, and failed to submit certain matters with post-trial clemency requests.[1]

We have carefully considered the record of trial, the appellant's single assignment of error and supporting declaration, and the Government's response. 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 an Information Systems Technician First Class with 17 years of service. The offenses to which he pled guilty involved his participation in fraudulent schemes with his wife. For his larceny conviction, he used a credit card that he knew was fraudulently obtained by his wife to make thousands of dollars of charges to purchase items at a restaurant, the commissary, and the Navy Exchange, and to rent a car. He received and kept a music keyboard from his wife, knowing it had been stolen. Participating in a scam with his wife and a friend, he received stolen money via electronic transfers from the friend's Navy Federal Credit Union account, and then converted it to cash through ATM withdrawals, essentially laundering the money. The appellant used his Navy computer to effectuate some of the transfers. Finally, when he suspected that law enforcement was closing in on them, he destroyed fraudulent credit cards and stolen documents to hide their crimes.

On sentencing, the appellant's counsel presented in-court testimony of five character witnesses, and submitted fifteen character letters. In fact, the sentencing exhibits submitted by counsel on the appellant's behalf fill an entire volume of the record of trial. Those submissions include award citations, letters of appreciation and commendation, training certificates, enlisted performance evaluations for the last ten years, and other documents in extenuation and mitigation.

The appellant does not contest his conviction. He does ask that his sentence be overturned and that the court order a rehearing on the sentence. The basis for the requested relief is the appellant's claim that he was ineffectively represented in the sentencing and post-trial clemency phases of his court-martial. To support his claim, the appellant submitted a 14-paragraph declaration alleging specific areas in which his representation was deficient. No countervailing declaration or affidavit has been submitted by either of this trial defense counsel. The appellant's allegations will be discussed below.

[1] Appellate defense counsel submitted this assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Ineffective Assistance of Counsel

All service members are guaranteed the right to effective assistance of counsel at their court-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We presume that trial defense counsel provided effective assistance throughout the trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Id.* The evidence of record must establish that counsel "made errors so serious that [they were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687.

Even if there is error, it must be so prejudicial "as to indicate a denial of a fair trial or a trial whose result is unreliable." *Davis,* 60 M.J. at 473 (citing *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001)). Thus, an appellant alleging ineffective assistance of counsel "'must surmount a very high hurdle.'" *United States v. Saintaude*, 61 M.J. 175, 179 (C.A.A.F. 2005)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). We will not judge attorney performance by a more exacting standard under the often distorting view provided solely by hindsight. *Strickland,* 466 U.S. at 689. Additionally, we recognize that the tactical and strategic choices made by defense counsel during trial need not be perfect; instead, they must be judged by a standard ordinarily expected of fallible lawyers. *See United States v. Anderson,* 55 M.J. 198, 202 (C.A.A.F. 2001)(citing *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993); *United States v. Curtis,* 44 M.J. 106, 119 (C.A.A.F. 1996)).

Ineffective assistance of counsel involves a mixed question of law and fact. *Davis*, 60 M.J. at 473 (citing *Anderson*, 55 M.J. at 201). Whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are determined by a *de novo* review. *Id.* (citing *Anderson*, 55 M.J. at 201; *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004); and *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)). We apply a three-prong test to determine if the presumption of competence has been overcome:

> (1) Are the 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?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991); *see also Anderson,* 55 M.J. at 201.

When an ineffective assistance claim is raised by an affidavit submitted by the appellant, we can resolve that legal issue without requiring a post-trial evidentiary hearing by using one of six principles set forth in *United States v. Ginn,* 47 M.J. 236 (C.A.A.F. 1997). The first *Ginn* principle permits us to reject the claim of ineffective assistance of counsel "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor." *Id.* at 248. Under the second principle, "if the affidavit does not set forth specific facts but consists instead if speculative or conclusory observations, the claim may be rejected on that basis." *Id.* Under the fourth principle, we may discount the appellant's affidavit and decide the legal issue "if the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts." *Id.* Under the fifth principle, "when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id.*

Discussion

The appellant was represented at trial by two military attorneys, his detailed defense counsel and an individual military counsel of his own choosing. In a post-trial declaration, the appellant claimed that the performance of his counsel in the sentencing phase was deficient; resulting in a sentence that was more severe than would have been awarded had his representation been adequate. The appellant's allegations will be discussed *seriatim*.

