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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DON W. BAILEY, JR.
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200370
SPECIAL COURT-MARTIAL

Sentence Adjudged: 20 April 2012.
Military Judge: LtCol Robert G. Palmer, USMC.
Convening Authority: Commanding Officer, 4th Marine Corps District, New Cumberland, MD.
Staff Judge Advocate's Recommendation: Col E.R. Kleis, USMC.
For Appellant: CDR Howard A. Liberman, JAGC, USN.
For Appellee: LT Philip S. Reutlinger, JAGC, USN.

7 February 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of failure to obey a lawful general order, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The military judge sentenced the appellant to confinement for four months, reduction to pay grade E-1, and a bad-conduct discharge. A pretrial agreement provided that all confinement in excess of thirty days would be suspended, but the

convening authority (CA) vacated the suspension because the appellant violated a military protective order (MPO). As a result, the CA approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant assigns two errors: first, that his civilian counsel was ineffective for failing to submit clemency matters to the CA, and second, that the CA wrongfully withdrew from the pretrial agreement due to violation of an MPO that lacked a valid military purpose.[1] After careful consideration of the record and the briefs of the parties, 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 serving as a recruiter when he became intimately involved with a high-school student (the student) who was a prospective recruit applicant. He sent her sexually explicit text messages and exchanged sexually explicit photographs, visited her family home after-hours, and had sexual intercourse with her. The student was 17 years old during the first instance of sexual intercourse, and turned 18 a few days before her relationship with the appellant was discovered.

On 29 April 2011, the appellant signed a DD Form 2873, "Military Protective Order" (the MPO), which forbade him from initiating any communication with the student for a period of three years. The MPO was issued by the appellant's commanding officer.

In May 2012, after being released from confinement, the appellant sent a Facebook message[2] to the student. The CA subsequently appointed an officer to inquire into whether the appellant violated the terms of the pretrial agreement. The appellant was represented by counsel at the hearing, and argued that the order lacked a valid military purpose because the appellant was no longer a recruiter, and the student was no longer a minor or a prospective recruit applicant. The appointed officer concluded that the appellant violated the MPO and recommended that the CA withdraw from the pretrial

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

[2] The order specifically named Facebook messaging as a prohibited form of communication.

agreement, which he did. The appellant requested that the CA order a post-trial Article 39(a) session, and also submitted a motion to the military judge who presided over his court-martial requesting a post-trial Article 39(a) session to address the legality of the MPO. Both the CA and military judge denied his request.

The appellant returned to the brig to serve the remainder of the adjudged confinement. Emails attached to the record suggest that his civilian defense counsel[3] experienced difficulty communicating with the appellant while in confinement. Documents attached to the record also indicate civilian defense counsel was granted at least two extensions to file post-trial matters, based, in part, on difficulty communicating with the appellant. One email from an apparent Government representative indicates that civilian defense counsel had been in contact with the appellant before the second deadline, but no clemency matters were submitted. In a one-page affidavit, the appellant now claims that, after the clemency deadline, his counsel told him that the CA was unlikely to award any clemency. He also alleges that his civilian defense counsel convinced him to sign a waiver of the right to submit clemency.

Discussion

We first address the appellant's claim that his counsel was ineffective, and then discuss the lawfulness of the MPO.

Effectiveness of Counsel during Clemency

The failure to submit clemency matters is not a *per se* violation of the appellant's right to effective assistance of counsel. *United States v. Cobe*, 41 M.J. 654, 655 (N.M.Ct.Crim.App. 1994). We review the effectiveness of counsel *de novo*. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). A claim that counsel was ineffective requires both a

[3] The appellant released his detailed defense counsel before trial, Appellate Exhibit XIV, but a second military defense counsel appears to have been detailed to him sometime after the trial. Therefore, the appellate defense counsel's assertion that his client "had no military counsel to fall back on to assist him with clemency" is not supported by the record. Appellant's Brief of 15 Oct 2012 at 5. In fact, the record shows that the second detailed defense counsel moved the court and petitioned the convening authority for a post-trial Article 39(a) session in order to address the lawfulness of the MPO. She was also copied on correspondence between the civilian defense counsel and the CA during the post-trial process. The record is silent concerning this second detailed defense counsel's role with respect to clemency matters.

serious deficiency and actual prejudice, and the appellant carries the burden to prove both. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). It is a burden of production as well as persuasion, especially when factual allegations are central to the claim of ineffectiveness. *United States v. Moulton*, 47 M.J. 227, 229-30 (C.A.A.F. 1997).

Although the appellant has produced no evidence that the civilian defense counsel's failure to submit clemency matters is a serious deficiency, we will proceed directly to the question whether the appellant was prejudiced by this deficiency.[4] *Strickland*, 466 U.S. at 697. The prejudice test requires the appellant to overcome a presumption of competence and show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Wiley*, 47 M.J. at 159.

