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

Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JACOB DENEDO
MESS MANAGEMENT SPECIALIST SECOND CLASS (E-5), U.S. NAVY

NMCCA 9900680
Review of Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis

Sentence Adjudged: 15 July 1998.
Military Judge: CAPT G.E. Champagne, JAGC, USN.
Convening Authority: USS JOHN F. KENNEDY (CV 67).
Staff Judge Advocate's Recommendation: LCDR P.D. Schmid, JAGC, USN.
For Appellant: LT D.J. Ambrose, JAGC, USN.
For Appellee: Mr. Brian K. Keller, Esq.; LCDR Sergio Sarkany, JAGC, USN.

18 March 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

This case is before us on a petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis*. In 1998, the Government charged the petitioner with conspiracy, larceny, and forgery, in violation of articles 81, 121, and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 921, and 923. In exchange for the convening authority's pretrial agreement to reduce the number of charges and refer the case to a special rather than general court-martial, the petitioner pled guilty to the charges of conspiracy and larceny at a special court-martial composed of a military judge alone. The military judge concluded that the petitioner's pleas were provident and entered

findings of guilty for the aforementioned charges. The military judge imposed a sentence that included three months confinement, reduction to E-1, and a bad-conduct discharge. The convening authority approved the sentence on 7 March 1999.[1] The Navy-Marine Corps Court of Criminal Appeals affirmed on 24 February 2000. *United States v. Denedo*, No. 9900680, unpublished op. (N.M.Ct.Crim.App. 2000)(per curiam). The convening authority ordered the discharge executed on 30 May 2000.

In 2006, the Government, through the United States Citizenship and Immigration Services, initiated proceedings to deport the petitioner, a permanent resident alien, citing his special court-martial conviction, interpreting it as an "aggravated felony" under immigration law. Petition for Writ of Error Coram Nobis of 9 Mar 2009 at 9; Motion to Attach of 9 Mar 2009; Declaration of the Petitioner of 8 Mar 2007 at 1. Subsequently, he filed a petition for extraordinary relief with the Navy-Marine Corps Court of Criminal Appeals, requesting collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a). This court considered the petition and denied relief. *Denedo v. United States*, No. 9900680 (N.M.Ct.Crim.App. Order 26 Mar 2007).

The Court of Appeals for the Armed Forces (CAAF) subsequently ordered the case returned to this court for further review of the alleged ineffective assistance of counsel. *United States v. Denedo*, 66 M.J. 114 (C.A.A.F. 2008). The Government sought and was granted a writ of certiorari by the Supreme Court. In *United States v. Denedo*, 129 S. Ct. 2213, 2224 (2009), the Supreme Court of the United States held that Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect. The Supreme Court remanded the case to the CAAF to determine the merits of the claim of ineffective assistance of counsel. CAAF remanded the petition to this court to determine whether the petitioner's counsel rendered deficient performance and, if so, whether such deficiency prejudiced the petitioner. *United States v. Denedo*, No. 07-8012/NA (C.A.A.F. Order Jul 16, 2009). The court received the record of trial on 27 August 2009 and, on 28 August 2009, we ordered the Government to provide affidavits from the petitioner's civilian and military defense counsel responding to his allegations of ineffective assistance of counsel. The Government subsequently filed affidavits from both counsel.

On the basis of the foregoing authority, we have jurisdiction to inquire into the merits of the present petition as it raises issues of ineffective assistance of counsel. We hold that the petitioner was not prejudiced by his defense counsel's professional performance and the Petition for

[1] There were no sentencing limitations in Part II of the pretrial agreement.

Extraordinary Relief in the Nature of *Error Coram Nobis* should be and hereby is denied.

Principles of Law

Judgment finality "is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." *Denedo*, 129 S. Ct. at 2223. Because the petitioner's claim arises under the All Writs Act, the petitioner must establish a "clear and indisputable" right to the requested relief. *Denedo*, 66 M.J. at 126 (quoting *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004)).

