UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant SYLVIO A. SOLER
United States Army, Appellant

ARMY 20210017

Headquarters, 21st Theater Sustainment Command
Christopher T. Fredrikson, Military Judge
Colonel John M. McCabe, Staff Judge Advocate

For Appellant: Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Joseph A. Seaton, Jr., JA (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Lieutenant Colonel Jaired D. Stallard, JA (on brief).

9 May 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

Appellant asserts that his counsel were ineffective during his pre-sentencing hearing for failing to: present evidence pertaining to his ten years of service in the Army, moving for admission of his enlisted record brief (ERB), or presenting evidence of appellant's combat-related [redacted] ([redacted]) diagnosis. We disagree and affirm.

BACKGROUND

A. Appellant's Guilty Plea Proceedings

In September 2018, appellant video-recorded his extra-marital sexual intercourse with a junior enlisted female soldier. During a party, approximately a week later, appellant bragged about his sexual encounter and played the video for several soldiers. Upon learning that Army Criminal Investigation Command (CID) opened an investigation into his conduct, appellant believed that he could face criminal proceedings for adultery and fraternization. Appellant then engaged in a frenzied attempt to impede the investigation by influencing the statements of soldiers to whom he showed the video. Appellant contacted two noncommissioned officers and instructed them to deny they knew him or knew anything about the video recording he showed them. He even leveraged his rank and position by directing a subordinate soldier in his direct chain of command to lie to CID about his knowledge of the video and appellant's misconduct.

On 12 January 2021, in accordance with his pleas, a military judge found appellant guilty of one specification of obstructing justice in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934 (2012) [UCMJ].[1] The government dismissed two specifications of sexual assault, one specification of indecent recording, and one specification of violating a general regulation in violation of Articles 120, 120c, and 92, UCMJ. In accepting appellant's guilty plea, the military judge confirmed that appellant understood that the maximum punishment for the offense to which he pled guilty included a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowances, and reduction to the grade of E-1.

During appellant's guilty plea proceedings, the military judge discussed the terms of appellant's pretrial agreement with him. Specifically, appellant acknowledged that he understood that he was waiving the production of personal appearance, at government expense, of any witnesses outside of Germany. He further acknowledged that he understood that he could present matters in mitigation and extenuation through telephonic testimony or written statements.

B. Appellant's Pre-Sentencing Proceedings

Appellant's pre-sentencing hearing was abbreviated by both parties.

The government did not offer any additional evidence and solely relied upon the stipulation of fact. While the stipulation of fact noted that appellant's enlisted record brief (ERB) could be considered by the military judge, the government declined to admit the ERB despite being invited to do so by the military judge.

[1] The government charged appellant with six specifications of obstructing justice in violation of Article 134, UCMJ. Appellant pled guilty to a merged specification that included language from several of the Article 134, UCMJ, specifications.

Appellant was represented by both civilian defense counsel and military defense counsel. During the pre-sentencing hearing, appellant's civilian defense counsel offered one exhibit which consisted of a collection of nine photographs: four family photographs; one photograph from a newspaper showing appellant participating in a program promoting diversity; and four photographs of appellant conducting military operations in which a few clearly appeared to be in deployed environments. Appellant also provided an unsworn statement assisted by civilian defense counsel.

During his unsworn statement, appellant provided details about his two deployments to Afghanistan in 2012 and 2014. He outlined the locations in which he worked and some of his duties while deployed. Appellant also discussed the two assaults with vehicle-born improvised explosive devices (IEDs) he experienced and the "multiple close calls with indirect fire" which became such common place that he "became numb to it all." Further, he described the lasting physical injuries he suffered as a result of falling from a vehicle during his first deployment and being knocked unconscious during a vehicle rollover accident during his second deployment. Appellant then shared his difficulties in readjusting to life upon his redeployment, suffering from anxiety, discomfort in being in crowds, and seeking behavior health treatment. Lastly, appellant expressed his desire to complete his bachelor's degree, teach high school students, and support his family

The military judge sentenced appellant to a bad-conduct discharge, confinement for seventy-five days, and reduction to the grade of E-1. Appellant's pretrial agreement limited appellant's sentence to a bad-conduct discharge, six months confinement, and reduction to the grade of E-2. The convening authority approved the adjudged sentence with the exception of the reduction in grade in which the convening authority only approved a reduction to the grade of E-2 as required by the pretrial agreement.

LAW AND DISCUSSION

A. Standard of Review

Appellant asserts that his counsel were ineffective during his pre-sentencing hearing for failing to present evidence pertaining to his ten years of service in the Army or evidence of appellant's combat-related [redacted] diagnosis. We disagree.

