

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HAIGHT, MULLIGAN, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class CHRISTOPHER A. DELGADO
United States Army, Appellant

ARMY 20140854

Headquarters, Fort Campbell
James A. Ewing, Military Judge
Colonel Susan K. Arnold, Staff Judge Advocate (pretrial)
Lieutenant Colonel Robert C. Insani, Staff Judge Advocate (post-trial)

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA, Major Leslie S. Smith, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Steven J. Collins, JA; Captain Linda Chavez, JA (on brief); Colonel Mark H. Sydenham, JA; Major Steven J. Collins, JA; Captain Linda Chavez, JA (on supplemental brief).

20 April 2016

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of absence without leave terminated by apprehension, false official statement, sexual assault of a child, sexual abuse of a child, and wrongfully giving alcoholic beverages to a minor, in violation of Articles 86, 107, 120b, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 886, 907, 920b, and 934 (2012). The military judge sentenced appellant to a bad-conduct discharge, confinement for fifty-one months, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provides for a bad-conduct discharge, confinement for twenty-four months, and reduction to the grade of E-1. The convening authority also credited appellant with eighty days against his sentence to confinement.

Appellant's case is now before us for review pursuant to Article 66, UCMJ. Appellant raises two assignments of error, one of which merits discussion but not relief.

Appellant asserts he was provided ineffective assistance of counsel during the pre-sentencing portion of his court-martial as well as for his post-trial submission to the convening authority. Specifically, appellant complains that his trial defense counsel, despite evidence that his client had been depressed and suicidal, failed to assert appellant's mental health problems as extenuation or mitigation at sentencing and as a ground for clemency from the convening authority.

In support of this assigned error, appellant submitted a notarized statement to this court (there is no indication the statement was sworn or made under penalty of perjury) in which he complains that his counsel did not press a defense of lack of mental responsibility at a court-martial where appellant had just entered a plea of guilty. In his statement, with respect to his post-trial submission, appellant complains:

[W]hen [I] first got to the JRCF [confinement facility] he [defense counsel] told me he would make contact with my family for clemency letters, my family told me he talked once and that was it. So [I] took it upon myself to get the letters and do what [I] could.

Appellant does *not* claim anything was provided to his defense counsel which was then not submitted to the convening authority nor are the referenced letters provided to this court.

In response, appellant's trial defense counsel submitted an affidavit fully explaining his actions and tactical decisions. First, counsel swears appellant never informed him as they prepared for trial of any "pre-offense depression or any other mental health issues." Second, appellant's health care providers explained to defense counsel that despite appellant's claim he attempted suicide while in pretrial confinement by cutting himself and drinking cleaning fluid, medical examination had revealed no signs of "either ingestion of toxic chemicals or of any physical injuries to his wrist." It was the opinion of the care providers that appellant was "acting out" in order to obtain a transfer from the county jail to a mental health facility. Third, counsel explains his tactical decision not to focus on appellant's mental health issues as this was a judge-alone trial and the "court was already fully aware of them from the providence inquiry." Fourth and finally, counsel flatly denies that he ever refused to submit anything that his client desired to be submitted for purposes of clemency. To the contrary, counsel claims appellant authorized him to submit whatever letters he received by a certain day—which turned out to be none.

LAW AND DISCUSSION

Claims of ineffective assistance of counsel are governed by the two-part test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* requires an appellant to demonstrate: (1) that his “counsel’s performance was deficient;” and (2) that this deficiency resulted in prejudice. *Id.*

We must initially determine if a post-trial evidentiary hearing is necessary to decide the legal issue of ineffective assistance of counsel. Having thoroughly reviewed appellant’s claim, relying on the factors established in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we conclude such a hearing is not necessary.* *Ginn* principles one, four, and five are most applicable to this case.

Even accepting the allegations in appellant’s statement as true, we reject his claim. In a case involving sneaking a minor on to post in order to have adulterous

* The five factors set forth in *Ginn*, 47 M.J. at 248, are as follows:

First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant’s favor, the claim may be rejected on that basis.

Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole “compellingly demonstrate” the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record . . . unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

sex and immediately thereafter fleeing military control, trial defense counsel's pre-sentencing strategy to focus on appellant's remorse and the impact of appellant's sentence on his family, rather than focusing on post-conduct mental problems which did not rise to the level of a defense, was a reasonable and sound trial strategy. *See United States v. Perez*, 64 M.J. 239, 243-44 (C.A.A.F. 2006). Furthermore, even if we were to assume a flawed strategy, appellant has not met his burden to show any prejudice in this case where, among other things, he was facing a dishonorable discharge and fifty-seven and one half *years* of confinement, was sentenced only to a bad-conduct discharge and fifty-one *months* of incarceration, and ultimately, by benefit of his pretrial agreement, only the bad-conduct discharge and twenty-four months of confinement was approved.

The record of this guilty plea compellingly demonstrates trial defense counsel was not ineffective either at sentencing or post-trial. All of appellant's mental health issues, medications, and treatment were fully explored on the record and before the military judge. In fact, with respect to the issue of his mental health, appellant personally and affirmatively disclaimed on the record any defense of lack of mental responsibility no less than six times. Then, appellant repeatedly assured the court he understood the proceedings and was mentally capable to cooperate in his defense. Although defenses were disclaimed, there is no doubt that appellant's struggles with "suicidal ideations, depression, and anxiety" were discussed and known to the sentencing authority.

Regarding appellant's clemency submission, there is nothing in the record or allied papers that indicates any lack of diligence on the part of trial defense counsel during the post-trial phase. Rather, appellant's post-trial rights and obligations were explained to him, and he acknowledged them and understood that it was his responsibility to assist his counsel in knowing what to submit. There is no assertion, let alone any evidence, that counsel failed to submit anything provided to him by his client for that purpose. Appellant has "not surmount[ed] [the] very high hurdle" required to successfully claim ineffective assistance of counsel. *See United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

CONCLUSION

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.
Clerk of Court