UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant SCOTT A. GILL
United States Air Force

ACM 35212

16 December 2004

Sentence adjudged 18 January 2002 by GCM convened at Aviano Air Base, Italy. Military Judge: Thomas W. Pittman.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Antony B. Kolenc, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MALLOY, Senior Judge:

The appellant was tried by general court-martial sitting with officer members on a single charge and specification of using cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to pleas, the members convicted him as charged and sentenced him to a bad-conduct discharge, confinement for 30 days, and reduction to E-4. The convening authority approved the sentence as adjudged. The case is now before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866.

The appellant has raised six assignments of error: (1) The military judge erred in failing to grant a challenge for cause against a court member based on actual and implied bias; (2) The evidence is factually and legally insufficient to support the appellant's conviction for wrongfully using cocaine; (3) The military judge erred by refusing to allow the appellant to tell the court members in his unsworn statement that the trial counsel had told prospective defense sentencing witnesses that the appellant had been untruthful; (4) The trial counsel improperly referred to Air Force core values during sentencing argument; (5) The appellant was denied effective assistance of counsel during sentencing because his civilian defense counsel was unprepared; and (6) The appellant is entitled to a new post-trial review because the staff judge advocate failed to process his request for waiver of automatic forfeitures and failed to advise the convening authority that the appellant raised numerous legal errors in his post-trial submission. We find no error that materially prejudices a substantial right of the appellant and affirm.

I. Challenge for Cause

A. Background

The appellant's cocaine abuse was discovered as a result of a random urinalysis. At the time of his selection for drug testing, the appellant was assigned to Moron Air Base (AB), Spain. Moron AB is a geographically separated unit of the 31st Fighter Wing, Aviano AB, Italy. On Friday, 6 April 2001, the Drug Demand Reduction Program Manager at Aviano AB notified the appellant's first sergeant at Moron AB by email that the appellant had been selected for drug testing. The first sergeant did not notify the appellant of this selection until the following Monday morning. The appellant provided a urine specimen as directed, which was mailed to the Air Force Drug Testing Laboratory at Brooks Air Force Base (AFB), Texas. After testing positive for cocaine at the Brooks Laboratory, a portion of the sample was sent to the drug testing laboratory at Fort Meade, Maryland, for a second test.

Analysis of the appellant's sample at the Brooks Laboratory revealed a concentration of 5,843 nanograms of the metabolite of cocaine per milliliter of urine. The Fort Meade test revealed a concentration of 4,968 nanograms of the metabolite of cocaine per milliliter of urine. The difference in test results was attributable to degradation of the sample over time. The Department of Defense cutoff for a positive cocaine urinalysis is 100 nanograms per milliliter. The appellant's levels were consistent with recreational use of cocaine.

The appellant had been the senior Independent Duty Medical Technician (IDMT) at Moron AB. As the senior IDMT, he was responsible for the base medical facility and the medical care of all personnel assigned to Moron AB. He was not in this position at the time of his selection for drug testing, however. As a result of alcohol-related misconduct at Aviano AB, he received nonjudicial punishment under Article 15, UCMJ,

10 U.S.C. § 815, and was permanently decertified from performing IDMT duties. The Deputy Command Surgeon, Headquarters United States Air Forces in Europe (HQ USAFE), signed the notice of permanent decertification that was sent to the appellant.

Colonel Jon M. Casbon was detailed as a member of the appellant's general court-martial. Colonel Casbon is a physician and was, at the time of trial, the Deputy Commander of the Medical Group at Aviano AB. Before this assignment, he was the Chief of Professional Services at HQ USAFE. During voir dire, the following exchange occurred between civilian defense counsel and Colonel Casbon concerning his duties at HQ USAFE:

> MBR (COL CASBON): My prior position at USAFE was as Chief of Professional Services. That means I was, basically the physician in charge for USAFE medical facilities. So, I had some level of oversight of the entire IDMT program in USAFE.
>
> Civ DC: So, that included the necessity to replace, or the fact that when TSgt Gill was decertified as an IDMT?
>
> MBR (COL CASBON): I was—
>
> MJ: Could one of you just say what "IDMT" stands for?
>
> MBR (COL CASBON): Sure. Independent Duty Medical Technician.
>
> MJ: Got it. You can continue.
>
> Civ DC: Thank you sir, that's fair. So you were involved in, or least getting briefings perhaps?
>
> MBR (COL CASBON): That's correct. I was not sure of the name, but you've since confirmed that, yes.
>
> Civ DC: Okay. Were you also involved, not necessarily at USAFE, but when you came here as the deputy commander, in his permanent decertification as an IDMT? Does that ring a bell?
>
> MBR (COL CASBON): No. I'm not even sure when that took place. But no I was not.
>
> Civ DC: All right. Were you involved at all in—He received a referral EPR. Were you involved in that process at all?

