IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **J.F. FELTHAM** **K.K. THOMPSON**

UNITED STATES

v.

Oscar R. GONZALEZ
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200400055 Decided 28 August 2006

Sentence adjudged 22 February 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

Maj CHARLES ZELNIS, USMC, Appellate Defense Counsel
LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

THOMPSON, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of indecent assault, unlawful touching, and three specifications of committing indecent acts, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The adjudged sentence consisted of a dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for 14 years. The convening authority approved the sentence, but, in an act of clemency, suspended confinement in excess of five years for a period of five years.

We have examined the record of trial and the appellant's four assignments of error asserting that: (1) the military judge erred in failing to grant a mistrial based on improper communications between members and witnesses; (2) the appellant was denied effective assistance of counsel in that his civilian

defense counsel failed to adequately prepare for trial or communicate with the appellant prior to trial; (3) the convening authority committed unlawful command influence in preventing the command chaplain from submitting a letter in support of clemency for the appellant; and (4) the military judge erred in failing to give a curative instruction as requested by the defense counsel after improper argument was made by the trial counsel. We have also considered the Government's answer, and related affidavits and replies. 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant lived in Army base housing with his wife and children. The appellant was often in the company of neighborhood children, playing games with them or being present in homes in the neighborhood. During a two-year time period, the appellant molested two girls under the age of 16, E and F, who lived in his neighborhood. The appellant, on separate occasions, pulled E's shirt off during a football game, hugged and attempted to kiss her, touched her vagina, and groped her breasts, buttocks, and thighs. On one occasion, the appellant went to F's house to drop off his daughter to play with F's siblings. He went to F's bedroom where he kissed her and digitally penetrated her vagina. Evidence of other uncharged incidents involving inappropriate touching of other minor girls was also introduced at trial.

Failure to Grant Mistrial

The appellant asserts that the military judge erred in failing to grant a mistrial because of improper contact or communications between members and witnesses or their family members. Several friends of the appellant and his wife gave affidavits approximately four months after the trial stating that they had observed, during the trial, certain members, specifically Colonel (Col) Bergmeister and Master Sergeant (MSgt) Weatherington, speaking, smoking and laughing with the witnesses and their family members during recesses.

A post-trial Article 39(a), UCMJ, session was conducted and testimony was received from both of the members, Col Bergmeister and MSgt Weatherington, as well as two of the witnesses who originally gave affidavits. During this session, Col Bergmeister testified that he was not a smoker and did not have

any conversation or other improper contact with any witness or family member during the trial. He further indicated that such a conversation would have been contrary to the military judge's instructions, and, if it had occurred, he would have reported it to the military judge. He further advised that, having sat on at least two other courts-martial, he was well aware of his obligation to avoid contact or conversation with parties concerned with the court-martial. He stated that, even for the Article 39(a), UCMJ, session, he avoided any contact whatsoever with the two witnesses, Sergeant (Sgt) and Mrs. Prasse, who had provided affidavits.

MSgt Weatherington testified that he was a smoker and would take smoking breaks. He did see, on occasion, witnesses and family members outside, but he did not communicate or have improper contact with any of them. Both he and Col Bergmeister indicated that their verdict and sentence was based solely upon the evidence presented at trial and no outside influence. Mrs. and Sgt Prasse testified they had seen these two members outside in close proximity to the witnesses and family members, but they could not hear any conversation or specific communications about the case. They also testified that they immediately communicated their observations to at least one of the military defense counsel, and were told that, since the members were not sequestered, there was nothing that could be done about their talking to each other. An affidavit was provided by Captain (Capt) Goldstein, the defense counsel they allegedly communicated with, wherein he adamantly denies the assertion that anyone notified him concerning improper communications between the members and witnesses or family members. We decide the issue on the record and affidavits before us. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Specifically adopting the military judge's findings of fact, we conclude that there were no improper communications or contact between Col Bergmeister or MSgt Weatherington and the witnesses or family members. We find that the Government met its burden by a clear and positive showing that any possible contact which may have occurred between the members and witnesses did not and could not operate in any way to influence their decision. *United States v. Elmore,* 33 M.J. 387, 393-94 (C.M.A. 1991)(citing *United States v. Adamiak,* 15 C.M.R. 412 (C.M.A. 1954). We further find that the military judge did not abuse his discretion in denying the defense motion for a mistrial. *United States v. Thompson,* 5 M.J. 28, 30 (C.M.A. 1978). This issue is without merit.

Ineffective Assistance of Counsel

The appellant asserts that his civilian defense counsel was ineffective when he failed to communicate with the appellant prior to trial and did not prepare for trial. The appellant discharged his civilian defense counsel prior to trial. The appellant had two military defense counsel assigned to represent him in this case and they were involved in his representation throughout the proceedings. The civilian defense counsel had originally assumed the role as lead counsel, and the military defense counsel were responsible for portions of the court-martial. After the civilian defense counsel had been discharged by the appellant, the military defense counsel became responsible for the entire defense presentation.