The CAAF identified the standards applicable to review an ineffective assistance of counsel claim raised via a *coram nobis* petition, and adopted the two-tiered evaluation used by Article III courts for *coram nobis* review of ineffective assistance of counsel claims. *Denedo*, 66 M.J. at 126. In the first tier, the petitioner must satisfy the threshold requirements for a writ of *coram nobis*. *Id.* If the threshold requirements are satisfied, as they are in this case, we proceed to the second tier analysis of the ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

A military accused is entitled under the Constitution and Article 27(b), UCMJ, to the effective assistance of counsel. *Id.* (citing *Strickland*, 466 U.S. 668); *see United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987). An individual making a claim of ineffective assistance "'must surmount a very high hurdle.'" *Denedo*, 66 M.J. at 127 (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). Courts reviewing such a claim "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). The presumption of competence will not be overcome unless the accused demonstrates: first, a deficiency that is "'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'"; and second, that the accused was prejudiced by errors 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

An attorney's failure to advise an accused of potential deportation consequences of a guilty plea does not constitute, deficient performance under *Strickland*. *Denedo*, 66 M.J. at 129. An affirmative misrepresentation about such consequences, however, can constitute deficient performance, particularly when the client requests the information and identifies the issue as a significant factor in deciding how to plead. *Id.*

When challenging the effectiveness of counsel in a guilty plea case, the accused must also show specifically "that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to

trial.'" *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The *Hill* test is an objective inquiry, as the Supreme Court has clarified and several circuit courts have held. *See Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000)(describing *Hill* as holding that "the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a *rational* defendant to insist on going to trial" (emphasis added)); *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 2975 (2008); *United States v. Curry*, 494 F.3d 1124, 1131 (D.C. Cir. 2007); *Richardson v. United States*, 379 F.3d 485, 489 (7th Cir. 2004). The focus is not on the outcome of a potential trial, but on "'whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'" *Denedo*, 66 M.J. at 129 (quoting *Hill*, 474 U.S. at 59). In many guilty plea cases the prejudice inquiry will involve a determination whether without counsel's error, counsel would have made a different recommendation as to the plea. *United States v. Ginn*, 47 M.J. 236, 247 (C.A.A.F. 1997). "This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.* (emphasis omitted). These predictions should be made objectively, without regard for the "'idiosyncrasies of the particular decision maker.'" *Id.* (quoting *Strickland*, 466 U.S. at 695).

The burden of establishing the truth of factual matters relevant to the claim of ineffective assistance rests with the accused. *Denedo,* 66 M.J. at 128. In making a determination whether a *DuBay*[2] factfinding hearing is warranted in a guilty-plea case raising an ineffective assistance of counsel claim, a hearing need not be ordered if an appellate court can conclude that "the motion and the files and records of the case . . . conclusively show that [an appellant] is entitled to no relief." *Ginn*, 47 M.J. at 244 (citation and internal quotation marks omitted). Having reviewed the record and the submitted affidavits, we conclude, consistent with the principles announced in *Ginn*, that we can resolve the merits of the petitioner's claim of ineffective assistance of counsel without directing a fact-finding hearing. *Id.* at 244-48.

Petitioner's Claim of Ineffective Assistance of Counsel

The petitioner's claim focuses on the advice he received from counsel prior to trial regarding the collateral consequences of a conviction specifically related to deportation. According to the petitioner's declaration: (1) He told Mr. Michael A. Ceballos, III, civilian defense counsel, that his primary concern was to avoid the risk of deportation, and that he was more concerned about deportation and separation from his family than the risk of going to jail, Declaration of Petitioner of 8 Mar 2007 at 2; (2) Mr. Ceballos advised him that if he contested the charges, he would likely face a general court-martial, and a

[2] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

conviction at a general court-martial would constitute a felony that could be used as a basis for deportation, *id*. at 3; (3) Mr. Ceballos advised that a special court-martial conviction, however, would only constitute a misdemeanor, and as with an acquittal, would avoid any risk of deportation, *id;* and (4) Had his counsel advised him that his special court-martial conviction could be interpreted as an "aggravated felony" and result in deportation, he would have insisted on going to trial, *id*. at 6-7.