MBR (COL CASBON): No. His chain of command is entirely separate from the Medical Group.

Civ DC: I understand that. But I'm wondering whether or not their [sic] were briefings between the headquarters, meaning—

MBR (COL CASBON): Not that I'm aware of, no.

Civ DC: When the issue of his decertification came up, did that mean that there was a manning issue for you at Moron, that needed to be resolved?

MBR (COL CASBON): Possibly at the headquarters level. Not for me, personally. I would not have been involved in that as a manpower issue per se, but I know that it would have created a need to put somebody else in that position.

Civ DC: Doctor, do you remember the reasons why he was decertified?

MBR (COL CASBON): From what I recall, I thought it had something to do with substance abuse. I thought it involved alcohol use and I don't recall any more beyond that.

In response to a question from the military judge, Colonel Casbon indicated that there was nothing about his limited exposure to the appellant's decertification that would prevent him from being fair and impartial as a court member.

The appellant challenged Colonel Casbon for cause. He argued that, based on his professional background as a physician and his knowledge, "complete or incomplete," of the appellant's decertification as an IDMT, Colonel Casbon would be unable to sit fairly and impartially on the case. The military judge denied the challenge. Based on his assessment of Colonel Casbon's demeanor, he found there was no evidence of actual bias. He also found no implied bias. As the military judge explained, the fact that Colonel Casbon knew something from a previous assignment about an administrative action taken against the appellant involving alcohol is not enough to cause a reasonable member of the public to perceive the proceedings as unfair. The appellant thereafter used his peremptory challenge to remove Colonel Casbon from the court. Defense counsel stated that he would have used his peremptory challenge against another court member had the military judge granted his challenge for cause against Colonel Casbon.

B. Discussion

The appellant argues that it was reversible error not to excuse Colonel Casbon because of both actual and implied bias. Although the defense peremptorily challenged Colonel Casbon, the issue has been preserved for appeal. *United States v. Armstrong*, 54 M.J. 51, 55 (C.A.A.F. 2000).

Military judges are to follow the liberal-grant mandate in ruling on challenges for cause. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). We review a denial of a challenge for cause based on actual bias for abuse of discretion. *Armstrong* 54 M.J. at 53; *see also United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000) (standard of review is "clear abuse of discretion"). The question of actual bias is essentially a question of credibility. Since the military judge is in the best position to judge the demeanor and credibility of the member during voir dire, we accord his assessment of the member's credibility "great deference." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998) (quoting *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). *See also Daulton*, 45 M.J. at 217.

We accord less deference to a military judge's denial of a challenge for cause based on implied bias. *Rome*, 47 M.J. at 469. Our task in evaluating a claim of implied bias involves application of an "objective standard" to the stated reasons for disqualification of the member that is not dependent on the military judge's credibility determination. *Daulton*, 45 M.J. at 217. We simply ask how would the public perceive the fairness and impartiality of the proceeding with the challenged member serving on the panel in light of the reason(s) for the supposed implied bias. *United States v. Dinatale*, 44 M.J. 325, 328 (C.A.A.F. 1996); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). "Implied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased].'" *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000) (quoting *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999)). The standard of review to be applied to such a challenge is less deferential than abuse of discretion but more deferential than de novo. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Generally, implied bias should rarely be used as the reason for granting a challenge for cause in the absence of actual bias. *Id.*; *but see United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997) (Effron, J., concurring in part and in the result) (questioning whether implied bias challenges should be the "rare exception").

Here, we find that the military judge did not abuse his discretion in denying the defense challenge against Colonel Casbon based on either actual or implied bias. Nothing about his medical training, past or current assignments, his professional relationship with a junior member of the court-martial, or his limited knowledge of the appellant's decertification from IDMT duties leads us to conclude that he should have

been excused "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial (R.C.M.) 912(f)(1)(N).