To establish that there has been ineffective assistance of counsel, an appellant must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). Assuming, *arguendo*, that the civilian defense counsel's pretrial representation was deficient, the appellant has not demonstrated that any of these deficiencies so impacted the performance of his two military defense counsel as to affect the outcome of trial. Under these circumstances, we need not determine whether any of the alleged errors constitute deficient performance under the first prong of *Strickland,* because the appellant has not met his burden to show prejudice under the high hurdle established by the second prong of *Strickland. See 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)).

The record of trial demonstrates that the two military defense counsel presented numerous defense witnesses and evidence, conducted vigorous cross-examination of prosecution witnesses, and made appropriate objections. Evaluating the performance of the appellant's trial defense counsel in light of all of the circumstances, we are confident that the adversarial process worked in this case. *See Scott*, 24 M.J. at 188. This assignment of error is without merit.

Unlawful Command Influence

In his third assignment of error, the appellant alleges that unlawful command influence occurred when the appellant's chaplain was prevented from submitting a letter on behalf of the appellant in support of his clemency request. We agree, but

find that the resulting error was harmless beyond a reasonable doubt.

The defense has the initial burden of producing sufficient evidence to raise unlawful command influence. *See United States v. Biagase,* 50 M.J. 143, 150 (C.A.A.F. 1999). As our superior court said in *United States v. Johnston,* 39 M.J. 242, 244 (C.M.A. 1994), "the threshold triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation." *See also United States v. Allen,* 33 M.J. 209, 212 (C.M.A. 1991).

The burden of disproving the existence of unlawful command influence or proving that it did not affect the proceeding does not shift to the Government until the defense meets its burden of production. *See United States v. Thomas,* 22 M.J. 388, 396 (C.M.A. 1986). Once an issue of unlawful command influence is raised, the Government must persuade the military judge and the appellate courts beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings and sentence. *See Biagase,* 50 M.J. at 151.

The appellant has presented as substantive evidence in support of his contention an email from Lieutenant (LT) Molina, the appellant's chaplain, to his defense counsel, Major (Maj) Stackhouse. In the affidavit given by Maj Stackhouse, he states that he had solicited LT Molina to prepare a letter to be included as part of the appellant's clemency submission. When Maj Stackhouse had not received the promised letter, he contacted LT Molina via email. The email response from LT Molina states, in part, "I had to submit the letter to the CO [Commanding Officer] for his review and was advised against submitting the letter. He felt that such a letter coming from the Command Chaplain (HQBn) would be representative of the Command's wishes."[1] The direct consequence of LT Molina's discussion with his commanding officer was an interference with the appellant's opportunity to submit this letter with his clemency submission to the convening authority under RULE FOR COURTS-MARTIAL 1105(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000). Although there is no supporting affidavit from the chaplain and the appellant's contention is based solely on this submission and the affidavit given by Maj Stackhouse, we find he has met his burden to raise the issue of unlawful command influence. *See United States v. Allen,* 31 M.J. 572, 590 (N.M.C.M.R. 1990), *aff'd,* 33 M.J. 209 (C.M.A. 1991).

[1] *See* Appellant's Motion to Attach Affidavits and Email of 13 Feb 2006.

The Government failed to present any evidence that command influence did not occur. Thus, we conclude that unlawful command influence occurred when LT Molina was discouraged from providing post-trial clemency matters by his commanding officer. What remains to be determined is whether or not this court is satisfied, beyond a reasonable doubt, that the findings and sentence are unaffected by the command influence. *United States v. Jones,* 30 M.J. 849 (N.M.C.M.R. 1990). We are so satisfied.

The appellant's criminal misconduct was egregious. The offenses of which the appellant was convicted authorized a maximum sentence of 30 years confinement, reduction to pay grade E-1, total forfeiture of all pay and allowances, and a dishonorable discharge. The members awarded a sentence of 14 years confinement, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge.

The record of trial included the favorable testimony of nine witnesses, including a general officer, on the appellant's character and service. Letters and statements were also submitted from friends and family members of the appellant, including his four daughters. After considering the staff judge advocate's recommendation, a personal plea for clemency on behalf of the appellant by a general officer, and the testimony and written statements, which were a part of the record of trial, the convening authority granted substantial clemency to the appellant, ordering executed only five years of the 14 year sentence awarded.

We conclude that the convening authority was fully aware of the appellant's character and his value to the Marine Corps, as well as his crimes and their effect on the victims. We are persuaded by all the facts contained in the record that a letter from LT Molina in support of the appellant would not have added significant value in view of the already extensive letters of support, or that it would have been sufficient to influence the convening authority to grant additional clemency. We thus find, beyond a reasonable doubt, that the lack of a clemency letter from LT Molina did not affect the findings and sentence approved by the convening authority. *United States v. Stombaugh,* 36 M.J. 1180, 1186 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 208 (C.M.A. 1994). Therefore, we decline to grant relief.

Improper Argument

The appellant claims as his final assignment of error that the trial counsel's argument on sentencing was improper in that it asked the members to put themselves in the place of the

victim and her father. We disagree and find this assignment of error to be without merit.

Conclusion

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

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court