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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Arthur J. WHITE
Hospitalman (E-3), U. S. Navy

NMCCA 200401813 Decided 27 March 2006

Sentence adjudged 19 July 2004. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Medical Battalion, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
CDR BRENT G. FILBERT, JAGC, USNR, Appellate Defense Counsel
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use of cocaine, wrongful possession of marijuana, and two specifications of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 100 days, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of pretrial confinement served (67 days).

After carefully considering the record of trial, the appellant’s assignment of error that his trial defense counsel was ineffective during sentencing, the Government’s response, and the appellant's reply brief, 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.

Ineffectiveness of Counsel

In his assignment of error, the appellant alleges that his trial defense counsel was ineffective because he did not present any evidence in sentencing. We decline to grant relief.

We review claims of ineffective assistance *de novo*. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Constitutional standard applies to military cases. *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). The Supreme Court explained the two components as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687. Counsel is presumed to have performed in a competent, professional manner. *Id.* at 689. To overcome this presumption, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). "[T]he appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick,* 59 M.J. 383, 386-87 (C.A.A.F. 2004).

Facts and Allegations

During the sentencing phase of the court-martial, the military judge properly advised the appellant of his right to present matters in extenuation and mitigation including his right to testify under oath, make an unsworn statement, or to remain silent. The appellant acknowledged that he understood those rights. Record at 50-51. In aggravation, the Government presented only a copy of the appellant's enlistment contract. When the trial defense counsel stated that he had nothing to present, the military judge again spoke to the appellant:

> MJ: Hospitalman White, when I informed you of the rights that you have to present matters in extenuation and mitigation, I told you that if you decided to not make a statement to this Court that will not be held against you in any way. And it will not be held against you in any way, but I just wanted to make sure that that is <u>your</u> desire in this case that you wish not to make a statement to this Court.
>
> ACC: Yes, sir.

Record at 52 (emphasis added). In a post-trial declaration under penalty of perjury attached to the record, the appellant swore in pertinent part:

> 5. My detailed defense counsel, Captain [Capt] K.D. M[], U.S. Marine Corps, represented me at my special court-martial tried at Camp Lejeune, North Carolina, on 22 June 2004 and 19 July 2004.
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> 6. At my special court-martial, I did not testify or make a statement of any kind during sentencing. I did not testify or make an unsworn statement during the sentencing portion of my case because my detailed defense counsel advised me that the sentence I would receive would be the same if I made a statement to the court or not.
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> 7. My detailed defense counsel did not introduce any evidence during the sentencing portion of my special court-martial. Specifically, he did not introduce into evidence any of my enlisted evaluations or provide any evidence to the court regarding my military service, including my service in direct support of Operation Enduring Freedom and Operation Iraqi Freedom.
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> 8. My detailed defense counsel did not discuss with me the fact that he was not going to introduce any evidence, including documents from my service record, during the sentencing phase of my court-martial.
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> 9. I did not request that my detailed defense counsel present no evidence during the sentencing portion of my special court-martial.

Declaration of Appellant of 29 Jun 2005. We ordered the Government to produce an affidavit from the trial defense counsel. In response to our order, the trial defense counsel provided an affidavit and four other documents. In the affidavit, the trial defense counsel swore in pertinent part:

> 1. On 9 June 2004, Hospitalman (HN) Arthur J. White requested me as his individual military counsel.

. . . .

5. HN White expressed to me that his priority in his case was to get out of the brig and the Navy as quickly as possible.

6. On 21 June 2004, I sent a letter directly to the Commanding Officer, 2d Medical Battalion, requesting HN White's case be handled at nonjudicial punishment or summary court-martial in return for HN White waiving his administrative discharge board. . . . I attached a signed pretrial agreement offer to this letter.

7. The Commanding Officer rejected this offer.

8. An additional charge for a single specification of marijuana use was preferred on 25 June 2004.

9. On 9 July 2004, the Commanding Officer signed a pretrial agreement that suspended all confinement in excess of time already served contingent upon HN White receiving a bad[-]conduct discharge and submitting a request for voluntary appellate leave.

10. Prior to the guilty plea, I prepared HN White for the providence inquiry. I explained to him that we could present evidence in order to try to reduce the amount of confinement and to attempt to prevent a bad[-]conduct discharge. HN White directed me to not put on any evidence because he wanted to make sure that he would receive a bad[-]conduct discharge in order to take advantage of the confinement clause of his pretrial agreement.

11. I advised HN White that presenting evidence of his record of service and details about his personal life could help in trying to prevent a bad[-]conduct discharge and possibly reduce the amount of confinement time.

12. I specifically advised HN White that this course of action was not in his best interest; however, HN White directed me, in writing, to not put on any evidence and to not argue for retention in the Navy.

13. I did not advise HN White that his sentence would be the same regardless of whether he made a statement to the court or not. I explained to him that it was my opinion that putting on evidence was the only way he could try to avoid a bad[-]conduct discharge. HN White did not want to take the chance of not getting a bad[-]conduct discharge and being required to serve additional time in the brig. Additionally, he made it clear to me that he did not want to remain in the Navy.

