

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant MICHAEL L. WILSON
United States Army, Appellant

ARMY 20210276

Headquarters, Fort Stewart
G. Bret Batdorff, Military Judge
Lieutenant Colonel Nicole L. Fish, Acting Staff Judge Advocate

For Appellant: Lieutenant Colonel Dale C. McFeatters, JA; Major Mitchell D. Herniak, JA; Captain Tumentugs D. Armstrong, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Mitchell D. Herniak, JA; Captain Tumentugs D. Armstrong, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schleuter, JA; Captain Patrick S. Barr, JA (on brief).

31 May 2023

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAYES, Judge:

Appellant asserts three errors before this Court, one of which merits relief. The government concedes certain language should be excepted from multiple specifications, but argues the findings of guilty of the remaining language in those specifications are legally and factually sufficient. We agree and reassess the sentence in our decretal paragraph.¹ The remaining asserted errors merit neither discussion nor relief.

¹ The Statement of Trial Results, as incorporated into the Entry of Judgment, is amended to except the word “anus” from Specifications 4, 5, and 6 of The Charge, and to except the words “inner thighs” from Specification 5 of The Charge.

Appellant personally argues his defense counsel were ineffective in their representation regarding the presentencing proceedings, specifically in reference to their investigation of potential evidence in mitigation and in their forum advice. This alleged error merits discussion but no relief.²

BACKGROUND

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of three specifications of rape of a child, three specifications of sexual abuse of a child, and one specification of sexual assault of a child, in violation of Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §920b (2012)(2016)(2019). There were two victims. Appellant sexually assaulted a 12-year-old neighbor³ and raped and sexually abused his biological daughter from the time she was 5 years old until she reported the abuse at age 12. The military judge sentenced appellant to a dishonorable discharge, confinement to two life sentences with the possibility of parole plus 20 additional years, and reduction to the grade of E-1.⁴ The convening authority approved the findings and sentence as adjudged.

Appellant alleges his counsel ineffectively represented him regarding his presentencing proceedings by failing to investigate a “pending diagnosis” of Post-Traumatic Stress Disorder (PTSD). He also charges they were ineffective for failing to fully explain the consequences of segmented sentencing when advising him on his forum election for pre-sentencing.

LAW AND DISCUSSION

² We have given full and fair consideration to the additional matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they merit neither discussion nor relief.

³ Appellant was also convicted in federal court for a related offense against the same neighbor; the presentencing investigation in that case factors into appellant’s ineffective assistance of counsel claims.

⁴ Appellant elected to have the military judge impose the sentence after the panel rendered its verdict, which resulted in a segmented sentence. *See* Article 56(c)(2), UCMJ. The judge’s segmented sentence for the seven specifications resulted in a total of three life sentences with the possibility of parole as to three specifications and a combined 50 years of confinement as to the other four specifications. After the military judge ordered certain specifications to run concurrently and others to run consecutively, the result was a sentence of two consecutive life sentences with the possibility of parole and an additional 20 years of confinement. *Id.*

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) (citing *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)). In defining what constitutes deficiency in a claim of ineffective assistance of counsel, the Supreme Court has stated 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.” *Strickland*, 466 U.S. at 691. Appellant must “affirmatively prove prejudice.” *Id.* at 693. This means appellant must show 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, “The likelihood of a different result must be *substantial*, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (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.

Investigation of PTSD

Appellant alleges he asked his trial defense counsel to investigate his “pending diagnosis” of PTSD resulting from his “childhood abuse, sex assault, and his later deployments.” As part of their pretrial investigation, trial defense counsel obtained appellant’s behavioral health records and medical records, neither of which revealed a diagnosis of PTSD. The only reference to PTSD in appellant’s behavioral health records was a report of “low PTSD symptoms reported” in August 2016. There were no references to any disclosures of childhood abuse.

The only references to PTSD in appellant's medical records were seventeen negative screenings for PTSD between 2013 and 2019. There were no references to childhood abuse. As part of the presentencing investigation for appellant's civilian trial, he revealed that his mother and stepfather were physically abusive. Initially, he did not recall being sexually abused but believed he might have been. Eventually he disclosed instances of sexual abuse as a child to his civilian presentencing investigators; however, he also disclosed symptoms of PTSD which contradicted the information he provided in his military health records.

