UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, BROOKHART, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class ROBERT J. COMINGO
United States Army, Appellant

ARMY 20190309

Headquarters, Fort Bliss
Michael S. Devine, Military Judge
Colonel Sean T. McGarry, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Kyle C. Sprague, JA; Captain Thomas J. Travers, JA (on brief); Colonel Michael C. Friess, JA; Major Christian E. Deluke, JA; Captain Thomas J. Travers, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Thomas J. Darmofal, JA (on brief).

27 May 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Senior Judge:

Appellate defense counsel raised multiple issues before this Court, only one of which merits discussion. We find, as a matter of law, the evidence failed to establish beyond a reasonable doubt that appellant sexually assaulted his wife by penetrating her vagina with his penis on "divers occasions" as alleged in Specification 1 of Charge I. As discussed in detail below, however, we do find the government established beyond a reasonable doubt that the charged offense occurred on "one occasion." We will modify the specification and reassess, but ultimately affirm, the sentence.

Additionally, appellant personally raised before this Court, in matters constituting more than 275 pages, multiple issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Again, only one issue merits discussion.[1] Appellant alleges his trial defense counsel failed in multiple areas, to include, a failure to investigate his case, a failure to adequately advise him, a failure to introduce certain evidence and/or witnesses, and a failure to file certain motions and/or challenge certain panel members. Based on appellant's allegation, we ordered affidavits from his trial defense counsel. As explained below, we find appellant's defense counsel were not ineffective.[2]

BACKGROUND

A panel consisting of both officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape, one specification of sexual assault, one specification of assault consummated by a battery, one specification of assault consummated by a battery upon a child under the age of sixteen, one specification of adultery, and one specification of communicating a threat, in violation of Articles 120, 128, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 928, and 934. The panel sentenced appellant to a dishonorable discharge, confinement for twenty-three years, reduction to the grade of E-1, and to forfeit all pay and allowances. The convening authority only approved a dishonorable discharge, confinement for twenty-two years and eleven months, reduction to the grade of E-1, and the forfeiture of all pay and allowances.

For Specification 1 of Charge I, appellant was convicted of "on divers occasions between on or about 1 December 2007 and 27 June 2012," "at or near Vilseck, Germany, and at or near Fort Drum, New York" causing his wife to engage in a sexual act by "penetrating her vagina with his penis" by placing her "in fear that she would be subjected to death or grievous bodily harm."

Appellant's wife testified that in December 2007, while stationed in Vilseck, Germany, appellant crossed the lines as to previously agreed-upon sexual activity between them. She testified that on that occasion, she initially engaged in

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[1] We have given full and fair consideration to appellant's other assigned errors, as well as the other matters asserted pursuant to *Grostefon*, and determine they warrant neither discussion nor relief.

[2] As discussed in more detail throughout this opinion, we see no need to order a post-trial evidentiary hearing under *United States v. DuBay*, 17 U.S.C.M.A 147, 37 C.M.R. 411 (1967). *See United States v. Ginn*, 47 M.J. 236, 246 (C.A.A.F. 1997) (reviewing appellant's claim in light of the entire record and concluding its proper resolution did not require a fact finding hearing).

consensual sexual activity with appellant but used a "safe word" to indicate to him that she was no longer agreeing to the ongoing sexual activity because it was "painful." Appellant did not stop the sexual activity but instead pushed her "down to the ground and sodomized" her. She testified "I was crying and begging him to stop. I was kicking my legs and trying to get him off of me." At one point, appellant stopped sodomizing her "and raped [her] vaginally and he ejaculated."

LAW AND DISCUSSION

1. Legal Sufficiency of Specification 1 of Charge I

Questions of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The standard for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 MJ 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citation omitted). During its legal sufficiency review, the court considers all available facts within the record and is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citation omitted). "Divers occasions" can be struck from a specification and only one instance of an offense can be affirmed. *See United States v. English*, 79 M.J. 116 (C.A.A.F. 2019) (citing *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008)). If this Court sets aside a conviction, our superior court has set forth four factors to consider when determining whether we can reassess the sentence or should order a rehearing. *See United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013) (outlining the four factors as including whether there are "[d]ramatic changes in the penalty landscape," whether sentencing was by members or military judge alone, whether "the remaining offenses capture the gravamen" of the original offenses, and whether the Court has the experience to determine what sentence would have been imposed for the remaining offenses).

