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.

Michael R. WILLIAMS, Jr.
Sergeant (E-5), U.S. Marine Corps

NMCCA 200301248 Decided 27 May 2005

Sentence adjudged 22 August 2002. Military Judge: T.A. Daly. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of rape of a child under the age of 16, four specifications of sodomy by force on a child, and indecent acts with a child. The appellant's offenses violated Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The appellant was sentenced to confinement for 40 years, total forfeiture of pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 20 years pursuant to a pretrial agreement.

We have carefully considered the record of trial and the appellant's five assignments of error contending that the military judge erred in admitting certain sentencing evidence, that the four specifications alleging forcible sodomy constitute an unreasonable multiplication of charges, that two of the specifications alleging forcible sodomy were multiplicious for

sentencing, and that his trial defense counsel was ineffective.[1] We have also considered Government's response. 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. *See* Arts. 59(a) and 66(c), UCMJ.

Improper Sentencing Evidence

The appellant contends that that the military judge erred in admitting certain sentencing evidence. We disagree.

The appellant pled guilty to multiple instances of rape, forcible sodomy, and indecent acts involving his 9-year-old stepdaughter over the course of nearly 3 years. During the sentencing hearing, the appellant's defense counsel called Mr. "M", a psychotherapist who specializes in the treatment of sex offenders. After qualifying as an expert in the "forensic psychological evaluation of sexual offenders," Mr. M described his evaluation of the appellant. Record at 137-41. Based on extensive testing of the appellant, Mr. M opined that the appellant could not be diagnosed as a "pedophile" and that the appellant presented a low to moderate risk of re-offending. *Id.* at 140-41. Mr. M also opined that the appellant was amenable to treatment.

On cross-examination, Mr. M related that the appellant reported emotional abuse while growing up, which might have impacted his sexual abuse of his stepdaughter. Mr. M also testified that he could not project what harm the victim would experience as a result of the abuse inflicted upon her by the appellant, but stated that she "could act out sexually." Record at 147-48. The trial defense counsel did not object to this line of questioning.

We find no error in the trial counsel's line of cross-examination, and no "plain error" in the military judge's failure to prevent such questioning. The defense offered the testimony of its expert witness, who minimized the appellant's threat of recidivism and presented a compelling case for the appellant's treatment. This testimony rested, in part, on psychological testing of the appellant and on his personal history. Trial counsel remained well within the permissible parameters of cross-examination by exploring the premise for the expert's opinions and challenging the basis of his conclusions. The appellant's personal history, as reported to the expert, was fair ground for cross-examination. It was equally appropriate for the trial counsel to draw the corollary between the appellant's own purported abuse as the basis for the appellant's sexual misconduct and the risk posed to his 9-year-old victim of "sexually acting out" because of the appellant's abuse of her.

[1] The appellant requested oral argument on these assignments of error. That request is hereby denied.

Assuming *arguendo* that the testimony on cross-examination was improperly admitted, we find no prejudicial harm to the appellant. *See* Arts. 59(a) and 66(c), UCMJ. Given the seriousness of the appellant's admitted misconduct, and the relatively *de minimis* nature of the complained of aggravation evidence, we are convinced that any error would have had no effect on the adjudged or approved sentence, even if the erroneous evidence had not been presented to the court. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Wrenn*, 36 M.J. 1188, 1193 (N.M.C.M.R. 1993). Thus, we decline to grant relief based on this assignment of error.

Unreasonable Multiplication of Charges (UMC)

The appellant contends that his conviction for 4 specifications of forcible sodomy with a child (Specifications 1-4, Charge II) constitute an unreasonable multiplication of charges. We disagree.

We evaluate five factors in determining the issue of unreasonable multiplication of charges: (1) Did the appellant object at trial; (2) Is each specification aimed at distinctly separate criminal acts; (3) Did the number of specifications misrepresent or exaggerate the appellant's criminality; (4) Did the number of specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

We begin by noting that the appellant raised no objection at trial. However, this factor is not dispositive of our analysis. As to the second and third *Quiroz* factors, we are convinced that the forcible sodomy offenses are not ostensibly aimed at the same criminal conduct and are not so closely intertwined that separately charged, they unreasonably exaggerate the appellant's misconduct. As to the fourth *Quiroz* factor, we note that the appellant was prosecuted at general court-martial, and therefore, his punitive exposure was increased by the Government's charging decision. Finally, we find no evidence of prosecutorial overreaching. Thus, we are satisfied that, on balance, our *Quiroz* analysis favors a holding that there was no unreasonable multiplication of charges under these circumstances. This assignment of error lacks merit.

