UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, COOK, and MAGGS[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class LYNNDIE R. ENGLAND
United States Army, Appellant

ARMY 20051170

Headquarters, III Corps and Fort Hood
James Pohl, Military Judge
Colonel Clyde J. Tate, II, Staff Judge Advocate (pretrial)
Colonel Mark Cremin, Staff Judge Advocate (post-trial)

For Appellant: Major Timothy W. Thomas, JA (argued); Colonel Christopher J. O'Brien, JA; Captain Frank B. Ulmer, JA (on brief).

For Appellee: Captain Nicole L. Fish, JA (argued); Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Major Christopher B. Burgess, JA; Captain Nicole L. Fish, JA (on brief).

10 September 2009

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

TOZZI, Senior Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to her pleas, of one specification of conspiracy to commit maltreatment, four specifications of maltreatment, and one specification of indecent acts with another, in violation of Articles 81, 93, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 893, and 934 [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge, three years confinement, and reduction to Private E1. The convening authority also waived

[1] Judge MAGGS took final action in this case while on active duty.

automatic forfeitures and credited appellant with ten days of confinement credit against the approved sentence to confinement.

On appeal, appellant claims, *inter alia*, that (1) the military judge abused his discretion when he rejected her guilty plea; (2) appellant's trial defense counsel were ineffective for calling Private (PVT) Charles Graner as a presentencing witness, in the alternative; and (3) information about an Article 15, UCMJ, was erroneously included in the staff judge advocate's recommendation (SJAR). This case is before the court for review pursuant to Article 66, UCMJ. We have considered the record of trial, appellant's assignments of error, the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and the government's response. We find the first two assignments of error merit discussion but no relief. In addition, we find appellant's third assignment of error is meritorious and will grant relief in our decretal paragraph. The remaining assignments of error are without merit.

FACTS

At the time of the offenses for which appellant was court-martialed, she was assigned to the 372d Military Police Company, a reserve unit headquartered in Maryland. In May 2003, appellant deployed with the 372d to Iraq. By the fall of that year, her unit assumed duties at the Baghdad Central Confinement Facility at Abu Ghraib, Iraq, where appellant served as a personnel administrative clerk.

Several months before the contested trial in this case, and pursuant to a pretrial agreement, appellant attempted to plead guilty to a majority of the charges against her. In the agreement, the convening authority agreed to disapprove any confinement in excess of thirty months.

Two of the specifications involved an incident where then-Corporal (CPL) Charles Graner[2] testified that he placed a "strap tied as a leash" around a nude detainee, removed the detainee from his holding cell, handed the leash to appellant, and then took photographs of appellant holding the leash. Specification 1 of Charge I alleged a conspiracy to maltreat the detainee, while Specification 1 of Charge II alleged the maltreatment itself. During the *Care*[3] inquiry, the military judge conducted an extensive examination of appellant to establish her understanding as to why her actions were unlawful. After satisfying himself that appellant was provident to the offenses, the military judge accepted her pleas and found her guilty.

[2] At the time of appellant's attempted guilty plea, CPL Graner had been convicted at a court-martial for his role in crimes committed at the Abu Ghraib prison. Part of his sentence included a reduction to the grade of E1 and he testified at appellant's court-martial as a Private. We refer to him in this opinion as PVT Graner.

[3] *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969).

During the presentencing case before members, the defense called PVT Graner to testify. Civilian defense counsel limited their questioning of PVT Graner to his personal background—age, prior service as a Marine, and fifteen years of work experience as a civilian corrections officer; his responsibilities at the Abu Ghraib prison; and his intimate relationship with appellant at the time of the offenses. Civilian defense counsel also used PVT Graner to develop the factual backdrop for the leashed detainee incident and the pictures PVT Graner took of appellant holding the leash.

Regarding the leased detainee incident, PVT Graner stated he needed to move the detainee from an isolation cell to an assigned cell, but he wanted to conduct the movement without having to actually enter the detainee's cell. Specifically, PVT Graner testified that:

> WIT: I had wrapped what I called the tether around his shoulders and began to pull him out of the cell, at which point it slid down around his neck. [The detainee] began to crawl out of the cell on his own . . . I asked [appellant] to hold the tether, or the lead, as the [detainee] crawled out of the cell. I took three quick pictures of the [detainee]. And then once he was fully out of the cell, I took the tether off his neck, snatched him up, I grabbed him by his neck and his arm and I escorted him to his cell on the B side.

Civilian defense counsel elicited additional details from PVT Graner about the planning and execution of the removal of the detainee from his cell.

