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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Carlos MORCIEGO
Private (E-1), U.S. Marine Corps

NMCCA 200101789 Decided 22 June 2005

Sentence adjudged 22 June 2000. Military Judge: R.H. Kohlmann. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Transportation Support Battalion, 2d FSSG, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LT JASON LIEN, JAGC, USNR, Appellate Government Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

REDCLIFF, Judge:

A military judge sitting as a special court-martial convicted the appellant, contrary to his plea, of wrongful use of cocaine, in violation of Article 112a, Uniform Code Of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 45 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error. First, he contends he received ineffective assistance of counsel because his trial defense counsel failed to present evidence of the appellant's good military character during his case-in-chief and because the trial defense counsel made the forum selection without the appellant's approval. Second, the appellant alleges that despite the lack of prejudice, he should receive relief because it took 462 days to process his case from the date of trial to its receipt for appellate review.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response and the appellant's reply.[1] We conclude that the findings and sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Effective Assistance of Counsel

The appellant claims that he was denied effective assistance of counsel because his counsel failed to present evidence of the appellant's good military character in his case-in-chief and because his counsel made the forum selection without his approval. The appellant has submitted a personal brief and affidavit supporting his claims. *See* Brief and Assignment of Errors of 2 Jun 2004 and Appendix A. The Government has filed a response disputing the appellant's claims but has not filed an affidavit from the trial defense counsel. *See* Government's Answer of 30 Aug 2004 and Government Response of 9 Feb 2005.

In *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F 1997), our superior court detailed the framework for evaluating an appellant's affidavit alleging ineffective assistance of counsel. Under *Ginn* neither an affidavit from trial defense counsel nor a *Dubay*[2] hearing is required in every case to resolve assertions of ineffective assistance of counsel.[3] *See Ginn*, 47

[1] The appellant's motion for expedited appellate review dated 29 April 2005 is hereby granted.

[2] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

[3] Under *Ginn,* we may resolve the appellant's claim of ineffective assistance of counsel based on the record under the following circumstances: 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. Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis. Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts. 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. Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record

M.J. at 248; *United States v. Lewis*, 42 M.J. 1, 3-4 (C.A.A.F 1995); *United States v. Collazo*, 53 M.J. 721, 723 (Army.Ct.Crim.App. 2000). As explained below, we find that review of the record and filings are sufficient pursuant to the principles set forth in *Ginn,* and that neither an affidavit from the trial defense counsel nor a *Dubay* hearing are required to resolve the appellant's ineffective assistance of counsel claims.

We begin by noting that the 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. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, we find neither prong satisfied.

The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* This standard applies equally to military cases. *See United States v. Scott,* 24 M.J. 186, 187 (C.M.A. 1987). Thus, an appellant must surmount a very high hurdle in order to show ineffective assistance of counsel. *See United States v. Moulton,* 47 M.J. 227, 229 (C.A.A.F. 1997). We are also guided in this case by the principle that "`[w]e will not second-guess the strategic or tactical decisions made at trial by defense counsel.'" *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v. Rivas,* 3 M.J. 282, 289 (C.M.A. 1977)).

It is axiomatic that good military character is a recognized defense to a prosecution involving illegal drug use. *See United States v. Barnes*, 57 M.J. 626 (N.M.Ct.Crim.App. 2002). Here, however, the record amply shows that the appellant's defense counsel made a reasonable tactical decision under the circumstances not to call character witnesses during the defense's case-in-chief. *See United States v. Weathersby* 48 M.J. 668, 671 (Army Ct.Crim.App. 1988)(holding that a decision not to use good character evidence did not rise to ineffective assistance of counsel).

(including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal. *United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004)(citing *Ginn*, 47 M.J. at 248).

We note that this is not a case where the appellant had an unblemished military career and the excluded character witnesses had information critical to the theory of the defense's case. *See United States v. Marshall*, 52 M.J. 578 (N.M.Ct.Crim.App. 1999)(finding these factors critical in holding that failure to call character witnesses amounted to ineffective assistance of counsel). To the contrary, the appellant was a Private and had three nonjudicial punishments (NJPs) that could have been used by the Government for impeachment purposes. *See* Staff Judge Advocate's Recommendation of 9 Jun 2001; Prosecution Exhibit 8. Indeed, when cross-examined about the appellant's prior misconduct during the sentencing phase, one of the appellant's witnesses, Gunnery Sergeant (GySgt) Timothy McQueen, conceded that the appellant was "[b]elow average because of these past NJPs. . . ." Record at 158. The defense counsel's tactical decision to focus on attacking the testimony of the Government's expert witnesses concerning the efficacy of the urinalysis program, instead of bringing into contention the appellant's military character, was certainly reasonable when balanced against the risks inherent in doing so. In reaching this determination, we do not look at the ultimate success or failure of the defense counsel's trial theory, but whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. *United States v. Dewrell,* 55 M.J. 131, 136 (C.A.A.F. 2001); *United States v. Ingham,* 42 M.J. 218 (C.A.A.F 1995); *United States v. Hughes,* 48 M.J. 700, 718 (A.F.Ct.Crim. App. 1998).