Colonel Casbon was a family practice physician by training but was not in a clinical position at the time of the appellant's trial. He had the same general training and knowledge of chemistry, toxicology, and pharmacology that any physician would have preparatory to becoming a doctor. As he noted, he was not an expert in any of these fields. And contrary to the appellant's suggestion, he had little in common professionally with the government's expert, Dr. Vincent Papa, who was a Ph.D. forensic toxicologist at the Brooks Laboratory. We reject the appellant's assertion that Colonel Casbon's education and medical training disqualified him from serving as a member of the appellant's court-martial. *See Daulton*, 45 M.J. at 217 (medical degree did not disqualify officer from service on a court-martial).

Colonel Casbon did, to be sure, have some limited knowledge concerning the appellant's decertification as an IDMT as a result of his prior assignment at HQ USAFE. Unlike the appellant, our reading of the entire exchange between defense counsel and Colonel Casbon during voir dire satisfies us that he played no official role in the decertification process. In fact, he probably would not even have remembered the appellant but for defense counsel's questions on voir dire about the action. In any event, he assured the military judge that his knowledge of the appellant would not affect his ability to fairly and impartially judge the appellant's case. The military judge, based on his observation of Colonel Casbon, found this assurance to be credible. We find no clear abuse of discretion in this determination and defer to the judgment of the military judge.

We find the appellant's claim of implied bias even less compelling. Colonel Casbon had limited exposure to an administrative action that was, at best, tangential to the criminal conduct before the court. His knowledge of this administrative action did not call into question the objective perception of fairness of the appellant's court-martial. *See Dinatale*, 44 M.J. at 328 (cursory administrative review of an accused's sanity board report did not disqualify Chief of Hospital Services from serving on the accused's court). Colonel Casbon's professional background and medical training did not raise the specter of implied bias.

The appellant bore the burden of establishing cause to excuse Colonel Casbon from his court-martial. R.C.M. 912(f)(3). We hold that he has failed to meet this burden.

II. Factual and Legal Sufficiency of the Evidence

As noted, the appellant was convicted of wrongfully using cocaine based on the results of a random urinalysis. The appellant's urine was independently tested at two drug-testing laboratories. Among other witnesses, the government called Dr. Vincent Papa as an expert witness to explain the results of these drug tests. The appellant now

argues that the evidence is factually insufficient to support the finding that he wrongfully used cocaine. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); Article 66(c), UCMJ. Here, there is sufficient competent evidence in the record of trial to find legal sufficiency to support the member's finding that the appellant used cocaine. "A urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required by [*United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987)], provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use . . . ." *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001).

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; Article 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). After reviewing the record and applying this standard, we are satisfied of the appellant's guilt beyond a reasonable doubt.

III. The Appellant's Unsworn Statement

The appellant made an unsworn statement by question and answer with the assistance of defense counsel during sentencing. During the course of questioning, the defense counsel asked the appellant if he "realize[d] that the prosecution has been to [sic] talking to family and witnesses and talking about how you're a liar, right?" Immediately, after the appellant answered "Yes," the military judge called an Article 39a, UCMJ, 10 U.S.C. § 839a, session. During this session, the following exchange occurred between the military judge and defense counsel:

> Civ DC: I want him to briefly talk about the Article 15, the EML issue—
> MJ: I am not going to allow you, even through an unsworn statement, to put in anything to the members about trial counsel calling him a liar or anything like that. I mean you can talk about the impact that these offenses or the process of prosecution has had on his life. But I think where you're stepping now is grounds where it's just—Well, I'm not going to allow it. You can continue on to some area that's permissible for an unsworn statement but unless you can relate this somehow to the court how this is

> permissible for the members to consider in an unsworn statement, I'll give that opportunity.
>
> Civ DC: My inclination is that we—My inclination is to try to address the issue with some different kinds of questions.
>
> MJ: But don't bring trial counsel into it. I mean the prosecution team is not the reason that your client is here today. They're doing their job just like you're doing yours. You can continue on any way you deem appropriate but I just think anything that's going to involve attacks on trial counsel in the unsworn statement is not proper for the court members' consideration.
>
> Civ DC: I was trying to a lay a foundation for his questions, but I see your point.