> CDC: When you handed the tether to Private England, did you tell her why you were handing it to her?
>
> WIT: No, sir, I just asked her to hold it.
>
> CDC: Were you asking her as the NCO [noncommissioned officer] in charge of that tier, or were you asking her as a friend or as a fellow soldier?
>
> WIT: I was asking her as the senior person of that extraction team, I guess you would say, as the NCO.

Finally, civilian defense counsel asked PVT Graner a very specific question about an alteration he made to the photograph he took of the detainee with appellant holding the leash.

> CDC: Now, you took three pictures. In one of the pictures, you seemed to have taken out Specialist Ambuhl . . . Was that done intentionally?
>
> WIT: Yes, sir.
>
> CDC: Why was that?
>
> WIT: I believe that was—someone—where Specialist England had worked in the—I believe it was the processing area for the prisoners, and someone over there had wanted a picture, and I had not asked Specialist Ambuhl if she, you know, wanted to be in this picture that I was giving away, blacked her out.

After hearing PVT Graner's confusing and nonresponsive answer, the military judge asked several clarifying questions.

> MJ: Private Graner, why did you take the pictures?
>
> WIT: The three pictures I took that night, sir, was—this was going to be a planned use of force, which anything that we did at the prison, since we had no other rules besides from the 800th MP's ROE [Military Police Rules of Engagement], I tried to bring what we would have done at Pennsylvania there, and since it was a planned use of force, you document it. We didn't have a video camera. This was the closest way I could document it. Apparently, since we had a lot of information during our case, that's the Army policy for their corrections, that you document planned use of force.
>
> MJ: So what you're saying is this cell extraction picture was part of a legitimate cell extraction technique with pictures to document what you were doing?
>
> WIT: I can't say it that it was a legitimate . . .
>
> MJ: Legitimate in the sense that you were doing it to extract him.
> WIT: Yes, sir, it was to me the safest way to get this prisoner out of his cell.

The military judge then excused the members and voiced his concern that PVT Graner's testimony contradicted appellant's guilty pleas and the stipulation of fact, since the pictures of appellant holding the detainee on a leash could have been part of a legitimate cell extraction in the mind of one of the alleged co-conspirators.[4] After giving both sides the opportunity to resolve the inconsistency, the government and the defense agreed, based on PVT Graner's testimony, appellant was not provident to the conspiracy to commit maltreatment charge. The military judge then entered a plea of "not guilty" for appellant as to that offense and determined there was no longer a valid stipulation of fact and appellant was no longer in compliance with the pretrial agreement. The rejected guilty plea led to appellant's contested court-martial, where she was acquitted of the conspiracy to commit maltreatment offense involving the leashed detainee.

LAW AND DISCUSSION

Military Judge's Rejection of Appellant's Guilty Plea

We review a military judge's decision to accept or reject a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). If appellant sets up a matter inconsistent with the plea, the military judge must either resolve the inconsistency or reject the plea. UCMJ art. 45(a).

Appellant asserts the military judge erred by concluding that PVT Graner's testimony that the photograph documented a legitimate cell extraction necessarily undermined appellant's plea of guilty, because PVT Graner's "understanding, belief, or interpretation" of the incident was irrelevant to appellant's belief that she conspired with PVT Graner to commit maltreatment.[5] Appellant further asserts that

[4] At the presentencing hearing, prior to PVT Graner's testimony, the defense also called Dr. Thomas Denne, director of assessments and psychological services for the school system appellant attended, to testify about appellant's learning disabilities, compliant personality, and problems with social judgment. Concerned about the possibility of a defense being raised, the military judge, after an Article 39(a), UCMJ session, instructed the members that, despite Dr. Denne's testimony, appellant admitted she knew the acts were unlawful when she committed them and she chose to act unlawfully.

[5] During oral argument, appellant modified her argument to some extent, asserting that while the extraction itself may have been legitimate, as PVT Graner testified, her act of posing for the photograph and PVT Graner's act of taking of the picture clearly constituted maltreatment. Consequently, appellant asserts her plea of guilty

(continued . . .)

PVT Graner's testimony was simply his attempt to rationalize his behavior. *See United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987) (Judge Cox, concurring).

Contrary to appellant's assertions, there was a direct contradiction between the evidence presented to the military judge during the *Care* inquiry (i.e., appellant's testimony and the stipulation of fact) and PVT Graner's testimony. During the *Care* inquiry, appellant admitted that she and PVT Graner had no lawful purpose in taking the photograph of the detainee with the leash around his neck. She described the event as orchestrated to be "degrading and humiliating" for the detainee and that PVT Graner took the photographs "for his personal use and amusement." However, PVT Graner's testimony at trial pointed in a different direction and thus, "set up a matter inconsistent" with appellant's plea. He testified that his purpose in taking the photograph was to document a valid, lawful "planned use of force." He testified further that he was required under the 800th Military Police Rules of Engagement to document this "planned use of force" and he did so by taking the photograph. Private Graner's wholly inconsistent testimony casts doubt as to whether the picture was taken for a lawful or unlawful purpose, thereby affecting any common understanding or agreement between them.