The result of the appellant's post-trial process could only have been different if the appellant had favorable clemency matters to submit, and thus we have required that appellants prove the existence of such materials in their case. *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003). The appellant has failed to do so here, offering only a one-page affidavit about his interactions with his counsel and no other documents or description of what he would have submitted to the CA. His affidavit consists of precisely the type of "bare allegations" we have disfavored, *id.* at 622, which do not overcome the presumption of competence because it is impossible for us to determine whether a different clemency process would have made any difference at all.

In deciding this assignment of error, we found it unnecessary to order production of an affidavit from civilian defense counsel. Such an affidavit is not necessary unless we "review[] the allegation of ineffectiveness and the government response, examine[] the record, and determine[] that the allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence." *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995) (citation omitted). By assuming a deficiency, we have taken as unrebutted the

[4] We have observed before that submitting clemency matters is a routine task for defense counsel to accomplish. *See Cobe*, 41 M.J. at 656. Nonetheless, the ease of "simply copying certain pages of the record of trial and forwarding them with a cover letter," *id.*, does not require us to find prejudicial error every time that an accused does not submit clemency matters. Such a holding would give rise to wasteful "*kabuki* type formalities." *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003).

appellant's assertions about his counsel's performance, but neither those assertions nor the record provide a factual predicate for a finding of prejudice. *See United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000).

The affidavit does not address any particular matter that might have been submitted during clemency, and the record does not reveal any other facts that might have earned the appellant some clemency even after he committed post-trial misconduct. What favorable facts there are appear to have received due consideration. The appellant benefitted from a recommendation of clemency by the military judge, which was noted in both the staff judge advocate's recommendation and the CA's action. The CA also took the appellant's "honorable service record in Iraq" into account, a departure from the boilerplate language that demonstrates his personal consideration of the appellant's case. Convening Authority's Action of 15 Aug 2012 at 3. The appellant has neither asserted nor proven the existence of favorable clemency matters for submission to the CA.

The appellant's "bare allegations" simply do not overcome the presumption of counsel's competence, or that but for civilian counsel's failure to submit matters in clemency, the results would have been different. *Strickland*, 466 U.S. at 694. This assignment of error is without merit.

The Lawfulness of the Military Protective Order

Turning to the second assignment of error, we interpret the assertion that the MPO was unlawful to be a claim of overbreadth. It would be incredible to suggest that there is not a valid military purpose in prohibiting contact between this recruiter and the high school student, when their relationship was the very basis of his court-martial. Thus, we read the appellant's claim to suggest that, even if the purpose was valid at the start of the criminal proceedings, it was overbroad in continuing to forbid contact after the appellant's confinement, when he was no longer a recruiter, the student was no longer a prospective applicant, and she had turned 18. In fact, the order continues to forbid contact until April 2014.

This assignment of error may have merit in the abstract. Commanders may not issue overly broad MPOs simply because one of their Marines or Sailors is accused of a crime. *United States v. Wysong*, 26 C.M.R. 29, 31 (C.M.A. 1958). Such orders should be "narrowly and tightly drawn," *id.*, and the three-year duration of this order may exceed that mandate.

But since *Wysong*, courts have not analyzed the lawfulness of orders in the abstract. Instead, they look to the specific conduct at issue and ask whether *that* conduct could lawfully be prohibited. *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003). For example, in *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989), an HIV-infected airman was ordered to engage only in safe sex, which order was justified by the need to protect other airmen whom he could have infected. This purpose was valid, but the terms of the order also barred Womack from having unsafe sex with civilians, whose health was unrelated to any military purpose. While that may have made the order overbroad in the abstract, Womack was not prejudiced by it because his case involved another airman, not a civilian. *Id*. at 91.

The result is the same here. It may have been overbroad to forbid the appellant from speaking to the student for three years, long past their involvement in this case and the time that recruiting interests are at stake. But the appellant did not violate the order in April 2014, he violated it in May 2012, within one month of his court-martial, before the CA had even taken action on his court-martial. With the purpose of protecting the integrity of the post-trial process, a commander could justifiably conclude that an accused should not be permitted to contact a sensitive witness prior to taking action on the findings and sentence. In this specific scenario, the recent nature of the appellant's misconduct suggests an alternative purpose.[5] His open sexual relationship with the student, perceived by her family and other members of her high school, reflected poorly on Marine Corps recruiters. While that impression may dissipate over time, it likely still existed just one month after the court-martial and one year after the illicit relationship was discovered. At that time, an MPO was still appropriate to show other prospective recruits, their families, and the public that recruiters who target high school students for sex could not then capitalize on their misconduct simply by serving a short term of confinement.

Conclusion

[5] We do not require that the commanding officer place his purpose in the text of the order or otherwise offer evidence of it, since his orders are presumed to be lawful and it is the appellant's burden to prove otherwise. *United States v. Kisala*, 64 M.J. 50, 52 (C.A.A.F. 2006). Furthermore, the lawfulness of an order is a question of law, not a question of fact. *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001).

We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court