This court conducts a de novo review of a claim of ineffective assistance of counsel. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (cleaned up). "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

To establish his counsel's deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." *Id.* at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (cleaned up).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "'a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different.'" *Captain*, 75 M.J. at 103 (citing *Strickland*, 466 U.S. at 694). In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted). Further, in assessing an ineffective assistance claim, we can analyze *Strickland's* performance and prejudice prongs independently, and if appellant fails either prong, his claim must fail. *Strickland*, 466 U.S. at 687. Thus, an appellate court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an [IAC] claim on the ground of lack of sufficient prejudice, which *we expect will often be so*, that course should be followed." *Strickland*, 466 U.S. at 697 (emphasis added).

The Court of Appeals for the Armed Forces (CAAF) recently explained how ineffective assistance of counsel may occur at the court-martial sentencing phase when defense counsel either "fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before a court-martial." *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (cleaned up). Even where defense counsel presents several character witnesses, prejudice may still occur at sentencing if there is a "reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense." *Id.* at 84-85 (cleaned up).

B. A Post-trial Evidentiary Hearing is not Required

Given that both appellant and the government[2] submitted extra-record matters for this court's consideration in evaluating appellant's claim of ineffective

[2] We ordered the government to obtain affidavits from appellant's trial defense counsel and civilian defense counsel addressing: (1) the basis for not calling

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assistance of counsel, we must first address whether a post-trial evidentiary hearing is required to resolve a factual dispute. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Our superior court has outlined five principles for this court in determining whether it is necessary to remand a case for an evidentiary hearing. *Id.* If any one of those five principles are satisfied, then this court may resolve the case without an evidentiary hearing. *Id.* Under the first principle outlined in *Ginn*, we need not remand a case for fact-finding if "we can determine that the facts asserted, even if true, would not entitle appellant to relief." *United States v. White*, 54 M.J. 469, 471 (C.A.A.F. 2001) (citing *Ginn*, 47 M.J. at 248). Moreover, *Ginn* also held that where the affidavits do not conflict, we may decide the issues without ordering a post-trial hearing. 47 M.J. at 248.

Appellant submitted an affidavit stating he provided his trial defense team with a copy of his medical records noting his diagnosis of [redacted] and expected that information to be presented during his pre-sentencing case. Appellant also provided an excerpt from his medical records with entries from August 2017 pertaining to his diagnosis of [redacted].[3] While appellant asserts before this court that his counsel were ineffective for failing to present any evidence of his ten-year military career during his pre-sentencing hearing, we note that appellant does not address that matter in his affidavit.

Affidavits from appellant's military and civilian defense counsel outlined their efforts in preparing both character and mitigation evidence for the pre-sentencing hearing and the tactical reasons for ultimately editing the presentation of that evidence. Appellant's military defense counsel submitted an affidavit stating she interviewed several family members, friends, supervisors, and colleagues of appellant and prepared those witnesses to testify at appellant's pre-sentencing hearing. Concerned that good soldier evidence would allow the government to present evidence of appellant's prior misconduct of an unfounded allegation of [redacted] and obstruction of justice, civilian defense counsel requested this

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(. . . continued)
witnesses or evidence pertaining to appellant's ten-year military career; (2) not presenting evidence of appellant's diagnosis of [redacted]; and, (3) not admitting appellant's ERB.

[3] Additional matters may be considered by a court of criminal appeals outside the record of trial in conducting its Article 66, UCMJ, review for claims of ineffective assistance of counsel. *United States v. Jessie*, 79 M.J. 437, 442-43 (C.A.A.F. 2020).

testimony be reduced to written statements.[4] As trial approached, the civilian defense counsel made a tactical decision not to admit any documentary evidence during the pre-sentencing hearing in an effort to prevent the government from potentially submitting rebuttal evidence of appellant's prior misconduct.[5] According to the military defense counsel's affidavit, she did not agree with the civilian defense counsel's approach to severely limiting the presentation of written character statements. However, the military defense counsel's affidavit states that appellant ultimately agreed with the advice of his civilian defense counsel to not admit any character letters during the pre-sentencing hearing. The civilian defense counsel's affidavit stated that, on at least three occasions, he discussed his strategic decision to limit pre-sentencing evidence of appellant's good military service in order to avoid opening the door to the government admitting information of appellant's prior misconduct and appellant agreed with that approach. Rather, the civilian defense counsel determined that it would be best to wait and submit the written character statements in appellant's post-trial submission to the convening authority.

Further, the military defense counsel's affidavit stated that she had requested a copy of appellant's medical records for purposes of presenting information about service-related conditions that appellant wanted presented during pre-sentencing. The civilian defense counsel's affidavit stated that the medical documents he reviewed were from 2018 and noted that appellant's [redacted] was in remission and that, given the status of the condition, he thought it more advantageous to have appellant describe the most significant combat experiences during his unsworn statement. While the military defense counsel's affidavit noted that appellant wanted his service-related conditions presented in pre-sentencing, it also stated that the civilian defense counsel preferred to have appellant present that information in his unsworn statement and that appellant deferred to his civilian defense counsel.