Appellant's trial defense counsel deny he ever requested investigation into his "pending diagnosis" of PTSD. Based on a review of his behavioral health records and medical records, appellant's counsel had no reason to suspect appellant suffered from PTSD. While appellant acknowledged to trial defense counsel his childhood physical abuse, he never disclosed to them any sexual abuse or combat-related trauma. He also never alleged that his alleged childhood physical abuse resulted in PTSD.

Given appellant's decision to disclose in his unsworn statement that he was sexually abused as a child, trial defense counsel discussed with their forensic psychology expert whether he might be able to provide favorable testimony in mitigation. When the expert opined appellant's risk of recidivism was moderate, the trial defense team declined to call him as a witness to avoid damaging cross-examination. However, the trial defense team reached out to 29 potential presentencing witnesses, 18 military and 11 civilians. Only 4 military witnesses were willing to provide positive testimony. Defense counsel requested statements from 2 of the 4 because of the risk of damaging cross-examination, and 1 provided a statement. The remaining 2, a retired Command Sergeant Major and an active-duty Major, testified in presentencing. Of the 11 civilians, 3 would testify favorably but desired to testify telephonically. All 3 testified for appellant in presentencing.

Advice on Forum Election

Upon announcement of the findings, appellant was able to elect sentencing by the panel or by the military judge. Appellant faced a maximum punishment of life without the possibility of parole regardless of forum. Appellant's defense team unanimously advised him to select sentencing by the military judge after carefully considering and comparing the panel's perceived negative demeanor towards appellant, their decision to convict him of all offenses, and the presiding judge's sentences in similar cases. Appellant voluntarily and knowingly made his election, as evidenced by his colloquy with the military judge and his signed acknowledgment of his presentencing rights. Appellant was informed the judge would be required to impose a separate sentence for each offense, and that each sentence to confinement could run consecutively.

Analysis and Discussion

Appellant's trial defense counsel's performance was not deficient from an objective standard of reasonableness. Each decision by defense counsel raised by appellant falls well "within the wide range of reasonable professional assistance" expected of trial defense counsel. *Strickland*, 466 U.S. at 689. Based on the entire record, we conclude appellant has not overcome the strong presumption his defense counsel were competent.⁵

Assuming *arguendo* deficient performance, appellant also fails to establish prejudice. Appellant fails in his burden to establish a "reasonable probability" of a different outcome if defense counsel took actions they were allegedly ineffective for failing to take. *Id.* at 694. Given the severity and repeated nature of appellant's misconduct, it is unreasonable to conclude the outcome of the trial would have been different if an undocumented claim of PTSD had been pursued, or if appellant had elected to be sentenced by the panel, which was his personal decision.⁶

CONCLUSION

On consideration of the entire record the findings of guilty, as excepted, are AFFIRMED. Upon reassessment, the sentence is AFFIRMED.⁷

⁵ Upon review of court-ordered affidavits submitted by counsel, 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.").

⁶ Although the panel could only impose one life sentence, we pause to note they possessed the ability to sentence appellant to a life sentence without the possibility of parole. This option was more severe than the military judge's ultimate decision to impose two life sentences with the possibility of parole.

⁷ Reassessing the sentence in light of the excepted language, we are aided by the mandatory dishonorable discharge and the segmented sentence to confinement. We assess the impacted specifications in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). Based on our experience as judges on this court, we are familiar with the offense of sexual abuse of a child such that we may reliably determine what sentence appellant would have received for the remaining language. Appellant remains guilty of the three

(continued . . .)

Senior Judge FLEMING and Judge MORRIS concur.

FOR THE COURT:



✓ JAMES W. HERRING, JR. ✓
Clerk of Court

(. . .continued)

specifications of sexual abuse of a child, with one of six body parts being excepted from two specifications, and two of six body parts being excepted from the third specification. Appellant was sentenced to 10 years confinement for each of these three specifications. The three specifications involved sexual abuse of a child under the age of twelve on divers occasions ranging in timeframe from a minimum of over 2 months for one specification to a maximum of over four years for another. Having conducted our assessment, we are confident the excepted language does not impact the adjudged sentence.