As such, we find that the military judge did not abuse his discretion in rejecting appellant's plea of guilty to the conspiracy offense because the conflicting testimony of the alleged conspirators at trial showed there was no "meeting of the minds" between them at the time of the incident. *United States v. Valigura*, 54 M.J. 187, 188 (C.A.A.F. 2000).[6] Our superior court, citing the Supreme Court, has said that "agreement is the essential evil at which the crime of conspiracy is directed and it remains the essential element of the crime. If there is no actual agreement or

---

(. . . continued)
and PVT Graner's testimony were not inconsistent and the military judge erred by rejecting her plea. We need not decide today whether the extraction or the taking of the photo was actually legitimate because appellant was ultimately found not guilty. We decide only whether the military judge abused his discretion in rejecting appellant's guilty plea where she presented an inconsistent matter in her presentencing evidence.

[6] At the time of appellant's first trial, PVT Graner had been court-martialed and convicted for his role in the Abu Ghraib crimes. When he testified, he stood convicted of conspiracy to maltreat a detainee for the same incident for which appellant was charged and is the subject of this assignment of error. His conviction for the same offense for which the military judge found appellant improvident bears no relevance to our decision in this case because it is well-established that totally inconsistent results may be reached in different trials. *See Valigura*, 54 M.J. at 190 (citing *Dunn v. United States*, 284 U.S. 390, 393 (1932) and *United States v. Powell*, 469 U.S. 57 (1984); *United States v. Garcia*, 16 M.J. 52 (C.M.A. 1983).

meeting of the minds there is no conspiracy." *Id.* (citing *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975)) (internal citations and punctuation omitted).

Ineffective Assistance of Counsel

Appellant's second assignment of error raises an argument in the alternative to the issue discussed above. Appellant claims she was denied effective assistance of counsel when her defense counsel called PVT Graner as a presentencing witness and his testimony so contradicted her plea that the military judge rejected it.

In order to show ineffective assistance of counsel, an appellant must demonstrate that her counsel's performance was so deficient that (1) the counsel was not functioning as counsel within the meaning of the Sixth Amendment, and (2) that her counsel's deficient performance rendered the results of the trial unreliable or fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant has not met that very high burden.

We disagree with appellant that defense counsel was ineffective because there was no reasonable basis to call PVT Graner during sentencing. Clearly, the defense strategy at sentencing was to paint appellant as submissive and compliant in structured situations and vulnerable to strong personalities, like PVT Graner, with whom she also had an intimate relationship.

We also discern from the record strategic reasons for calling PVT Graner as a witness. *See United States v. Lewis*, 42 M.J. 1, 3 (C.A.A.F. 1995) ("in many cases review of the record itself is sufficient" to resolve claims of ineffectiveness). As part of its presentation of extenuation and mitigation evidence, appellant's defense team called three witnesses before the military judge declared a mistrial. First, Dr. Denne testified about appellant's social compliance, academic learning disabilities, and deficits in language-based reasoning and processing while attending school. Second, Major David DiNenna, the 320th Military Police Battalion S-3 officer from June 2003 to February 2004, testified about the physical conditions at Abu Ghraib prison, the personnel shortages, and the lack of training where "non-MP [military police] MOS [military operational specialty] soldiers" were involved in guarding prisoners. Finally, the defense called PVT Graner.

The defense used PVT Graner to develop the facts for the leashed detainee incident, to showcase his domineering personality, and to establish that he was clearly in charge of the entire incident from its inception. Private Graner testified that he developed the plan for removing the detainee from the cell using a leash, he brought appellant into the incident, and it was his plan—not appellant's—to extract the detainee from his cell using a leash and take photographs with appellant featured in them.

The record also shows that appellant's defense counsel attempted to limit PVT Graner's testimony. Civilian defense counsel never asked PVT Graner whether he believed pulling the detainee out of the cell on the leash was a legitimate use of force. He simply asked PVT Graner to testify how it happened—the acts that led up to him taking the photographs, that it was his idea to take the photographs, that he altered one of the photographs, and that he did not explain the "cell extraction" to appellant. While there may have been other ways to put this information before the panel, we find calling PVT Graner in person to testify a reasonable tactic by the defense. Presenting these details through PVT Graner is consistent with the overall defense sentencing strategy.