There is no factual dispute as to the decision of the defense team deciding not to present character evidence through testimony or written statements given that appellant did not address this in his affidavit and the military and civilian defense counsel's affidavits are consistent with each other on this matter. The only material factual dispute between appellant's submission to this court and the government's submission is whether appellant acquiesced to his civilian counsel's recommendation not to present medical records pertaining to his diagnosis of [redacted]. However, we

[4] In 2013, appellant was the subject of an unfounded allegation for [redacted] of a female soldier. The investigation contained information that, after becoming aware of the criminal investigation, appellant asked a witness not to speak with law enforcement.

[5] The government marked a copy of the CID final report (Prosecution Exhibit 3 for Identification) and two sworn statements (Prosecution Exhibits 4 and 5 for Identification) concerning an allegation of appellant [redacted] a female soldier in 2011.

need not order an evidentiary hearing on this issue because, even if the facts asserted by appellant are true, appellant would not be entitled to relief.

C. The Defense Team was Not Ineffective

In light of the affidavits from both the military and civilian defense counsel, appellant's ineffective assistance claims pertaining to his sentencing are meritless.

First, as to the issue of whether the defense team was ineffective for failing to call any witnesses or present character statements, we find that the civilian defense counsel's approach was well-reasoned, informed, and objectively reasonable in light of the appellant's prior misconduct. In 2013, appellant was investigated for the offense of [redacted] While the [redacted] was unfounded, there was evidence in the investigation that appellant made efforts to obstruct justice during the investigation by asking a witness not to talk to the military. Appellant's witness production request included ten witnesses, both military and civilian, that appellant asserted would testify as to his rehabilitative potential during the pre-sentencing hearing. Given that appellant plead guilty to obstruction of justice approximately five years after his prior attempt to do so was relevant information as to both appellant's good military service and rehabilitative potential. The government could have utilized appellant's prior efforts to obstruct justice by: (1) cross-examining his character witnesses about this prior misconduct in order to test the strength of their opinion as to his rehabilitative potential, or (2) presented the information as rebuttal evidence concerning appellant's rehabilitative potential or good military service. *See Scott*, 81 M.J. at 86 (C.A.A.F. 2021) ("[R]ecogniz[ing] that, in some cases, trial defense counsel may not wish to call witnesses on sentencing who, through their testimony, may open the door for the government to present additional adverse evidence."). Thus, we find the civilian defense counsel's decision to constrain the presentation of character evidence reasonable under the circumstances. *See United States v. Datavs*, 71 M.J. 424 (C.A.A.F. 2012) ("Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so.").

Assuming, without deciding, whether the defense counsel team provided ineffective assistance by not presenting evidence of a [redacted] diagnosis, we conclude that appellant has not met his burden of establishing prejudice. The severity of appellant's misconduct warranted the approved sentence of a bad-conduct discharge, seventy-five days confinement, and a reduction to the grade of E-2. Appellant was charged with six separate specifications of obstruction of justice. The government consolidated those specifications into one specification thereby already reducing appellant's punitive exposure and the number of offenses of which he was convicted. Appellant pled guilty to obstructing justice by attempting to influence the statements of three other lower ranking soldiers, to include a subordinate in his direct chain of command. Appellant's actions placed these soldiers in a situation of either committing a criminal offense by providing false information to law enforcement or

facing negative impacts to their military careers by not complying with appellant's request. In fact, the subordinate soldier initially lied to law enforcement based upon appellant's request. Appellant's actions thereby exposed another soldier to adverse administrative action or criminal prosecution. Appellant readily admitted at trial that his actions were "completely unacceptable and abuse of power by an NCO." The government requested appellant receive a bad-conduct discharge, twelve-months confinement, total forfeiture of pay and allowances and a reduction to E-1. Further, appellant's pretrial agreement limited his maximum sentence to a bad-conduct discharge, six months confinement, and a reduction to the grade of E-2. The adjudged sentence was considerably less severe in terms of the amount of confinement appellant received by the military judge.

Appellant further asserts that the admission of his ERB and diagnosis of [redacted] would have somehow influenced whether he received a punitive discharge. We disagree. The stipulation of fact provided information about appellant's age, family, and length of service. While the admission of appellant's ERB would have provided information on appellant's awards, military training, and expiration of his term of service, we are not persuaded that those details would have created a substantial likelihood of no punitive discharge. Further, while appellant's actual diagnosis of [redacted] was not provided to the military judge, evidence of appellant's deployments and the physical and mental impact of those deployments was presented to the military judge. Appellant provided testimony in his unsworn statement about his two deployments to Afghanistan, the acute physical injuries he suffered during each deployment, and the lingering mental and physical impacts he suffered as a result of those deployments. Despite appellant's assertions to the contrary, the conduct to which appellant pled guilty was significant in not only attempting to impede a law enforcement investigation but leveraging his rank and position of authority to influence subordinates to commit a criminal offense for his benefit. Even if defense counsel presented the few pages of medical evidence of appellant's [redacted] diagnosis in 2017 and appellant's ERB, there is no "reasonable probability" that the sentence would have been any different given the severity of appellant's misconduct.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Judge EWING and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court