UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ALAIN R. HICKS
United States Air Force

ACM 38191

27 December 2013

Sentence adjudged 25 June 2012 by GCM convened at Joint Base San Antonio-Lackland, Texas. Military Judge: J. Wesley Moore (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PELOQUIN, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of one specification of reckless operation of a vehicle; five specifications of wrongful use of a controlled substance; three specifications of wrongful distribution of a controlled substance; three specifications of wrongfully introducing a controlled substance onto a military installation with the intent to distribute; three

specifications of wrongful possession of a controlled substance;[1] and one specification of stealing property valued under $500, in violation of Articles 111, 112a, and 121, UCMJ, 10 U.S.C. §§ 911, 912a, 921. The adjudged sentence consisted of a dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1. Consistent with the terms of a pretrial agreement, the convening authority approved only a bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1. On appeal, the appellant asserts he was denied the effective assistance of counsel. Finding no error that materially prejudices the appellant, we affirm.

Background

On various occasions in late 2011, the appellant used and distributed cocaine, methamphetamine, Vicodin, Percocet, and Xanax. In September 2011, Airman NG informed his chain of command that his roommate, Airman TC,[2] and the appellant were using illegal drugs. Airman NG agreed to work as a confidential source (CS) for the Air Force Office of Special Investigations (OSI). Over the next two months, Airman NG had multiple engagements with the appellant where he witnessed the appellant use, possess, and distribute various drugs, both on and off base, often in concert with Airman TC. As a CS, Airman NG participated in at least two controlled buys of illegal drugs from the appellant. Airman NG was also a passenger in the vehicle at the time the appellant recklessly operated his car by driving in excess of 100 miles per hour while removing his hands from the steering wheel and snorting a powdery substance into his nose.

At trial, the appellant pled guilty pursuant to a pretrial agreement and agreed to a stipulation of fact that laid out the facts and circumstances relevant to his criminal actions.

Assistance of Counsel

The appellant contends his trial defense counsel provided ineffective assistance of counsel by not advising him that he could request deferment and waiver of adjudged and automatic forfeitures in his clemency submissions.

We review de novo claims of ineffective assistance of counsel. *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)). "[T]o prevail on a claim of ineffective assistance of counsel, an

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[1] The appellant was originally charged with six specifications of wrongful use of a controlled substance. At trial, the appellant pled guilty to the lesser included offense of wrongful possession of a controlled substance for one of those specifications excepting the word "use" and substituting the word "possess."
[2] Airman TC was administratively separated in October 2011. Airman TC was a party to much of the appellant's misconduct over the charged time period. As a result of his separation, Airman TC was a civilian during the latter portion of the charged time period.

appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citation omitted). Where there are opposing affidavits raising a factual dispute that is material to the resolution of the appellant's assignment of error, we can resolve the appellant's claim without a fact-finding hearing when the appellate filings and the record as a whole compellingly demonstrate the improbability of the facts alleged by the appellant. *United States v. Ginn*, 47 M.J. 236, 244-45, 248 (C.A.A.F. 1997).

There is no need for a fact-finding hearing in this case. The record of trial and the appellate filings do not support the factual premise raised in the appellant's affidavit. In his affidavit, the appellant asserts trial defense counsel did not advise him that he had the option to request the deferral or waiver of forfeitures for the benefit of his son. The record squarely contradicts the appellant's assertion.

Appellate Exhibit V, the Post-Trial Rights Advisement, dated 19 June 2012, bears the appellant's signature. The appellant was advised at paragraph 2.c. that:

> The Convening Authority has the power to waive any or all of the forfeitures for a period not to exceed six months so as to direct an involuntary allotment to provide for the support of your dependents.

On 26 June 2012, the appellant acknowledged in writing his receipt of a memorandum entitled, "Submission of Matters to the Convening Authority." Paragraph 5 of that memorandum advised, in part:

> If you have dependents, you may also submit an application to the convening authority, through the servicing SJA, to waive any mandatory forfeitures of pay and allowances . . . with the amount waived paid to your dependents. Applications for deferral and/or waiver may be submitted immediately.

In acknowledging the memorandum, the appellant averred he consulted with trial defense counsel concerning his right to submit matters to the convening authority and had not waived those rights.

Finally, the appellant told the military judge that his trial defense counsel had reviewed his post-trial and appellate rights with him, and that he had no questions concerning those rights.

The appellant's assignment of error is wholly without merit. In at least three instances, the appellant affirmatively acknowledged his post-trial rights to include the option to request deferral or waiver of forfeitures and further acknowledged his trial defense counsel had discussed those rights with him.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[3] Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] The Court notes that the Court-Martial Order (CMO), dated 30 August 2012 incorrectly reports the sentence adjudged. It should correctly state that the sentence adjudged included the forfeiture of all pay *and allowances*. Accordingly, the Court orders the promulgation of a corrected CMO.