After the members returned, defense counsel turned to questioning the appellant about his Article 15 punishment and decertification from IDMT duties.

The appellant now complains that the military judge improperly curtailed his right to make an unsworn statement. We, of course, agree with the proposition that the right to make an unsworn statement during sentencing is an important and traditional right under military law and should be broadly construed in such a light. *United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998); *United States v. Johnson*, 59 M.J. 666, 675 (A.F. Ct. Crim. App. 2003). But, we see nothing about the above exchange that curtailed this right. First, defense counsel was simply attempting to lay a foundation for questioning the appellant about his Article 15 and decertification from performing his medic duties. And he was clearly allowed to do this after the members returned. Second, even if this exchange is construed as initially limiting the appellant's statement, the military judge gave the defense counsel the opportunity to relate how the information was permissible for an unsworn statement. Instead of doing so, defense counsel agreed with the military judge, noting, "I see your point," and moved on.

We hold the appellant was not denied his right to include any matter in his unsworn statement.

IV. Reference to Air Force Core Values

During the sentencing hearing, the trial counsel questioned two of the appellant's witnesses, both Air Force noncommissioned officers (NCOs), as to whether they believed the appellant's drug abuse and other misconduct were consistent with Air Force core values. Defense counsel did not object to these questions. The witnesses provided the obvious and only answer they would be expected to provide as Air Force NCOs, and

responded in the negative. The trial counsel returned to this theme during closing argument but this time civilian defense counsel objected to the reference to core values. The military judge overruled the objection but admonished the assistant trial counsel not to make core values the centerpiece of his argument, and told the members that he would instruct them on what they should consider. He then noted: "The appropriateness of sentencing is not about whether he did or didn't meet core values, it's about what's an appropriate punishment for this accused for this offense."

While we do not put our imprimatur on this line of questioning or argument, we find that it was not error in this case for several reasons. First, the military judge made it abundantly clear that the members were not to determine the appellant's sentence based on the appellant's failure to meet Air Force core values. Second, the argument did not introduce unlawful command influence into the courtroom. *United States v. Schnitzer*, 44 M.J. 380, 383 (C.A.A.F. 1996) (improper to reference command polices in such a way that it brings the commander into the court). Core values are simply inspirational institutional precepts to which all members of the Air Force should aspire. They are of common knowledge to all Air Force members and they do not, by themselves, establish a departmental policy as to what should be done to those individuals who fail to meet them. *Cf. United States v. Martin*, 36 M.J. 739, 741 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 481 (C.M.A. 1994) (argument that "incorporates departmental policy on the treatment of a class of offenders can constitute plain error"). Indeed, it would be hard to know precisely when a member has failed to meet these highly subjective inspirational precepts.

We hold that it was not plain error to question the appellant's sentencing witnesses about core values, and that the appellant was not materially prejudiced by reference to them during argument. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

V. Ineffective Assistance of Counsel—Sentencing

The appellant next argues that he was denied effective assistance of counsel during sentencing because his civilian defense counsel failed to offer all available evidence and was unprepared. In support of this argument, he relies, in part, on a post-trial letter from a defense paralegal who was involved in the case that negatively critiques defense counsel's performance as less than optimum.

It is clear from the record that the civilian defense counsel was concerned about taking any action that would result in reciprocal relaxation of the rules of evidence for the government. *See* R.C.M. 1001(c)(3) (relaxation of the rules of evidence for the defense during the sentencing phase of trial may result in relaxation of the rules for the government). It is also clear from the record that the military judge was concerned that civilian defense counsel was not offering all available sentencing evidence for the members' consideration. He voiced this concern on the record to defense counsel but at the same time acknowledged that he understood that counsel's reticence may be part of

the defense tactics or strategy. Civilian defense counsel acknowledged the court's concern and indicated: "I have absolutely no criticism of your concern. I think it's an extremely valid concern and I appreciate that concern. However, I will not allow it, as you understand, to effect negatively, my representation. I appreciate that. It's not a problem."

