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

Before
E.E. GEISER, L.T. BOOKER, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN J. REDEAUX
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200900213
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 December 2008.
Military Judge: LtCol David Oliver, USMC.
Convening Authority: Commanding General, III Marine Expeditionary Force, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol D.J. Bligh, USMC.
For Appellant: CAPT Patricia Leonard, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, JAGC, USMC; LCDR C.G. Trivett, JAGC, USN.

22 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of disobedience of a lawful order, one specification of dereliction of duty, one specification of destruction of property, and two specifications of wrongful appropriation, in violation of Articles 91, 92, 109, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 909,

and 921. The approved sentence was confinement for 30 months, forfeiture of all pay and allowances, and a bad-conduct discharge.

The appellant asserts on appeal that his trial defense counsel was ineffective.[1] Upon consideration of the record of trial and the pleadings of the parties, 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was stationed at Camp Foster in Okinawa, Japan. Following an argument with a Japanese national, the appellant absconded with a highly mobile multipurpose wheeled vehicle ("HMMWV"), the property of the United States. The appellant drove the vehicle around for approximately one hour. He then parked the HMMWV in a residential area near the installation. Approximately three hours later, the appellant saw an unattended and unlocked automobile, the property of a Japanese national, with the keys inside. He aimlessly drove that vehicle for some time before he was apprehended outside Camp Foster.

Prior to trial, the appellant and his counsel negotiated an agreement with the convening authority that provided, *inter alia*, for suspension of all approved confinement in excess of 36 months. At the time this limitation was negotiated, the appellant had been advised by counsel that the maximum authorized confinement for the offenses he had agreed to plead guilty to was 78 months.

The military judge ruled that the orders violation, which would authorize up to one year of confinement, was essentially an absence from appointed place of duty, with a maximum of one month confinement. Additionally, the military judge engaged in an extended colloquy with the parties regarding the wording of the two specifications under Charge V. In essence, the military judge ruled that omission of the words "motor vehicle" from each of the specifications changed each specification from an allegation that the appellant wrongfully appropriated a motor vehicle to an allegation that he wrongfully appropriated property of a value greater than $500. The net result of this

[1] The appellant's sole assignment of error was raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

decision was that the military judge calculated the maximum confinement authorized for each specification to be 6 months as opposed to 2 years as was previously believed by the parties. Record at 19. These rulings effectively reduced the appellant's maximum confinement exposure to 31 months.

In view of the changed sentencing landscape, the military judge gave the parties an opportunity to revisit the pretrial agreement. After less than 20 minutes, the defense counsel negotiated a revised confinement cap of 24 months. The new sentence limitation was agreed to by the appellant who initialed the change to the existing agreement. Appellate Exhibit II.

In his assignment of error, the appellant alleges that his defense counsel was ineffective because the reduction was not at the same ratio to the maximum punishment as was the original limitation. We find this assignment of error without merit. The record makes clear that the appellant agreed to the improved confinement suspension provision his counsel negotiated for him. That the time he was agreeing to serve was not in the same proportion to the new maximum authorized confinement was clearly evident at the time he agreed to the revised plea agreement.

We review claims of ineffective assistance of counsel *de novo*. *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)(citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). A trial defense counsel enjoys a strong presumption of competence. *See United States v. Cronic*, 466 U.S. 648, 658 (1984); *United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993). In order to overcome this presumption of competence, the appellant must satisfy a two-part test by showing: "(1) a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the "counsel" guaranteed the [appellant] by the Sixth Amendment'"; and (2) that the deficient performance of the trial defense counsel prejudiced the appellant's defense by errors "'so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable.'" *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)(quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Applying this standard to the facts, we find the trial defense counsel's performance was in no way deficient when he failed to negotiate an even more beneficial modification to the initial pretrial agreement for the appellant.

Although not directly germane to our resolution of the appellant's assignment of error and in no way prejudicial to the appellant, we take this opportunity to address the mistaken

impression of the military judge concerning the nature of the wrongful appropriation specifications alleged.

The military judge determined that the two specifications of wrongful appropriation should be punished as wrongful appropriations of property valued at more than $500, rather than wrongful appropriations of motor vehicles. On the record before us, we have no doubt that the specifications properly alleged activity regarding "motor vehicles," normally warranting increased confinement exposure. *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 46e(2)(b), *with* ¶ 46e(2)(c).

Specification 1 of Charge V described the wrongfully appropriated item as "one HMMWV." The second specification under Charge V described the wrongfully appropriated item as "one Daihatsu Mira, Okinawa license plate number 50TO514." A specification states an offense if it alleges, either expressly or *by implication*, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)(emphasis added)(citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). These descriptions clearly identify the relevant items as "motor vehicles" and provide the appellant the requisite notice and protection.

In *United States v. Miner,* 33 C.M.R. 450 (A.B.R. 1963), the appellant was charged with wrongful appropriation of a "five ton dump truck." The specification as written did not allege that the dump truck was a motor vehicle. The appellant pleaded to wrongful appropriation of a motor vehicle. The issue on appeal was whether the appellant was subject to sentencing for the more severe punishment of wrongful appropriation of a motor vehicle, since the specification only alleged wrongful appropriation of property of some value. *Id.* at 451. The Board of Review ruled that the phrase "five ton dump truck," while equivocal, was one as to which there is common knowledge and judicially noticed that it means a motor propelled "five ton dump truck" for sentencing purposes.[2] *Id*. at 455.

Here, the two specifications of Charge V described the vehicles, but did not use the words "motor vehicle," and, unlike in *Miner*, the appellant was not required to plead to wrongful appropriation of motor vehicles nor was he sentenced for such offenses. However, a review of the factual basis of the

[2] The concurring opinion opined that the only reasonable implication from the words "five ton dump truck" is that it is a motor vehicle. *Miner*, 33 C.M.R. at 455 (Henderson, J., concurring).

appellant's plea confirms that the appellant, respective counsel, and the military judge all understood and acknowledged that the factual basis for the two specifications of wrongful appropriation was when the appellant drove the tactical vehicle and drove the Daihatsu Mira. Record at 48-61; Prosecution Exhibit 1 at p. 3-8. Thus, we are left to conclude that there was absolutely no question among all the participants that the appellant wrongfully appropriated two motor vehicles.

Specifications 1 and 2 of Charge V adequately charged, by implication, the wrongful appropriation of a motor vehicle, and the appellant knew and understood that he was voluntarily pleading guilty to wrongful appropriation of two different motor vehicles. But for the military judge's erroneous ruling to the appellant's advantage, he should have been subjected to a maximum confinement exposure of 67 months, and not 31 months.

Conclusion

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

Chief Judge GEISER and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge STOLASZ participated in the decision of this case prior to detaching from the court.