Mr. Ceballos asserts in his affidavit that his custom and practice with clients was to never predict future collateral consequences where a plea of guilty is concerned, and that he made no such predictions in this case. Government Response to Court Order of 15 Sep 2009, Declaration of Mr. Ceballos of 14 Sep 2009 at 1-2. He states that he is certain he advised his client that a plea at a special court-martial was favorable to a general court-martial because of sentencing limitations, and the primary focus of his client was exposure to and limitation of incarceration. *Id*. at 2. The petitioner's detailed defense counsel states in her affidavit that she was not present at any meeting where any concerns about the possibility of deportation were discussed. *Id*., Declaration of Detailed Defense Counsel of 11 Sep 2009 at 1.

If Mr. Ceballos failed to advise the petitioner of the potential deportation consequences of a special court-martial conviction, that would not be sufficient to constitute deficient performance. *Denedo*, 66 M.J. at 129. Assuming arguendo that the alleged affirmative misrepresentation about deportation consequences constituted deficient performance, it does not establish prejudice in this case. *Id*. Assuming, without deciding, that deportation was the petitioner's primary concern, and that Mr. Ceballos incorrectly advised him as to potential deportation consequences, the petitioner has not established a reasonable probability that he would have insisted on going to trial if not for counsel's misrepresentation. *Id*.

The pretrial agreement negotiated between the petitioner and the Government placed the forum of trial at a special court-martial, which at that time could not impose a sentence of confinement in excess of six months. *See* Art. 19, UCMJ. The petitioner testified that he received a benefit by pleading guilty at a special court-martial, because it limited his punitive exposure. Record at 138. The petitioner now asserts that had he known deportation was a potential collateral consequence of a special court-martial conviction, he would have contested the charges at a general court-martial. This would have exposed the petitioner to additional charges, a significantly harsher sentence, and a more serious conviction - with no realistic possibility of an acquittal based upon our review of the record below.

The Government possessed overwhelming evidence of the petitioner's guilt. The record shows that he conspired with an accounting department employee at Bethune-Cookman College (KAO) to fraudulently endorse, utter, and cash checks backed by the college in exchange for a percentage of the deposited money. Record at 22-91; Prosecution Exhibit 1; Charge Sheet. The Government possessed thirty-eight stolen checks, totaling approximately $70,429.29, that were fraudulently endorsed to the petitioner. Charge Sheet. Many of these stolen checks were cashed and deposited in the petitioner's personal bank accounts. *Id*.

The petitioner's responses during the providence inquiry and stipulation of fact leave no doubt as to his factual guilt. Record at 22-91; PE 1. At the petitioner's court-martial, he pled guilty to conspiracy and multiple larceny charges. In the stipulation of fact, the petitioner attested that he entered into a conspiracy with KAO to cash stolen checks, that he knew the checks were not payable to KAO or himself, that he personally received $3,800.00 for his part in the conspiracy, and that his actions constitute larceny, under the Article 121, UCMJ. PE 1 at 1-5. The petitioner testified that he knew the checks had been stolen and yet deposited them in his personal bank account. Record at 84. He stole at least $28,068.50 from the school, with the intent to permanently deprive the school of the money. *Id*. at 82-85. The petitioner testified that he had no legal justification or excuse for negotiating any of the fifteen checks referred to in the specifications to which he pled guilty. *Id*. at 87. He testified that he knew his conduct was wrong at the time he did it, and that he negotiated the checks with a criminal state of mind. *Id*. at 87-89. The accused admitted that he had no right to deposit the checks in his account. *Id*. at 90.

Contesting the charges at a general court-martial with no conceivably valid defense would almost certainly have led to a significantly more calamitous result for the petitioner, thereby only increasing the likelihood of deportation in addition to a more severe sentence. It was "well within the wide range of reasonable professional assistance" to advise the petitioner to plead guilty under these circumstances. *Strickland*, 466 U.S. at 689. A competent attorney would have advised the petitioner that his chance of success at a contested court-martial was slim at best, and that the Government had offered a deal that was in his best interests. We find it unlikely that, given such advice, a rational accused "would have insisted on going to trial." *Denedo*, 66 M.J. at 129.

After carefully examining the briefs of the parties, the submitted declarations, and the record of trial, we conclude that the petitioner has not met his burden to establish prejudice as a result of deficient performance of counsel, and not established a "clear and indisputable" right to the relief he requests.

Denedo, 66 M.J. at 126. We therefore decline to grant relief.

Conclusion

The Petition for Extraordinary Relief in the Nature of *Error Coram Nobis* is denied.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court