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

Before
D.E. O'TOOLE, J.A. MAKSYM, M. MCALEVY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BENJAMIN R. WAGES
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800071
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 May 2007.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA.
Staff Judge Advocate's Recommendation: Col B.A. White, USMC.
For Appellant: LT Brian D. Korn, JAGC, USN.
For Appellee: Maj James Weirick, USMC.

28 April 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MCALEVY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of attempting to damage the property of another, six specifications of failure to obey a general order, larceny of military property, twelve specifications of assault, adultery, and five specifications of communicating a threat, in violation of Articles 80, 92, 121, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, 921, 928, and 934. The appellant was sentenced to confinement for 25 years, forfeitures of all pay and allowances, reduction in pay grade to E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged. Pursuant to

the pretrial agreement, the CA suspended all confinement in excess of 12 years.

We have examined the record of trial, the appellant's two assignments of error,[1] the Government's answer, the appellant's declaration, and the trial defense counsel's affidavits. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a sergeant with three enlistments and almost ten years of military service, including multiple deployments to Iraq, pled guilty as specified above. In exchange, the CA agreed to suspend any confinement adjudged in excess of 12 years. The appellant admitted during his providency inquiry, including a detailed stipulation of fact, that he engaged in an adulterous relationship with a then-Lance Corporal (LCpl) E[2] from September 2006 to October 2006. All of the charges, except for the larceny, arise out of events surrounding this relationship.

The appellant admitted that he became angry on numerous occasions and choked LCpl E, and that she lost consciousness more than once. He also admitted that he had struck her backhanded across the face. His abuse of LCpl E culminated when he learned that she had been sexually active with another Marine shortly after meeting the appellant. He became enraged, verbally abused her, threw her to the floor, and threatened to scrub her vaginal area with a brush. He thereafter retrieved from his car an unregistered .44 Magnum revolver, ammunition, and a smoke grenade he had stolen, and brought these items onto the base in violation of Marine Corps regulations. He went to LCpl E's barracks room, brandished his weapon, and told her "I am gonna show what its like to feel hurt." He asked her "are you ready to die tonight, because I am ready to die." He pointed the loaded gun at her face, at her head, and ultimately stuck it into her mouth. He then removed all but one bullet from the gun, and after spinning the cylinder, pointed the gun at her head and pulled the trigger.

At trial, the appellant was represented by trial defense counsel (TDC), Captain ECM, and individual military counsel (IMC), Captain PJC. During the sentencing phase of his trial, the Government called LCpl E and the lead criminal investigator. The

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[1] I. TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WHEN THEY FAILED TO CALL ANY OF THE SENTENCING WITNESSES APPELLANT REQUESTED.

II. APPELLANT'S GUILTY PLEA TO SPECIFICATION 2 OF CHARGE VI WAS IMPROVIDENT, AS THE MILITARY JUDGE FAILED TO ESTABLISH THAT APPELLANT'S CONDUCT WAS PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OR SERVICE DISCREDITING.

[2] At the time of the appellant's court-martial, LCpl E was a private first class (PFC).

defense case consisted of the telephonic testimony from the appellant's twin sister, and the appellant's unsworn statement. Copies of his service awards and fitness reports were also submitted to the military judge as mitigation.

Ineffective Assistance of Counsel

In his first assignment of error, the appellant contends that he received ineffective assistance from both of his military defense counsel because they failed to call any of the four character witnesses that he requested testify at the sentencing phase of his trial.[3] Appellant's Brief of 30 Apr 2008 at 4-5.

We review ineffective assistance of counsel claims *de novo*. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We analyze claims of ineffective assistance of counsel under the framework established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (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 his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis*, 60 M.J. at 473 (citing *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004)). In doing so, 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)). This is because it is presumed that counsel are competent in the performance of their representational duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000).

The *Strickland* two-part test applies to sentencing hearings as well as guilty pleas. *Id.* "Trial defense counsel may be ineffective at the sentencing phase when counsel either 'fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation, or, having discovered such evidence, neglects to introduce that evidence before the court-martial'". *Id.* (quoting *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F 1998). However, as a general matter, we will not second-guess the strategic or

[3] We note that, as a term of this pretrial agreement, the appellant affirmatively waived the appearance of any witness located beyond 200 miles from the site of his court-martial in San Diego, California. He affirmatively acknowledged to the military judge that this did not impair his ability to present a defense. We assume, then, that the complaint on appeal pertains only to local witnesses. However, if that assumption is incorrect, we apply waiver to that portion of the claim that would pertain to out-of-area witnesses.

tactical decisions made at trial by defense counsel. *United States v. Paxton*, 64 M.J. 484, 489 (C.A.A.F. 2007).

The evidence supporting the appellant's ineffective assistance claim is his post-trial declaration to this court, wherein he asserts that he provided his counsel the names of four Marines[4] as potential character witnesses during sentencing, and that trial defense counsel told him that it would not be in his best interest to call these witnesses, as it would permit the Government to then cross-examine them on the appellant's prior civilian conviction for a similar act. Appellant's Declaration of 30 Apr 2008 at 1. In response, the Government provided the affidavits of appellant's TDC and IMC.