We also note that the appellant claims in his affidavit that he was prevented by his trial defense counsel from calling six character witnesses in his case-in-chief: "then Lt. Hernan Torres, USMC, my C.O. for the communication section, Lt. G.F. Reniers, my MMO; GySgt Timothy McQueen; GySgt. D.M. Fitzpatrick; Sgt. William Murray and Cpl. Michael Taylor." Appendix A at 1-2. The appellant, however, only briefly describes the prospective testimony of two of these witnesses. *Id* at 2. Namely, the appellant claims that LT Torres would have testified that he had known the appellant since late 1999 and that the appellant had a good military character. *Id.* LT Torres also would have been asked to offer an opinion that the appellant would not have used cocaine. *Id.* According to the appellant, the second prospective witness, LT Reniers, would have testified about the appellant's good military character, *i.e.*, the appellant would not have used cocaine. *Id.*

Assuming that the offered testimony would have been admitted without objection even though it goes to the ultimate issue, we find that these two witnesses would not have created reasonable doubt or changed the results of the trial, especially once they were impeached with the appellant's extensive prior misconduct. Therefore, the trial defense counsel's decision not to call "good character" witnesses resulted in no prejudice to the appellant.

The appellant also alleges that his trial defense counsel failed to follow the appellant's decision regarding forum selection. The appellant contends that although he told the military judge he wanted to be tried by a judge alone, he did so only because his defense counsel had told him that the forum selection had already been made. Appendix A at 1. The record makes clear, however, that the forum selection decision was solely the appellant's choice. At the appellant's original Article 39(a), UCMJ, session on 5 May 2000, the military judge properly explained to the appellant his rights to a trial by members or a trial by judge alone. Record at 6. The appellant said he understood his rights and that he had discussed the choices with his defense counsel. *Id.* On 21 June 2000, the military judge again advised the appellant of his rights and asked him if he understood his rights. Record at 11. Again, the appellant responded that he did. *Id.* The military judge also asked the appellant if anyone forced him to forgo a trial by members and the appellant replied that they did not. *Id.* at 12.

We find that the appellant's statements on the record concerning forum selection are certain and unequivocal. Further, the fact that the judge asked the appellant to make a choice demonstrated to the appellant that, in fact, the choice had not been predetermined. Finally, the appellant had every opportunity to make his personal preference known to the military judge. As the appellant was fully aware of his forum selection options and made a knowing and voluntary choice to be tried by a military judge alone, we find no merit to this purported deficiency.

Simply put, we conclude that the appellant has not met his burden of showing that his trial defense counsel's decision not to call "good character" witnesses during the defense case-in-chief, or that the appellant's voluntary election to be tried by military judge alone, amounted to ineffective assistance of counsel under the standards set forth by *Strickland* and *Scott*. This assignment of error is without merit.

Post-Trial Processing Delay

The appellant also contends that he was denied speedy post-trial review of his conviction because 462 days passed before the record of trial was docketed with this court for appellate review. As a result, he requests that we disapprove his bad-conduct discharge. We decline to do so.

In determining if post-trial delay violates the appellant's due process rights, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80 (C.A.A.F. 2005)(citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Jones*, slip. op, at 8. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*, slip op. at 9.

Here, there was a delay of 462 days from the date of sentence to the date the one volume record of trial was docketed with this court for review. We find that the unexplained delay alone is facially unreasonable, triggering a due process review. Since there are no explanations for the delay in the record, we look to the third and fourth factors. We find no assertion of the right to a timely appeal prior to the appellant's 28 April 2005 Motion to Expedite Review, nor do we find any claim or evidence of prejudice to the appellant. While we do not condone the unexplained delay in this case, we conclude that there has been no due process violation due to the post-trial delay.

We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, but we decline to do so. *Id.; United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

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

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court