

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant IAN M. BYINGTON
United States Air Force

ACM 35917

30 September 2005

Sentence adjudged 18 February 2004 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

BROWN, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

A military judge sitting as a general court-martial tried the appellant at McGuire Air Force Base, New Jersey. The court-martial convicted the appellant, pursuant to his pleas, of one specification of committing an assault upon a child under the age of 16 years, with a force likely to produce grievous bodily harm, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge sentenced the appellant to a bad-conduct

discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts two errors for our consideration: (1) That he received ineffective assistance of counsel because his trial defense counsel failed to request deferment of the adjudged forfeitures and a waiver of the automatic forfeitures on behalf of his dependents; and (2) That the staff judge advocate (SJA) failed to properly advise the convening authority that the appellant had dependents for whose benefit the appellant's automatic forfeiture could be waived.

Background

During his providence inquiry, the appellant admitted that he repeatedly shook KB, his 3-month-old stepson. His wife had left him to care for her son and her 5-year-old daughter while she was at work. KB was crying throughout the day and the appellant's stepdaughter was constantly vying for his attention. He said he got frustrated because he could not get KB to stop crying so he picked him up out of his crib and shook him. When KB did not stop crying, the appellant shook him again, this time a bit harder. The appellant panicked when he noticed that the baby's eyes had rolled back in his head and he started to contact his wife. Fortunately, the appellant's wife came home from work early and entered the house just as the appellant was picking up the telephone to call her. After the appellant's wife examined KB, she knew he needed immediate medical attention. She told the appellant to call the hospital. When the appellant described the baby's symptoms, he was told to bring the baby to the emergency room. After they arrived at the hospital, medical personnel performed several tests and determined that the baby had a subdural hematoma, otherwise known as bleeding under the lining of his brain, and retinal hemorrhages.

I. Ineffective Assistance of Counsel

At the time of his court-martial, the appellant was married to another enlisted member of the Air Force, Senior Airman (SrA) Brittany Byington. He had two stepchildren, KB and HM, who were SrA Byington's biological children. The appellant asserts that he received ineffective assistance of counsel because his trial defense counsel failed to adequately advise him about his right to request a deferment of adjudged forfeitures or a waiver of mandatory forfeitures under Article 57a and 58b, UCMJ, 10 U.S.C. §§ 857a, 858b. As a result, his clemency request did not include a request for waiver or deferment of forfeitures. He claims that as a result, his clemency process was prejudiced because his dependents and their needs for support were never brought to the attention of the convening authority.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, the appellant must show that, (1) counsel's performance was deficient, and (2) counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong of *Strickland* requires that the appellant show counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession, however, there is a "strong presumption" that counsel was competent. *Id.* at 688-89. The prejudice prong requires that the appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The *Strickland* standard applies to representation at both courts-martial, and in post-trial proceedings. *Wiley*, 47 M.J. at 159 (C.A.A.F. 1997).

Because the appellant was sentenced to more than six months confinement, in addition to receiving a bad-conduct discharge, he was subject to mandatory forfeitures for the length of his confinement pursuant to Article 58b(a)(1), UCMJ. Rules for Court-Martial (R.C.M.) 1101(d)(1) and Article 58b(b), UCMJ, allow the convening authority to waive forfeitures for a period of up to six months for the purpose of providing support to the dependents of an accused. R.C.M. 1101(d)(3) defines dependents for the purpose of waiver as "any person qualifying as a 'dependent' under 37 U.S.C. [§] 401." 37 U.S.C. § 401(a)(1) includes spouses in the category of dependents. 37 U.S.C. § 401(a)(2) and § 401(b)(1) includes adopted children and stepchildren. Because the appellant was married, his wife and stepchildren qualified as dependents for the waiver provision.

The appellant claims that his counsel performed deficiently because she failed to adequately advise him about the possibility that the convening authority could waive forfeitures for the benefit of his dependents. Without question, the appellant's trial defense counsel advised him of his right to seek a deferment or waiver of forfeitures of pay. In fact, the appellant signed a post-trial rights advisement form on 18 February 2004. However, based on the fact that his spouse was in the military and he had no biological children, the appellant avers that he did not believe that the option of requesting a deferment was available to him. Moreover, he claims that his trial defense counsel never specifically advised him that his wife and stepchildren were qualifying dependents.