Response from Detailed Defense Counsel of 3 Feb 2005. The trial defense counsel also attached a statement entitled, "COUNSEL DIRECTIONS," which was signed by the appellant on 18 July 2004, the day before trial. In this document, the appellant stated that he was advised by his counsel and understood the possible adverse consequences of a bad-conduct discharge and that it was not in his best interest to request a bad-conduct discharge, that he might avoid a bad-conduct discharge by presenting a strong sentencing case. He then stated, "I have directed him [Capt M] to not put on evidence in this case that may prevent me from receiving a bad[-]conduct discharge," and "I also do not desire to pursue post-trial clemency." HN White ltr 5800 LSSS/kdm of 18 Jul 04.

As noted above, the sentencing portion of the pretrial agreement provided, in part, that the convening authority could approve the sentence as adjudged, but if a bad-conduct discharge were adjudged and if the appellant submitted a request for appellate leave within 10 days of trial, the convening authority would suspend all confinement in excess of time served as of the date of trial. Appellate Exhibit II.

Discussion

Our superior court has ruled that a trial defense counsel violated no ethical or legal issues if he presented no sentencing evidence at the behest of the appellant:

> [I]f . . .[the] accused instructs his counsel to present nothing in mitigation or extenuation, the attorney is bound not to do so, though he should, of course, exert every effort to sway his client's judgment, pointing out the undeniably permanent stain and other serious consequences to a young man who must henceforth be branded as one discharged from the services by an instrument bearing a less than honorable characterization. But, if his client nonetheless remains steadfast in his determination to sacrifice his character in order to gain an illusory freedom from his present responsibility and duty, counsel, though he may withdraw as such, violates no legal or ethical principle in continuing to represent him and following his instructions to present nothing on his behalf.

United States v. Blunk, 37 CMR 422, 424 (C.M.A. 1967). The question before us then is a factual one. Did the appellant decide for himself not to present matters in sentencing in order to ensure that he be awarded a bad-conduct discharge and also receive the benefit of the confinement limitation of his pretrial agreement? We answer the question in the affirmative.

In his affidavit, the appellant alleged that he did not testify or make an unsworn statement during sentencing because his counsel advised him that it would not make any difference in

the sentence he received. Further, the appellant stated that he did not request that the counsel present no other evidence during sentencing. In his affidavit, the trial defense counsel stated that the appellant wanted to do whatever was necessary to get out of the U.S. Navy and out of confinement as soon as possible, the commanding officer rejected an initial proposal for an administrative discharge, the commanding officer then accepted a pretrial agreement to suspend all confinement in excess of time served so long as the appellant received a bad-conduct discharge and applied for appellate leave, the appellant was advised that the presentation of sentencing evidence might reduce confinement or eliminate the bad-conduct discharge, the appellant elected not to present any sentencing evidence, and the appellant signed a *Blunk* letter to that effect.

Clearly, the declaration under penalty of perjury of the appellant and the affidavit of the trial defense counsel conflict in part. But we do not find it necessary to order an evidentiary hearing to determine the facts on this issue:

> [A] post-trial evidentiary hearing . . . [is] not required in any case simply because an affidavit is submitted by an appellant. In most instances in which an appellant files an affidavit in the Court of Criminal Appeals making a claim such as ineffective assistance of counsel at trial, the authority of the Court to decide that legal issue without further proceedings should be clear. The following principles apply:
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> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
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> . . . .
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.
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> . . . .
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> Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *DuBay* proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66 factfinding power and decide the legal issue.

United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997). We find that the first and fourth principles apply to our case and obviate the need for an evidentiary hearing.

First, even if the trial defense counsel was ineffective in failing to present evidence in sentencing, the error was harmless. Nowhere in the appellant's declaration does he dispute his trial defense counsel's statement that the appellant wanted out of the brig and out of the U.S. Navy as soon as possible. The results of trial, coupled with the terms of the pretrial agreement, succeeded on both of the appellant's wishes. He was released from confinement on the day he was sentenced and he thereafter left the U.S. Navy on appellate leave. "If we conclude that any error would not have been prejudicial under the second prong of *Strickland* [466 U.S. at 697], we need not ascertain the validity of the allegations or grade the quality of counsel's performance under the first prong." *United States v. Saintaude*, 61 M.J. 175, 179-80 (C.A.A.F. 2005).

Further, in regard to the fourth principle, the appellate record clearly demonstrates the improbability that, as the appellant alleges, his counsel did not discuss with him the decision not to present matters in sentencing and advised him not to testify or to make an unsworn statement. As noted above, at the outset of the sentencing hearing, the military judge explained to the appellant his rights to present such matters and to testify or to make an unsworn statement. Later, when the trial defense counsel did not present any evidence in sentencing and the appellant made no statement, the military judge asked the appellant directly if it was <u>his</u> decision not to make any statement. The appellant answered affirmatively. The generous pretrial agreement also lends credence to the trial defense counsel's affidavit. Finally, the trial defense counsel has presented us with a *Blunk* letter, signed by the appellant, in which he directed his trial defense counsel not to present evidence in sentencing. We note that the appellant has not challenged the accuracy of that letter.

Under those circumstances, it is not difficult for us to find as a fact, as we do, that the appellant's post-trial affidavit is not truthful. Instead, we find that the trial defense counsel's affidavit is truthful. Thus, the assignment of error has no merit.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court