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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BRADLEY A. LINDELL, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200900691
SPECIAL COURT-MARTIAL

Sentence Adjudged: 31 July 2009.
Military Judge: LtCol Thomas J. Sanzi, USMC.
Convening Authority: Commanding Officer, 1st Battalion, 11th Marines, 1st Marine Division, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col B.D. Landrum, USMC.
For Appellant: CAPT M.R. McCormick, JAGC, USN; Capt Bow Bottomly, USMC.
For Appellee: Capt Mark V. Balfantz, USMC.

16 November 2010

OPINION OF THE COURT

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

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, two specifications of wrongful use of cocaine, and wrongfully introducing cocaine onto an armed forces installation, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to 10 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence

executed. In accordance with a pretrial agreement, the CA suspended confinement in excess of 180 days.

The appellant now alleges two errors in his case:

(1) that his sentence was inappropriately severe given that the misconduct resulted from his attempt to cope with an overwhelming addiction to cocaine and despite his efforts to seek help from his command; and,

(2) that his detailed defense counsel was ineffective for failing to investigate and present evidence as to (a) the powerfully addictive nature of cocaine to bolster the appellant's statements of his struggle with cocaine addiction and his attempts to obtain needed, timely treatment; and, (b) the impact of two highly stressful life events and typical reactions thereto.

The court examined the record of trial, the appellant's assignments of error, and the Government's responses. 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.

Sentence Appropriateness

A court-martial is free to impose any lawful sentence that it determines to be appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964). Sentence appropriateness under Article 66(c), UCMJ, requires the court to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy,* 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). The court is mindful that sentence appropriateness is distinguishable from clemency, which is the prerogative of the CA. *Healy,* 26 M.J. at 395.

In this case, the appellant faced the maximum punishment of 12 months confinement, a bad-conduct discharge, forfeiture of two-thirds pay per month for 12 months, and reduction to the lowest enlisted pay grade. The court carefully considered and examined the record of trial -- including the testimony of the appellant's father, the appellant's unsworn statement, and his record of service, and balanced that against the appellant's use of cocaine on two occasions, unauthorized absence on two occasions, and bringing a controlled substance on a military installation. We conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005).

Ineffective Assistance of Counsel

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). Upon review, the court presumes that trial defense counsel provided effective assistance throughout the trial; 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)); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Davis,* 60 M.J. at 473. Additionally, 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. *United States v. Anderson,* 55 M.J. 198, 202 (C.A.A.F. 2001)(quoting *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). 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.

Ineffective assistance of counsel involves a mixed question of law and fact, which requires a *de novo* review. *Davis*, 60 M.J. at 473 (citing *Anderson*, 55 M.J. at 201). In review, a three-prong test is used 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)(internal citations omitted).

While the appellant may, at this point, disagree with the result of his sentencing case, we find that there is a reasonable explanation for his trial defense counsel's actions. The appellant's trial defense attorney made deliberate, tactical decisions to present the sentencing case -- particularly the issue of the appellant's struggle with drugs, his friend's death, and the loss of his girlfriend -- through the testimony of the appellant's father and the appellant's unsworn statement. Sworn

Declaration of Trial Defense Counsel of 10 May 2010. The trial defense counsel determined that these issues did not raise an affirmative defense, and chose to be cautious in how the appellant's struggles were exhibited to the trial judge so as to enhance his sentencing posture. *Id.* This explanation is reasonable and did not fall measurably below the performance ordinarily expected of fallible lawyers. As such, the appellant has not demonstrated substandard representation or that the result of the proceeding would have been different had other choices been made. This court concludes that the appellant has not met his burden of showing that his trial defense counsel was ineffective.

Conclusion

Accordingly, the findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court