UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARCUS J. DAVIS
United States Air Force

ACM 36490

13 June 2007

Sentence adjudged 4 August 2005 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, Captain John S. Fredland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge, sitting alone, convicted the appellant, in accordance with his pleas, of one specification of false official statement and three specifications of larceny, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. Contrary to his pleas, the military judge also convicted the appellant of three specifications of attempted wrongful appropriation and making a false identification card, one specification of conspiracy, 14 additional specifications of larceny, and one specification of wrongful appropriation, in violation of Articles 80, 81, and 121, UCMJ, 10 U.S.C. §§ 880, 881, 921. The military judge sentenced the appellant to a bad-conduct discharge, 2 years confinement, total forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises one error on appeal: whether the appellant received ineffective assistance of counsel during the post-trial processing stage where the appellant's trial defense counsel failed to submit matters in clemency to the convening authority.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Counsel is presumed to be competent. *Id*. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Vague or general intimations about the particular nature of materials the appellant would or could have submitted to support a clemency request are insufficient to show prejudice. *Key*, 57 M.J. at 249 (citing *United States v. Pierce*, 40 M.J. 149, 151 (C.M.A. 1994)).

As to the assignment of error, we have reviewed the record of trial, the assignment of error, and the government's answer thereto. The appellant was advised, on several occasions, of his right to submit post-trial matters for consideration by the convening authority. Furthermore, the appellant repeatedly acknowledged his understanding of that right. Although the appellant indicated in writing that he desired to submit matters, after an extension of time to submit such matters was granted, no matters were submitted and the convening authority took action. "Failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such mattes." Rule for Courts-Martial 1105(d)(1). Clearly, the appellant waived this right. The appellant has failed to meet his burden of proving deficient performance.

Assuming, arguendo, the appellant has overcome the presumption of competence of counsel, there is absolutely no evidence provided by the appellant, or otherwise, to support any finding of prejudice. Although the trial defense counsel submitted an affidavit and a number of memoranda, they are not necessary as the appellant has not met his burden on this issue.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Chief Court Administrator