UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMAL R. HOYE
United States Air Force

ACM S31538

17 April 2009

Sentence adjudged 13 June 2008 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: Charles E. Wiedie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Imelda L. Paredes, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Captain Ryan N. Hoback, and Captain Jason M. Kellhofer.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Pursuant to his pleas, a military judge sitting as a special court-martial found the appellant guilty of five specifications of larceny of property of a value less than $500 and one specification of obtaining services under false pretenses, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The military judge sentenced the appellant to a bad-conduct discharge, 75 days confinement, and reduction to E-1. The convening authority approved the bad-conduct discharge, 14 days confinement, and the reduction to

E-1.[1] On appeal the appellant asks this Court to set aside the sentence and remand this case for new post-trial processing.

The basis for the appellant's request is that he asserts his trial defense counsel was ineffective when he advised the appellant: (1) the convening authority never overturns a court-martial sentence and just approves the sentence adjudged by the military judge; (2) he should not worry about submitting a clemency request; (3) it did not matter whether the appellant submitted a clemency request; and (4) to waive the appellant's right to submit clemency matters. Finding no prejudicial error, we affirm.

Background

On divers occasions between on or about 21 November 2007 and on or about 30 January 2008, the appellant, without authority, used his girlfriend's and another airman's debit and credit card numbers to purchase clothes, pizza, compact discs, digital video discs, and cellular telephone services, with a total value of over $500. The appellant's girlfriend discovered the appellant's crimes and confronted him. The appellant initially denied his crimes but approximately one week later made a written confession to his girlfriend. His girlfriend, in turn, provided the appellant's written confession to military law enforcement authorities. During the sentencing portion of trial, the appellant's trial defense counsel argued for no bad-conduct discharge and advised the military judge to approve additional confinement in lieu of a bad-conduct discharge.

On 9 July 2008, the appellant, opining that the sentence he had received was fair, waived his right to submit clemency matters. On 23 February 2009, the appellant submitted an affidavit to this Court not only highlighting his assignment of error, but also opining that if he had submitted clemency, he would have provided the convening authority with the defense sentencing exhibits and a written request that the convening authority approve additional confinement in lieu of the bad-conduct discharge.

On 25 March 2009, the government submitted a post-trial affidavit from Captain (Capt) RAD, the appellant's trial defense counsel. In his affidavit, Capt RAD asserts he: (1) advised the appellant that while he had a right to submit clemency matters, Capt RAD believed the chances the convening authority would grant clemency were unlikely given that the appellant's pretrial agreement reduced his confinement to one-fifth of that adjudged; (2) never advised the appellant that the convening authority never grants clemency; and (3) discussed the appellant's clemency options with him, after which the appellant decided to waive his right to submit clemency matters. Capt RAD did not discuss whether he advised the appellant to waive his right to submit clemency matters.

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise to not approve confinement in excess of 14 days if a bad-conduct discharge was adjudged and to not approve confinement in excess of three months if a bad-conduct discharge was not adjudged.

Ineffective Assistance of Counsel

Unquestionably, 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). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). 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).

The appellant bears the heavy 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). Where 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 deficient conduct 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 test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

We need not decide whether Capt RAD advised the appellant that the convening authority never grants clemency. Nor do we need to decide whether Capt RAD advised the appellant to waive his right to submit clemency matters. Assuming Capt RAD so advised the appellant and assuming such conduct was deficient, we find no prejudice. The appellant avers if he had submitted a clemency request, he would have provided the convening authority with the defense sentencing exhibits and asked the convening authority to approve more confinement in lieu of the bad-conduct discharge. However, prior to taking action, the convening authority: (1) considered the defense sentencing exhibits; (2) was ostensibly aware that the appellant desired more confinement in lieu of the bad-conduct discharge; and (3) nevertheless approved the bad-conduct discharge.[2] Under these facts it is highly unlikely a clemency request by the appellant would have convinced the convening authority to disapprove the bad-conduct discharge. In short, there has simply been no showing that absent the alleged deficient conduct there is a reasonable probability that the approved sentence would have been different.

Staff Judge Advocate Recommendation

Though not raised as an issue on appeal, we take this opportunity to address erroneous advice in the Staff Judge Advocate Recommendation (SJAR). The staff judge advocate mistakenly advised the convening authority that the appellant had received an

[2] The convening authority averred he considered the Staff Judge Advocate Recommendation (SJAR) and its attachments prior to taking action. The record of trial was an attachment to the SJAR, and the defense sentencing exhibits and trial defense counsel's argument for more confinement in lieu of a bad-conduct discharge were contained therein.

Article 15[3] and a *letter of reprimand* for off-duty and duty-related misconduct wherein the appellant had actually received an Article 15 and a *letter of counseling* for such misconduct. Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F 2000). Failure to timely comment on matters in the SJAR waives any later claim of error in the absence of plain error. Rule for Courts-Martial 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). In the instant case, the appellant failed to comment on this error, thus, any error is waived absent plain error.

"To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Kho*, 54 M.J. at 65 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). Given the record of trial clearly shows the appellant received a letter of counseling rather than a letter of reprimand, the staff judge advocate's reference to a letter of reprimand was error. However, there has been no showing that the error materially prejudiced a substantial right of the appellant. Put simply, the error was harmless and the appellant is not entitled to any relief.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

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[3] Nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815.

[4] The Court notes that the court-martial order (CMO), dated 12 September 2008, fails to list the plea and finding to the Specification of Charge II. The Court orders the promulgation of a corrected CMO.