UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JACOB L. EDWARDS
United States Air Force

ACM S31812

31 May 2012

Sentence adjudged 13 April 2010 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $964.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Daniel E. Schoeni; and Major Reggie D. Yager.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and SARAGOSA
Appellate Military Judges

OPINION OF THE COURT

SARAGOSA, Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 6 months, forfeiture of $964.00 per month for 6 months, and reduction to the grade of E-1. Consistent with the pretrial agreement, the convening authority approved a sentence of a bad-conduct discharge, confinement for 90 days, forfeiture of $964.00 per month for 6 months, and

reduction to the grade of E-1.[1] On appeal, the appellant asks the Court to remand the case for post-trial processing, asserting that he was denied effective assistance of counsel when his defense counsel failed to submit clemency matters on his behalf.

Prior to taking final action, the convening authority must consider matters submitted by the accused under Rule for Courts-Martial (R.C.M.) 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). An appellant may waive his right to submit clemency matters. R.C.M. 1105(d). We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)).

The appellant submitted a post-trial declaration under the penalty of perjury wherein he asserts he told his defense counsel that he wanted to submit clemency matters and she agreed to take care of it. He further asserts that after he went into confinement he never heard from her again. At trial, the appellant specifically informed the military judge that trial defense counsel informed him of his post-trial and appellate rights and that he had no questions about his rights. Additionally, the appellant signed a written acknowledgment that trial defense counsel had advised him of his post-trial and appellate rights.

Captain AL, one of the appellant's trial defense counsel, submitted a declaration under the penalty of perjury stating that, prior to trial, she explained the clemency process to the appellant. She further stated that after trial she and appellant spoke again about the clemency process. She indicates her advice to appellant during this conversation was that, given the significant benefits derived from the pretrial agreement—specifically the withdrawal of three specifications and confinement limited to 90 days—there was very little chance any clemency would be granted. After discussion, the appellant knowingly and affirmatively waived his right to submit clemency matters. Major KP, the appellant's other defense counsel, also submitted a declaration under the penalty of perjury that corroborates Captain AL's recollection of the discussion regarding clemency that took place after trial in the courtroom. He reiterates that Captain AL advised the appellant it was very unlikely he would get clemency from the convening authority due to the favorable pretrial agreement. He states the appellant was happy with the outcome of the case and agreed that he did not wish to submit clemency.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). However, if the appellate filings, and record as a whole, "compellingly demonstrate" the improbability of the appellant's

[1] After the pleas were accepted, the trial counsel, pursuant to the pretrial agreement, withdrew and dismissed Charge I and its two specifications alleging the making false official statements, in violation of Article 107, UCMJ, 10 U.S.C. § 907, and Charge III and its specification alleging unlawful entry, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

assertions, we can resolve the factual dispute without resorting to a post-trial fact finding hearing by applying one of six principles set forth in *Ginn*. *Id.* at 248. In the case at hand, the appellate filings and record as a whole "compellingly demonstrate" the improbability of the appellant's assertions. Captain AL's declaration makes clear that she discussed clemency matters with the appellant, both before trial and after trial. This discussion was witnessed by Major KP. The appellant's declaration is silent as to any post-trial discussion regarding submission of clemency matters and therefore is not in direct opposition. Under these circumstances, we can resolve the disputed issue without a post-trial evidentiary hearing.

Generally, claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was in fact deficient, and, if so, (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687. Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citing *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1993)). The appellant bears the heavy burden of establishing that his trial defense counsel were 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) (citations omitted). However, the threshold for finding prejudice stemming from ineffective assistance of counsel for post-trial proceedings is lower.

The convening authority is the appellant's best hope for relief. *See United States v. Bono*, 26 M.J. 240, 243 (C.M.A. 1988); *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958). As a result, our superior court imposed a lower threshold for claims of post-trial ineffective assistance of counsel: "However, because of the highly discretionary nature of the convening authority's clemency power, the threshold for showing [post-trial] prejudice is low." *United States v Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Therefore, the appellant gets the benefit of the doubt and needs to make only a "colorable showing of possible prejudice." *Id.* (internal quotation marks and citations omitted).

Applying these principles, we find that the appellant is not entitled to relief. Even if we assume he did not affirmatively waive his right to submit clemency matters and that reasonably competent counsel would have submitted a clemency request to the convening authority, we fail to see how any submission would have resulted in relief. The appellant's declaration fails to show specifically what information he would have submitted to the convening authority. He instead makes a generic reference to highlighting his good behavior while in confinement and the possibility that his family, friends, or coworkers would have written letters on his behalf. These speculative

thoughts of what might have been submitted are insufficient to make a colorable showing of possible prejudice.

In short, we find that: (1) Captain AL advised the appellant of his right to submit a clemency package; (2) Captain AL made a tactical and strategic decision to advise the appellant to forego the submission of clemency matters given the favorable pretrial agreement and low probability of having clemency granted; (3) the appellant, following the advice of counsel, knowingly and intelligently chose not to submit a clemency package; and (4) therefore, Captain AL's advice to the appellant does not amount to ineffectiveness of counsel. Even assuming arguendo that trial defense counsels' conduct was deficient, we find no colorable showing of possible prejudice, especially given the highly favorable pretrial agreement which limited the convening authority to approving only half of the confinement adjudged.

Appellate Delay

In this case, the overall delay of over 18 months between the trial and completion of review by this Court is facially unreasonable. Because this delay is unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006) (citations omitted). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review of his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The approved findings, and the sentence, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] The Court notes the court-martial order (CMO), dated 19 May 2010, incorrectly fails to indicate the not guilty pleas entered to Charge I and its two specifications and to Charge III and its specification. We order the promulgation of a corrected CMO.

Accordingly the findings and the sentence are

AFFIRMED.

OFFICIAL

LAELA F. SHARRIEFF
Chief Commissioner