Old Evaluations: The appellant complains that his counsel did not submit his enlisted performance evaluations reflecting his service at Naval Station Roosevelt Roads from 1991 to 1993 and his evaluations reflecting his service at NCTAMS EASTPAC from 1996 to 1999. The appellant has not supplied the court with these evaluations, so it is impossible to determine if they contain information of such significance that they would affect his sentence, despite their age. The appellant has not asserted that his counsel had been supplied with these old evaluations. The appellant indicates only that they would reflect his service in his rating. The trial judge was fully aware of the

appellant's rating and his prior service. Admitted into evidence were all of appellant's enlisted performance evaluations from August 1999 to the date of trial. Those evaluations indicated average to good performance for the most recent nine years of the appellant's service. We do not believe that submission of older evaluations would have had any impact on the sentence. Counsel did not err by not seeking their admission on sentencing.

Training Records: The appellant contends that his counsel erred by not submitting his most recent military training records. Again, the appellant has not supplied the court with these records, so it is impossible to determine their content. The appellant has not asserted that his counsel had been supplied with these records. The appellant indicates only that they would have shown his leadership traits and his general military training. His leadership traits were well-documented in the testimony of defense witnesses at trial, in the 15 character letters submitted on his behalf, his awards and letters of commendation and appreciation, and in his enlisted performance evaluations. His training was well-documented in his many training certificates and records from the United States Military Apprenticeship Program. The appellant has not satisfied his burden of showing that his counsel erred by not submitting additional unidentified training records.

Letters of Support: The appellant contends that his counsel erred by not submitting letters written by the children at Orlando Elementary School after the September 11, 2001 attacks. The appellant has not supplied the court with these letters, and does not assert that he provided them to his counsel. He indicates only that the letters would show the appreciation of the country for the service of Sailors at that time. We do not believe such evidence would add anything that would affect the appellant's sentence, particularly where the trial judge was well aware from the records admitted that the appellant served on board a ship that was deployed to the Red Sea very shortly after the attacks. Counsel, even if they had been made aware of the letters, did not err by not seeking their admission.

Show of Support: The appellant contends that his counsel erred by not having several of his shipmates present in court (apparently behind the bar) as a show of support. Two of the seven named persons testified at trial, and one submitted a character letter that was admitted. There has been no showing that the remaining persons were available or willing to serve as spectators at the appellant's trial. No authority has been cited for the proposition that the defense counsel had any duty to provide additional spectators, or that the trial judge could consider for sentencing the mere silent presence of unidentified spectators in the back of the courtroom. The appellant has not shown that his counsels' representation was ineffective.

Divorce Paperwork: Defense counsel submitted to the court the appellant's divorce decree showing that he was granted sole custody of his son, along with a pre-decree order granting the appellant temporary sole custody. The appellant contends that his counsel erred by not submitting documents showing all the steps it took him to get those orders. Again, defendant has not submitted the missing documents. Again, there is no indication that he had provided these documents to his defense counsel. The record was rife with testimony and character evidence that the appellant was a good father to his son. Counsel did not err by not submitting more evidence on this matter, and we do not believe that more documents would have affected the appellant's sentence in any way.

Family Pictures: The appellant does not contend that family pictures were not admitted into evidence. Rather, he complains that copies of those pictures were admitted rather than the original color photographs. We find that the exhibits admitted adequately portray the appellant and his family, and add little if anything to the other evidence on this issue presented at trial on the appellant's behalf by his counsel.