In his affidavit, the TDC confirmed that the appellant had provided names of prospective sentencing witnesses. However, he did not specifically remember the witnesses named in the appellant's post-trial declaration as having been among them. Regardless, he declared that all potential military sentencing witnesses identified by the appellant were interviewed by one or both of appellant's trial defense counsel. Affidavit of TDC of 14 Oct 2008 at 1-2. He also said that the appellant's prior conviction had nothing to do with the decision not to call military witnesses during sentencing. *Id.* Rather, a tactical decision was made not to call any of the identified witnesses because they had significant negative testimony about the appellant's character and lack of rehabilitative potential. *Id.*

In his affidavit, the IMC declared that although the appellant had provided names of potential military sentencing witnesses, the appellant did not identify the individuals listed in appellant's affidavit. Affidavit of IMC of 14 Oct 2008 at 2. Regardless, he also said that TDC contacted each of the witnesses provided by the appellant. However, after interviewing them, TDC made the tactical decision not to call any of them, as each would provide negative testimony regarding the appellant's military character and rehabilitative potential. *Id.* at 2-3. Finally, the IMC stated that the appellant's prior civilian conviction played no part in TDC's decision regarding calling sentencing witnesses. *Id.* at 3.

Having reviewed the record and the affidavits, we conclude, consistent with the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), that we can resolve the

[4] Specifically, appellant identified the witnesses as: (1) Sergeant Major M.B., with whom the appellant twice deployed to Iraq, and who would have testified about the appellant's military character and service; (2) Gunnery Sergeant [GySgt] A, with whom he deployed twice to Iraq and once to Okinawa; who was stationed at the site of the appellant's court-martial at the time of the court-martial; and who would have testified as to his military character and actions while deployed; (3) GySgt K.B. with whom he deployed to Iraq, and who would have testified as to the appellant's personal and military character; and (4) Captain J.S., who would have testified as to the appellant's abilities as a field instructor. Appellant's Declaration of 30 Apr 2008 at 1-2.

appellant's claim without directing a *DuBay* hearing. The central point of contention by the appellant is that he provided the names of prospective witnesses to his counsel, and yet they did not present them. These facts are conceded by the affidavits of counsel. The affidavits of counsel go on to explain that they contacted all witnesses and, for tactical reasons, did not call them to the stand. The appellant's affidavit does not refute that his counsel contacted the witnesses, and he admits that his counsel told him that it would not be in his best interest to call these witnesses, because it would permit the Government to cross-examine them. At trial, the appellant, under oath, acknowledged that he believed the advice of his counsel was in his best interest. Record at 293. We find no material issue of fact is presented by these affidavits, notwithstanding that the appellant now recalls only one category of negative information. On these undisputed facts, and in view of the appellant's sworn testimony, we conclude that counsel fulfilled their responsibility to adequately investigate and advise the appellant.

Additionally, we find no basis on which to question the reasonableness of their tactical decision, particularly when the appellant admits he was informed that the judgment of his counsel was that presenting the witnesses was not in his best interest. However, even assuming *arguendo*, that the performance of trial defense counsel was deficient, we find no prejudice.

The military judge considered the defense exhibits showing the appellant's military awards and fitness reports, which detailed the nature of his military service, including his participation in combat. The military judge even commented from the bench on the appellant's Combat Action Ribbon. Record at 236. We have no doubt that the testimony proffered by the appellant in his affidavit would have had no impact on the sentence in this case given the information the military judge had about the appellant and his service, and considering the vicious nature of his offenses. Thus, even if the performance of counsel was deficient, the appellant has failed to show prejudice. As a result, this claim does not merit relief.

Providence of Plea

In his second assignment of error, the appellant contends that his plea to Specification 2 of Charge VI was improvident because the military judge failed to establish a required element of the offense, that is, that the appellant's conduct was prejudicial to good order and discipline or service discrediting. Appellant's Brief at 7. We disagree.

Under Specification 2 of Charge VI, the appellant's conduct had originally been charged as a violation of Article 134, UCMJ. However, pursuant to the terms of his pretrial agreement, the appellant pled not guilty to this offense, but guilty to the lesser included offense of assault with a loaded firearm used in a manner likely to produce death or grievous bodily harm, a

violation of Article 128, UCMJ. Appellate Exhibit XXV at 6. In exchange for his guilty pleas, the CA agreed to withdraw the original specification. AE XXV at 3.

At the appellant's court-martial, the military judge properly instructed the appellant on the elements of all of the offenses to which he pled guilty, including assault with a loaded firearm. There was no requirement for the military judge to instruct or question the appellant regarding the terminal element of the original Article 134, UCMJ, offense to which he had pled not guilty, and which was subsequently withdrawn. This issue is without merit.

C**onclusion**

Accordingly, we affirm the findings of guilty and the sentence as approved by the CA.

Chief Judge O'TOOLE and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court