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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Charles M. BRICKER
Aviation Machinist's Mate First Class (E-6), U.S. Navy

NMCCA 200001970 Decided 27 June 2005

Sentence adjudged 29 June 2000. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

Maj PHILLIP D.SANCHEZ, USMC, Appellate Defense Counsel
Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel
Maj RAYMOND E. BEAL II, USMC, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge, sitting alone. Contrary to his pleas, the appellant was convicted of committing an indecent act with a child under the age of 16 years, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 18 months and a bad-conduct discharge. The military judge recommended that the convening authority suspend the bad-conduct discharge and confinement in excess of 5 months for 3 years and, if requested, defer and suspend[1] automatic forfeitures. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed.

After carefully considering the record of trial, the appellant's three assignments of error, and the Government's

[1] We presume that the military judge misspoke, intending to say, "waive," since automatic forfeitures cannot be suspended. *United States v. Emminizer*, 56 M.J. 441, 443 (C.A.A.F. 2002).

response, 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.

Sufficiency of Evidence

In the appellant's first assignment of error, he asserts that the Government failed to offer factually and legally sufficient evidence to prove that the appellant had any indecent intent towards the victim. The appellant avers that this court should set aside his conviction. We disagree.

This court has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. *See* Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ.

To support a conviction for committing an indecent act with a child under the age of 16 years, the Government must establish the following five elements beyond a reasonable doubt:

> (1) That the [service member] committed a certain act upon or with the body of a certain person;
>
> (2) That the person was under the age of 16 years and not the spouse of the [service member]:
>
> (3) That the act of the [service member] was indecent;
>
> (4) That the [service member] committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the [service member], the victim, or both; and
> (5) That, under the circumstances, the conduct of the [service member] was to the prejudice of good order and

> discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 87b(1).

We have carefully examined all of the evidence admitted on the merits. We conclude that the evidence is both legally and factually sufficient on each and every element of the offense of committing an indecent act with a child under the age of 16 years. We are therefore convinced, beyond a reasonable doubt, that the appellant is guilty of this offense. As such, we decline to grant relief.

Ineffective Assistance of Counsel

In the appellant's second assignment of error, he asserts that he was denied his Sixth Amendment right under the U.S. Constitution to effective assistance of counsel when his trial defense counsel failed to call witnesses during sentencing and failed to present financial impact evidence regarding his potential loss of retirement benefits. The appellant avers that this court should set aside his sentence and remand his case for a new sentencing hearing. We disagree.

A military accused enjoys the right to effective assistance of counsel in sentencing hearings. *See United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). To prevail on such a claim, however, an accused must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and demonstrate: (1) "a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment'; and (2) that the deficient performance prejudiced the defense [through] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *See Alves*, 53 M.J. at 289; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

Under the deficiency prong, "[t]he competence of counsel is presumed." *Scott*, 24 M.J. at 188. This presumption is overcome if the counsel's performance falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Reasonableness is "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Scott*, 24 M.J. at 188.

At the time of trial, the appellant had 17 years of service in the Navy. The appellant insists that his trial defense counsel was constitutionally ineffective when he failed to investigate and present the economic impact a punitive discharge

would have on the appellant after 17 years of military service, and failed to call sufficient witnesses to testify for him. Specifically, the appellant insists that his trial defense counsel was constitutionally deficient in that he failed to present sufficient evidence of rehabilitation, mitigation, and extenuation.

To determine whether the "presumption of competence has been overcome," our superior court has outlined a three-part inquiry:

> (1) Are appellant's 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 a defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result.

United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991), *appeal after remand aff'd*, 59 M.J. 245 (C.A.A.F. 2004). Applying this test, we are of the opinion that the appellant has not overcome the presumption of competence.

The appellant contends that his trial defense counsel "failed to present mitigation evidence concerning the financial impact caused by a bad[-]conduct discharge." Appellant's Brief of 30 Apr 2004 at 13. The appellant relies on *United States v. Greaves*, 46 M.J. 133, 138 (C.A.A.F. 1997)(concluding that loss of retirement pay is the "critical" factor for determining the appropriate sentence). However, the appellant's assertion has failed to rebut the strong presumption of competency attached to his trial defense counsel's representation.

First, the appellant has failed to show that the military judge did not consider evidence of the potential loss of future potential retirement benefits during his sentencing case. The appellant was nearly 3 years away from retirement at the time of his court-martial. Therefore, regardless of the outcome of the appellant's court-martial, the potential benefits of future retirement were not guaranteed. Further, a military judge can be presumed to be aware that retirement entails substantial

monetary benefits. As such, we find no prejudice in the appellant's case despite the omission.

With regard to the appellant's attack on his trial defense counsel's presentation of a sentencing case, that attack is not well-taken. In fact, his trial defense counsel put on a considerable sentencing case on the appellant's behalf. Further, the appellant has failed to identify the witnesses, i.e., military character witnesses he would have called concerning his good military character or what their testimony would have been, what other evidence he would have provided through written statements, and why he did not present these matters in addition to those he presented to the convening authority before he took his action.

We conclude that the appellant has failed to overcome the presumption that his trial defense counsel provided competent assistance and, further, has failed to show there is a reasonable probability that, absent the alleged errors, "there would have been a different result." *Gilley* 56 M.J. at 124. As such, we decline to grant relief.

Sentence Appropriateness

In the appellant's third assignment of error, he asserts that his sentence, which includes an unsuspended bad-conduct discharge, is inappropriately severe given the nature of the offense and the character of the offender. The appellant avers that this court should set aside the bad-conduct discharge. We disagree.

A court-martial is free to impose any legal sentence it deems appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964); RULE FOR COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). On review, a court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Further, courts of criminal appeal are tasked with determining sentence appropriateness vice granting clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). Clemency, which involves bestowing mercy, is the prerogative of the convening authority. An appropriate sentence results from an "individualized consideration" based on "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 record of trial well-supports the appropriateness of the appellant's sentence. We are confident that the appellant received the individualized consideration required based on the seriousness of his offense and the nature of his character--that is all that the law requires. The appellant's assignment of error amounts to nothing more than a request for clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395-96; R.C.M. 1107(b). In this regard, the convening authority considered the appellant's request for clemency before taking action on the appellant's case. As such, we decline to grant relief.

Conclusion

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

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court