Character Letters: The appellant complains that character letters from two individuals were not presented to the trial judge. Again, the appellant does not supply this court with the omitted letters, and does not show that he had provided these letters, if they exist, to his counsel. The appellant does not indicate that these letters contained anything that would be other than cumulative of the testimony of five character witnesses and fifteen character letters admitted at trial. We find no error has been proven by the appellant.

Athletic Awards: The appellant complains that his unspecified athletic awards were not submitted. We have not been provided with copies of these records, and the appellant does not state whether such records were provided to his counsel. While the relevance of the fact that the appellant was a fit felon is not apparent, the record is replete with both the appellant's athletic prowess and his leadership as a fitness coordinator. The character witnesses talked about it, the character letters almost all discussed it at length, his evaluations remarked on it, an outstanding physical readiness award was admitted, his physical readiness results were admitted, and records showing his placement in several races were admitted. Anything more would be cumulative, and would not add anything to the appellant's sentencing case. Counsel, even if they had been provided with these unspecified awards, did not err by not seeking their admission. If admitted, they would have had no conceivable affect on the appellant's sentencing.

Explanation of the Appellant's Job: The appellant complains that the trial judge was not presented with an explanation of his job. He is mistaken. His job duties were fully explained

through his witnesses, through his character letters, through letters of appreciation, through his performance evaluations, and through his own sworn testimony.

Testimony of Senior Chief Information Systems Technician (ITCS) Reeves: The appellant claims that his counsel did not present the testimony of ITCS Reeves. There is no indication that the appellant identified this person as a potential witness to his defense counsel. There is no indication that the witness was willing and available to testify at trial. There is no indication from ITCS Reeves what his testimony would have been. Defense counsel could reasonably conclude that the testimony of this witness would be cumulative of those presented at trial, and that the risk of negative testimony outweighed any possible benefit. The testimony of the other Navy witnesses brought out the fact that the appellant's conviction would make him ineligible for a security clearance, that without a security clearance appellant could not work in the rating the Navy trained him for, and that it was highly unlikely that he could change to another rating. They also said they would not be comfortable giving the appellant access to personally identifiable information. The testimony indicated that stealing money, receiving stolen goods, and destroying evidence were not indicia of desirable leadership traits. Even if ITCS Reeves testified that the appellant performed well as an information systems technician in the past, it is likely that the witness would also testify that he could never serve as one in the future. The appellant has not carried his burden of showing that his counsel erred by not presenting this witness.

Highlighting of Character Letters: The appellant's complaint that his character letters were not properly emphasized is unsupported. The IMC skillfully wove them into closing argument. The trial judge had sufficient time to read them prior to closing arguments. The letters, while numerous, are very short, and many of them are the same, down to the actual language used. None of them mention the appellant's offenses.

Disciplinary Review Board: During the appellant's sworn testimony on sentencing, trial counsel asked questions regarding a 2006 disciplinary review board. The appellant testified, without objection by his counsel, that he had been investigated for about $5,000.00 of charges on his Government credit card. The appellant admitted that he had used the card, but testified that he later obtained a loan and paid it off. There was no evidence that the appellant was disciplined for his credit card abuse and no evidence that the trial judge assumed that the appellant had any disciplinary history. There is no evidence or indication whatsoever that the trial judge was in any way biased against the appellant. The appellant's allegation is without basis.

Testimony of NCIS Agent: The appellant complains that an NCIS agent, who could testify that the appellant had cooperated as a source for NCIS, did not testify. There is no showing that this agent was available to testify at trial. The fact that the appellant cooperated with NCIS against his wife and others was well-established in the record.

We can discern no deficiency in the performance of any of the appellant's counsel that would overcome the presumption of competence they enjoy under the law. Indeed, we are fully confident that the appellant was well and ably represented throughout his trial by all of his counsel and that each of his lawyers was, in all regards, effective within the standards required by law.

Applying the *Ginn* principles, we conclude that the appellant's claim of ineffective assistance of counsel lacks merit.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge GEISER and Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court