We concur with appellant's brief which correctly observed "the government elicited exactly one incident of penis-in-vagina penetration" within the timeframe of "between on or about 1 December 2007 and 27 June 2012" as charged in Specification 1 of Charge I. The record reflects that when directly questioned by government counsel, as to any other specific sexual acts involving vaginal penetration within the charged timeframe, appellant's wife testified only to the insertion of a sex toy into her vagina (encompassing appellant's conviction to another offense (Specification 2 of Charge I)). Any other references to specific acts within the relevant timeframe or more importantly, the body parts involved, were to

"oral sex . . . where it would be extremely difficult for [her] to breathe" or "[a]nal sex where [there was] very little preparation to make it easier for" her.

Drawing "every reasonable inference from the evidence" we find appellant's wife testified to only the one act of penile penetration during the charged timeframe. The other acts described by appellant's wife during that timeframe were not evidence of the offense as charged. Accordingly, we find as a matter of law, the government failed to prove "divers occasions" beyond a reasonable doubt. Therefore, we can affirm only one instance of sexual assault by penile penetration for Specification 1 of Charge I.

Having affirmed the occurrence of only one penile penetration within the specification, we now turn to reassessing the sentence. Looking at the four factors set forth by our superior court, affirming only one occurrence for Specification 1 of Charge I does not alter the penalty landscape, and the gravamen of appellant's conduct is captured by the remaining offenses and the affirmed single instance of conduct. *Id.* While appellant was sentenced by military members, we have experience and familiarity with the types of offenses at issue in this case. *Id.* Therefore, we reassess the sentence and are confident appellant would have received the same sentence as originally imposed at trial even with the deletion of "divers occasions" from Specification 1 of Charge I.

2. Ineffective Assistance of Counsel

We review appellant's claim of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020)). Military courts evaluate ineffective assistance of counsel claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id.* (citing *Strickland*, 466 U.S. at 687).

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).[3]

Appellant fails the first *Strickland* prong, as his defense counsel's performance was not deficient. We closely reviewed appellant's trial defense counsel's affidavits and the multiple attachments to their affidavits in light of appellant's allegations and the entire record. After our review we hold appellant's counsel thoroughly investigated his case, advised appellant of his options, and made or recommended tactical decisions regarding evidence, witnesses, motions, testifying, and the selection of panel members that easily fell "within the wide range of reasonable professional assistance" expected of trial defense counsel.[4]

Based on the entire record, appellant has not overcome the strong presumption that his defense counsel were competent. *See United States v. Clark*, 55 M.J. 555, 560 (Army Ct. Crim. App. 2001) ("An appellant must overcome this strong presumption [of competence] by demonstrating that his counsel's performance was 'outside the wide range of professional and competent assistance.'") (quoting *Strickland*, 466 U.S. at 690).

CONCLUSION

On consideration of the entire record the findings of guilty as to Specification 1 of Charge I are modified to:

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[3] 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 proceedings would have been different.'" *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 694). Finally, 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 697. As we find appellant failed to establish his counsel were ineffective, this opinion does not address prejudice.

[4] "[A] post-trial evidentiary hearing was not required in this case and 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." *Ginn*, 47 M.J. at 248

"In that Sergeant First Class Robert J. Comingo, U.S. Army, did, at or near Vilseck, Germany, between on or about 1 December 2007 and 31 December 2007, cause Sergeant [redacted], U.S. Army, to engage in a sexual act, to wit: penetrating her vagina with his penis, by placing Sergeant [redacted] in fear that she would be subjected to death or grievous bodily harm."[5]

The finding of guilty of Specification 1 of Charge I, as modified, is AFFIRMED. The remaining findings are AFFIRMED.

We have closely reviewed the record of trial and are satisfied that the sentence adjudged for appellant's convictions would have been at least a dishonorable discharge, confinement for twenty-two years and eleven months, reduction to the grade of E-1, and total forfeitures. *See Winckelmann*, 73 M.J. at 15–16; *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Accordingly, the sentence is AFFIRMED.

Senior Judge BROOKHART and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[5] The Promulgating Order, dated 26 September 2020, contains several errors with regard to appellant's conviction for Specification 1 of Charge II. The military judge partially granted a defense motion pursuant to Rule for Courts-Martial 917 for Specification 1 of Charge II, finding there was no evidence appellant "choked or pulled the hair of Sergeant [redacted] at the location and times charged in this specification." Therefore, we amend Specification 1 of Charge II as reflected in the promulgating order by deleting "choke" and "pull the hair of." Additionally, at trial the government moved to amend this specification by deleting "whip," and the military judge granted the motion. Therefore, we amend Specification 1 of Charge II as reflected in the promulgating order by deleting "whip."