The appellant had good reason to believe that his wife and stepchildren were not qualifying dependents. During his trial, his Personal Data Sheet (PDS) stated that he had no dependents. As the assistant trial counsel introduced the PDS into evidence during the sentencing portion of the trial, the military judge asked "And the marital status indicated married and no dependents[?]" The assistant trial counsel responded "Your Honor, yes, he's still married and his wife is an active duty member so the dependents are under her." The trial defense counsel had no objection to this explanation or to the PDS. As a result, the appellant asserts that trial defense counsel's performance was deficient because she

failed to recognize the status of appellant's wife and stepchildren as dependents and advise him accordingly.

Normally, the appellant's assertion that he did not understand that he could request a deferment or waiver would give us cause for concern. However, the appellant gives another reason why he did not file a request for the support of his dependents. Specifically, he states he did not submit a deferral/waiver request because his trial defense counsel advised him that he should not risk compromising his major clemency request, which was admission to the Return to Duty Program (RTDP), with other requests that were unlikely to be granted. This explanation is consistent with the trial defense counsel's stated reasons for not filing a waiver request for the support of the appellant's dependents. In her post-trial affidavit, she avers that she advised the appellant that a waiver/deferral of pay was an entitlement and that the appellant could submit a request to the convening authority. Additionally, she said that the appellant expressed a sincere desire to be accepted into the RTDP and did not ask about submitting a request for a deferral/waiver. In essence, the appellant and his counsel made a tactical decision to seek his admission in the RTDP in lieu of requesting a deferral/waiver.

"We will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Even though the appellant did not receive a deferment or waiver, the appellant was ultimately accepted into the RTDP with the assistance of his trial defense counsel. Therefore, we conclude that the appellant has not met his burden of showing that his trial defense counsel provided ineffective assistance.

II. Erroneous Matter in the SJAR

The appellant further alleges that the SJA failed to properly advise the convening authority that the appellant had dependents who were eligible to receive the benefit of the appellant's forfeited pay. Specifically, the staff judge advocate's recommendation (SJAR) to the convening authority states that "[t]he accused is married to an active duty Air Force member and has no dependents." The appellant asserts that this statement is erroneous and asks this Court to set aside the action and return the case to the convening authority for a new action.

Erroneous or misleading information in the SJAR may result in prejudice to the substantial rights of an accused. *United States v. Martinez*, 1 M.J. 280, 281 (C.M.A. 1976). If there is a fair risk that the misstatement misled the convening authority, and prejudice resulted from the error, then the action must be invalidated. *Id.* Because the appellant's trial defense counsel did not object to the erroneous information, this assignment of error is waived absent plain error. R.C.M. 1106(f)(6). In order to find plain error, we must be convinced that: (1) there was error; (2) the error was obvious; and

(3) the error materially prejudiced a substantial right. *United States v. Kho*, 54 M.J. 63, 64 (C.A.A.F. 2000). “In the context of a post-trial recommendation error, the threshold for material prejudice is said to be low because of the convening authority’s vast power in granting clemency. However, an appellant must make ‘some colorable showing of possible prejudice.’” *United States v. Parsons*, 61 M.J. 550, 551 (A.F. Ct. Crim. App. 2005) (citations omitted).

As stated above, the appellant has dependents eligible to receive benefits under the provisions of Article 58b, UCMJ. However, the granting of these benefits to the appellant’s dependents falls within the sole discretion of the convening authority. We have no doubt that the convening authority was aware that the appellant had dependents because the record is full of references to appellant’s wife and stepchildren. Additionally, the appellant’s clemency submissions made it clear that he was still supporting his wife and stepchildren. Therefore, even with the inaccurate statement in the SJAR, the convening authority had sufficient information to either grant a waiver or ask whether the appellant had dependents for waiver purposes. As a result, we find no prejudice to the appellant.

Even if we were to assume that the erroneous statement materially prejudiced a substantial right of the appellant, he and his trial defense counsel had ample opportunity to correct and or clarify the statement. This fact coupled with the appellant’s tactical decision not to file a request for a waiver and to focus his clemency request on being accepted into the RTDP causes us to deny his request for a new action.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court