In assessing a claim of ineffective assistance, we "do not scrutinize each and every movement . . . of counsel. Rather, we satisfy ourselves that an accused has had counsel who, by his or her representation, made the adversarial process work." *United States v. Murphy*, 50 M.J. 4, 8 (C.A.A.F. 1998). In this case, we find the full scope of appellant's representation was effective. Her defense team negotiated a favorable pretrial agreement, adequately prepared appellant such that she could articulate to the military judge why she believed she was guilty in accordance with *Care*, and developed and presented a cogent sentencing strategy. We find the spectrum of appellant's defense counsel representation to be reasonable and certainly within the consideration of "sound trial strategy." *See Strickland*, 466 U.S. at 689.[7]

The affidavits[8] submitted by appellant in her post-trial submission do not reveal ineffective assistance of counsel, but they do reveal the risk inherent in

---

[7] In parsing PVT Graner's testimony, we note that it was not defense counsel, but the military judge who actually asked the question that elicited the inconsistent testimony. The military judge asked, "Private Graner, why did you take the picture?" We find that the military judge did not abuse his discretion in questioning PVT Graner because he was simply attempting to clarify the unclear and rambling response PVT Graner had previously given to defense counsel. *See United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995) (A military judge "can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further."). *See, e.g. United States v. Dock*, 40 M.J. 112, 128 (C.M.A. 1994), *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987); Military Rule of Evidence 614(b).

[8] We are mindful of our superior court's directive that "Article 66(c) does not authorize a Court of Criminal Appeals to decide disputed questions of fact pertaining to a post-trial claim . . . on the basis of conflicting affidavits submitted by the parties." *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). We find that the affidavits submitted by appellant in her post-trial Rule for Courts-Martial

(continued . . .)

calling any witness, particularly, a co-conspirator who was previously found guilty and continues to profess his innocence. But, after some investigation, appellant's defense team determined that the possible benefit to appellant outweighed that risk.

Though no counsel can know for certain how a particular witness will actually testify, due diligence requires that he or she must do a reasonable job of investigating to determine that the witness testimony is relevant. *See* R.C.M. 1001. We are satisfied appellant's defense counsel exercised due diligence in investigating and determining the relevancy of PVT Graner's testimony. Civilian defense counsel met with PVT Graner at least two times,[9] discussed his expected testimony, and intentionally limited the scope of his questions. Civilian defense counsel stated that he "never would have asked [PVT] Graner the questions posed by the court during the sentencing phase" because he knew despite PVT Graner's convictions, he persisted with the notion that the photographs depicted a lawful cell extraction.

The decision by appellant's defense counsel to use PVT Graner to minimize appellant's culpability and gain sympathy from the panel posed some risk, but was well within the realm of a reasonable defense strategy. The fact that ultimately PVT Graner's testimony set up a matter inconsistent with appellant's plea does not render her counsel's assistance ineffective. *See Strickland*, 466 U.S. at 689. ("Judicial scrutiny of counsel's performance must be highly deferential" because "it is all too tempting . . . to second-guess counsel's assistance . . . after it has proved unsuccessful.")

SJAR Error

In the SJAR, the Staff Judge Advocate included details of an Article 15, UCMJ, appellant received for disobeying a lawful order to sleep only in her own bed while she was a Specialist and under a different convening authority. Appellant argues, and we agree, that the Article 15, UCMJ, appellant received from her

(. . . continued)
[hereinafter R.C.M.] 1105 submission do not conflict. Both agree that appellant's defense team knew that PVT Graner would profess his innocence with regard to the conspiracy to commit maltreatment offense.

[9] According to the affidavits, civilian defense counsel interviewed PVT Graner on at least two separate occasions (30 April 2005 and 1 May 2005). Dr. Amadour apparently attended only one of those interviews.

previous unit should have been destroyed and not submitted to the convening authority in the SJAR.[10]

Appellant asserts and we agree that including this information in the SJAR constituted error and appellant has made a "colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). An Article 15, UCMJ, for failing to obey an order to "sleep in your own bed" could affect a convening authority's clemency decision. We will grant appellant one month relief for the error. *See id.*

CONCLUSION

The findings of guilty are approved. Reassessing the sentence on the basis of the error, in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion, the court affirms only so much of the sentence as provides for a dishonorable discharge, confinement for thirty-five (35) months, and reduction to Private E1.

Judges COOK and MAGGS concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

[10] The government attempted to admit this document during appellant's presentencing hearing. Though there was no objection by the defense, the military judge refused to admit the document because it was received by appellant while she was under a different General Court-Martial Convening Authority and should have been destroyed. *See* Army Reg. 27-10, Legal Services: Military Justice, para. 3-37b (16 November 2005).