UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 JUAN C. CHAVEZ, JR.
United States Army, Appellant

ARMY 20210100

Headquarters, Eighth Army
Christopher E. Martin, Military Judge
Colonel Dean L. Whitford, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Captain Lauren M. Teel, JA; Captain Nandor F.R. Kiss, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain A. Benjamin Spencer, JA (on brief).

21 July 2022

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAYES, Judge:

Appellant asserts two errors before this Court, one of which merits discussion but not relief. Appellant argues his defense counsel were ineffective for failing to recall a witness to elicit testimony regarding appellant's "good character for abiding by the law." As explained below, we find appellant's defense counsel were not ineffective when making the strategic decision not to recall the witness to elicit character evidence.[1]

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[1] We have also reviewed and considered the matters personally submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they warrant neither discussion nor relief.

BACKGROUND

A military judge sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. The military judge sentenced appellant to a dishonorable discharge and confinement for six months. The convening authority approved the findings and sentence as adjudged.

During appellant's presentation of evidence, defense counsel called Specialist (SPC) JP as a witness. During the redirect examination of SPC JP, defense counsel asked him if he had an opinion regarding whether appellant had a law-abiding character. During the course of SPC JP's response—which was "[h]e has . . . a law-abiding character"—the government objected to the question. Ultimately, the objection was sustained. After the testimony of the next witness called by appellant, the military judge announced that he had reconsidered his prior ruling sustaining the government's objection and would now allow defense counsel to elicit the opinion testimony about the appellant's character from SPC JP if the defense elected to recall him. Defense counsel did not recall SPC JP during the findings phase, but recalled SPC JP during presentencing. However, defense counsel did not ask SPC JP for his opinion regarding whether appellant had a law-abiding character.

LAW AND DISCUSSION

We review claims 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 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).

In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. 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). With regard to defining what constitutes deficiency in a claim of ineffective assistance of counsel, the Supreme Court has stated that a "defendant must show that counsels' representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Even where counsel has committed an unreasonable error, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Appellant must "affirmatively prove prejudice." *Id.* at 692. This means appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 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) (emphasis added). This requires consideration of "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In short, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Defense Counsel's Performance

Appellant's trial defense counsel's performance was not deficient from an objective standard of reasonableness. Appellant's trial defense counsel competently represented appellant by eliciting testimony that attacked the victim's credibility and motive to fabricate while presenting evidence that raised the defense of mistake of fact with respect to the victim's allegedly withdrawn consent. To challenge the victim's version of events, defense counsel questioned her and other witnesses in an effort to establish that she pursued appellant romantically and initiated the sexual encounter that led to what was initially consensual sexual intercourse. Defense counsel extracted an admission from the victim that she wanted the sex to continue and just wanted the pain to stop, and ably presented her post-encounter actions as evidence of a motive to fabricate the nonconsensual nature of the encounter.

The fact that defense counsel did not take the opportunity to elicit testimony regarding one witness's opinion regarding whether appellant had a law-abiding character after the military judge indicated the question would be allowed does not amount to deficient legal representation. The record disclosed no prior misconduct by appellant that defense counsel needed to counter. Further, defense counsel elicited character testimony from another witness, Private First Class (PFC) AB, that appellant was respectful towards women. Given this testimony, it was reasonable for defense counsel to conclude that recalling SPC JP solely to ask about his opinion of appellant's character for law-abidingness was either unnecessary or would result in a net loss to appellant should the government conduct an effective cross-examination.

Given defense counsel's performance throughout the trial, the tactical decision not to recall SPC JP fell "within the wide range of reasonable professional assistance" expected of trial defense counsel. Based on the entire record, we

conclude appellant has not overcome the strong presumption that his defense counsel was competent.[2]

Prejudice

Assuming *arguendo* deficient performance, appellant also fails to establish prejudice. Appellant argues there is a "reasonable probability" of a different outcome if defense counsel elicited the character testimony because of the "exceedingly high import the law assigns character evidence." However, as stated, defense counsel called PFC AB who testified she was a close friend of appellant's and she would interact with him "every other day." Defense counsel asked PFC AB if she had an opinion as to appellant's character for respectfulness towards women and PFC AB answered "[h]e's respectful towards women."

Given PFC AB's unequivocal testimony regarding an even more probative aspect of appellant's character, it is unreasonable to conclude the outcome of the trial would have been different if less probative evidence was elicited through an additional witness. This is especially true when considering that appellant admitted to law enforcement that he continued penetrating the victim for at least thirty seconds after he heard her tell him to stop. Accordingly, we find appellant has not established prejudice.

CONCLUSION

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

Senior Judge FLEMING and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[2] 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, 248 (C.A.A.F. 1997) (stating in most instances involving an ineffective assistance claim, "the authority of the Court to decide that legal issue without further proceedings should be clear."). Appellant's argument rests solely on the defense counsel's decision not to recall SPC JP. That decision is undisputed and the appellant fails to rebut the presumption that it was reasonable.