Ineffective Assistance of Counsel

The appellant asserts that he was inadequately represented by his trial defense counsel because his counsel "failed to present relevant and material evidence on the merits." Appellant's Brief at 14. Specifically, the appellant complains that his trial defense counsel was deficient because he:

(1) failed to raise a motion regarding improper pretrial confinement under RULE FOR COURTS-MARTIAL 305(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), due to a lack of a "neutral and detached officer" under that rule;

(2) failed to raise an Article 13 motion regarding the conditions of the Camp Lejeune brig and the nature of the restrictive treatment imposed on the appellant;

(3) failed to present mitigation evidence during pre-sentencing regarding the financial condition of the appellant's family;

(4) failed to object to the testimony of an expert witness which was beyond the scope of direct examination, beyond the scope of expertise of the witness, and extremely aggravating to the appellant;

(5) failed to object to an inflammatory statement by the prosecutor, who called the appellant an "animal"; and,

(6) failed to present a proper pre-sentencing argument because he conceded that the appellant should get a dishonorable discharge.

See id. at 15.

The test to determine whether an appellant received ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant must demonstrate that the trial defense counsel's performance was deficient and that the deficiency resulted in prejudice to the appellant. *Id.* When reviewing the trial defense counsel's performance, a tactical decision will not be second-guessed "unless it lacks a plausible basis." *United States v. Mansfield*, 24 M.J. 611, 617 (A.F.C.M.R 1987)(emphasis added); *United States v. Garries*, 19 M.J. 845, 864 (A.F.C.M.R 1985)(citing *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). Nor will trial defense counsel's performance be judged by the success of the case, but rather by whether the counsel made reasonable choices in trial strategy from the alternatives available at trial. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)(quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998). We find that the trial defense counsel was not ineffective.

We are puzzled by the assertion that the appellant's trial defense counsel was deficient because he "failed to present relevant and material evidence on the merits." Appellant's Brief at 14. We note that the appellant pled guilty to the offenses pursuant to a pretrial agreement, and thus, there was no trial on the merits. We also note that the pretrial agreement negotiated by the trial defense counsel afforded the appellant substantial protection concerning confinement.

We likewise view with dismay the appellant's complaint concerning the efficacy of his trial defense counsel in presenting extenuation and mitigation evidence during the pre-sentencing case. During its sentencing case, the prosecution presented service record entries reflecting the appellant's performance of duty. No other aggravation evidence was presented by the prosecution. In contrast, the trial defense counsel presented the following evidence in extenuation and mitigation: (a) the appellant's awards, including two Good conduct Medals; (b) a character statement from the appellant's cousin describing the appellant as a kind person and good father; (c) photographs of the appellant and his family, and an obituary for the appellant's deceased 5 year-old daughter; and (d) numerous commendatory letters and certificate, including a Bible-study course completion certificate. After being appropriately advised of his allocation rights, the appellant elected to provide an unsworn statement spanning 8 pages in the record of trial. In his unsworn statement, the appellant outlined his upbringing, his keen interest in music, the death of his youngest daughter to a rare disease, the suicide of his best friend, the death of the appellant's nephew by a drunk driver, and the financial stress faced by the appellant's family. The appellant also described other sources of stress in his life contributing to marital difficulties and his abuse of alcohol. Lastly, the defense presented strong testimony by a defense expert concluding that the appellant could not be diagnosed as a "pedophile," that the appellant presented a low to moderate risk of re-offending, and that the appellant was amenable to treatment.

Finally, we are not convinced that the trial defense counsel erred by tacitly conceding that a punitive discharge was appropriate under the circumstances of this case. Contrary to the appellant's assertions, his trial defense counsel did not specifically advocate for a dishonorable discharge but simply agreed with the prosecutor's sentence recommendation "but for" the amount of confinement. Record at 179. This concession followed the appellant's unsworn statement, which acknowledged his "heinous crime" against his [step]daughter. *Id.* at 165. Instead, the trial defense counsel urged the military judge to consider the appellant's remorse, rehabilitative potential, and treatment amenability in arguing for a confinement punishment substantially less than that urged by the prosecutor or authorized by statute. *Id.* at 176-79.

A court need not reach the question of deficient representation if it can first determine a lack of prejudice. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004). Even assuming, without deciding, that the trial defense counsel's tactical decisions were unreasonable, we conclude that the purported errors were not prejudicial and thus do not constitute ineffective assistance of counsel. This was a guilty plea case before a military judge alone, who is presumed to know and appropriately apply the law. The appellant's offenses were

indeed heinous and deserving of severe punishment, including a dishonorable discharge. Despite the appellant's contentions now on appeal, he has not challenged the appropriateness of his adjudged sentence nor offered any basis to support his claim for relief under Article 13, UCMJ, or R.C.M. 305(i). Simply put, the appellant has failed to carry his burden of establishing that his trial defense counsel's performance rendered the result of these proceedings "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). We find no merit in the appellant's criticism of his trial defense counsel's performance and decline to grant relief on the basis of this assignment of error.

Remaining Assignments of Error

We have considered the appellant's remaining assignments of error that Specification 1 of Charge I, Specifications 1 and 2 of Charge II, and Charge III and its sole specification, as well Specifications 3 and 4 of Charge II, are multiplicious for sentencing. We find that these offenses reflect separate and distinct acts of criminal misconduct for which the appellant was properly charged, convicted, and punished. Having earlier considered and rejected the appellant's contention that he was subjected to an unreasonable multiplication of charges, we find no merit in these related assignments of error

Conclusion

Accordingly, the findings 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