A military accused has a constitutional and codal right to effective assistance of counsel during the sentencing phase of his trial. U.S. CONST. amend. VI; Article 27(b), UCMJ, 10 U.S.C. § 827(b); *United States v. Bolkan*, 55 M.J. 425, 427 (C.A.A.F. 2001). In addressing claims of ineffective assistance of counsel, we apply the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). Under *Strickland*, the appellant must show deficient performance and prejudice. *Strickland*, 466 U.S. at 687. In order to demonstrate deficient performance, the appellant must identify specific acts or omissions that render defense counsel's performance "outside the wide range of professionally competent assistance" that could have been provided in a given case. *Id.* at 690. To demonstrate prejudice, the appellant must show that, but for counsel's mistakes, there is a "reasonable probability" that the results of the court-martial would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In assessing counsel's performance, we must be ever mindful that "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 7 (2003).

An ineffective assistance of counsel claim presents a mixed question of fact and law. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Since we are the first court to review the appellant's claim of ineffective assistance of counsel and the factual predicate for the claim is not in dispute, we will review it de novo. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997); Article 66(c), UCMJ. In undertaking this task, we apply a strong presumption that counsel was effective. *United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995). Our review is "highly deferential." *Strickland*, 466 U.S. at 690. We do not second guess decisions that were the product of tactics or strategy. *Grigoruk*, 52 M.J. at 315.

Here, it could not be clearer that defense counsel's decision to limit what was presented during sentencing was a product of trial strategy designed to limit the prosecution's ability to present additional evidence during sentencing. He informed the military judge that this was so. We, of course, do not know what evidence he was seeking to avoid coming before the members. But we do know from the record that part of this strategy was to ensure that the defense did not trigger relaxation of the rules of evidence. We will not second guess that decision. This is a judgment call entrusted to defense counsel at the time of trial and not to an appellate court operating with the benefit of hindsight.

Finally, we find that counsel's argument was not outside the wide range of professionally competent assistance that could have been rendered in this case. Defense counsel's argument that the appellant be reduced in grade was calculated to avoid a punitive discharge and salvage the appellant's retirement eligibility. The appellant was not prejudiced by this argument. *United States v. Quick*, 59 M.J. 383 (C.A.A.F. 2004). In any event, we see no reasonable probability that an NCO convicted of wrongfully using cocaine would not suffer some reduction in rank.

VI. Post-trial Processing

The appellant raises two complaints concerning post-trial processing. First, he claims that the staff judge advocate's recommendation was deficient because it failed to advise the convening authority that the appellant had raised legal error in his post-trial submission. R.C.M. 1106(d)(4). The staff judge advocate's addendum noted, in part. "I have reviewed the matters submitted by the defense counsel and the accused. My earlier recommendation remains unchanged." This response was adequate to meet the minimum-response requirement of the rule. *United States v. Catrett*, 55 M.J. 400, 408 (C.A.A.F. 2001). The appellant's complaint simply raises form over substance.

The appellant's final complaint is that the convening authority did not consider his request for waiver of automatic forfeitures. In a post-trial declaration filed in support of this issue, the appellant stated:

> After my trial, while I was in confinement, SSgt Aimee Schlenker, my defense paralegal, faxed me a letter for my signature that was going to be sent to the convening authority. The letter formally requested waiver of automatic forfeitures while I was in confinement. This was very important to me since I strongly wanted my family to receive my pay while I was in confinement. I believe someone did not follow the proper procedures, since I never heard back on my request and automatic forfeitures were, in fact, taken from my account (see attached leave and earnings statement).

The appellant attached 13 pages of computer-generated pay records for the period of January-May 2002 to his declaration and left it to us to decipher these records. In an effort to resolve the issue we obtained declarations from the two military defense counsel involved in his post-trial representation, the defense paralegal to whom the appellant says he faxed his waiver request, the deputy staff judge advocate who prepared the post-trial recommendation and addendum thereto, and a finance official. Neither defense counsel nor the paralegal recalls specifically submitting a request for waiver of automatic forfeitures with the convening authority or his staff judge advocate on the appellant's behalf. And no such request was ever received by the staff judge advocate's office.

We believe some brief background information is necessary before resolving this issue. During the initial Article 39a, UCMJ, session, civilian defense counsel indicated that he wanted to alert the court to a potential issue of illegal pretrial punishment based on problems the appellant was having with his pay. Defense counsel stated the appellant had not received his regular pay and allowances as a married NCO since October 2001, but had received some partial pay. Defense counsel attributed the appellant's pay problems to the fact that the appellant had been scheduled to retire in November 2001 and after that date he was receiving retired pay without allowances, though he remained on active duty pending trial. The issue was not revisited during trial as defense counsel suggested that it might be and we do not know if defense counsel's statement concerning the reasons for the appellant's pay problems is correct.

On 18 January 2002, the appellant was sentenced to a bad-conduct discharge, confinement for 30 days, and reduction to E-4. The appellant was again present for duty on 11 February 2002. He thereafter remained in a pay status until being placed on appellate leave on 21 June 2002. Although in a pay status, the appellant received no net pay for January or February 2002 for reasons unrelated to his court-martial. According to the pay records he supplied the Court, his total entitlements for those months equaled his total deductions, leaving a balance of zero. Ultimately, the appellant forfeited $584.10 of pay as a result of his court-martial sentence.[1] But this occurred well after he was released from confinement and returned to a full pay status. Presumably he had the ability to support his wife at this point, albeit at the reduced grade.

Under Article 58b, UCMJ, 10 U.S.C. § 858b, a convening authority may waive automatic forfeitures for the benefit of a convicted servicemember's dependents if three conditions are met.[2] The member must: (1) receive a qualifying sentence, (2) be in confinement or on parole, and (3) be entitled to pay and allowances that are subject to mandatory forfeitures. *United States v. Emminizer*, 56 M.J. 441, 444 (C.A.A.F. 2002). "When a servicemember is not entitled to compensation covered by the mandatory forfeiture provisions of Article 58b, there is nothing to waive." *Id*.

We accept the accuracy of the appellant's statement that he desired his defense team to submit a request for the waiver of forfeitures to the convening authority and that he supplied them with information where the money should be deposited for his wife. Nonetheless, we find that the appellant is not entitled to relief for three reasons. First, we find that he has failed to demonstrate that he or his defense team actually submitted a

[1] The January 2002 pay chart reflects that the basic monthly pay of an E-4 (the appellant's reduced rank) was $1752.30. The $584.10 forfeited represents 10 days pay of an E-4 on this chart and would correspond to the period 1-10 February 2002. It appears that forfeitures were taken from the appellant's pay in March 2002 in a greater than authorized amount, and the excess amount was refunded to the appellant. It does not appear that the appellant ever forfeited allowances as authorized by Article 58b(a)(1), UCMJ, 10 U.S.C. § 858b(a)(1).

[2] Under Article 57a, UCMJ, 10 U.S.C. § 857a, a convening authority may defer mandatory forfeitures before action. The appellant does not claim that he sought a deferment from the convening authority.

waiver request to the convening authority on his behalf. After review of the declarations supplied by the defense team, we are convinced that a waiver request was never filed with the convening authority on the appellant's behalf.

Second, we find that the appellant has waived this issue as a result of his own inaction. The appellant was returned to a duty status on 11 February 2002 and remained in that status until placed on appellate leave on 21 June 2002. Thus, he had over four months to resolve this matter with the convening authority and could have easily done so. Under these circumstances, we believe it is not unfair to apply waiver to his claim. *United States v. Key*, 57 M.J. 246, 249-50 (C.A.A.F. 2002) (Crawford, C.J., concurring in part and in the result). His best opportunity to resolve this matter was when he was present for duty, and he did not avail himself of that opportunity.

Third, we find that even if it the appellant's defense counsel made a mistake by not following through on his request, the appellant was not prejudiced by this mistake. *Id*. at 249; *see also Quick*, 59 M.J. at 386 (no need to decide issue of deficient performance when there is no showing of prejudice). The appellant has failed to provide any plausible explanation as to why the convening authority would have retroactively granted a waiver of automatic forfeitures long after his release from a very short period of confinement and return to a pay status. The information provided by his wife addressed only the mechanics of where the money should be sent, and it did not include any justification for granting the waiver. Moreover, while the appellant believed that he was not receiving pay while confined as a consequence of the court-martial sentence, his pay records and the comments of defense counsel during the initial Article 39(a) session, tell a different story. We conclude from this information that even if defense counsel had filed a request for waiver, it would not have resulted in his wife receiving his pay and allowances during the very short time the appellant was in confinement. His failure to receive pay or allowances while in confinement was unrelated to his court-martial sentence.

VI. Conclusion

The 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; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court