

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman ALFREDO E. PRECIADO
United States Air Force**

ACM 35871

20 December 2005

Sentence adjudged 27 January 2004 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, Captain Diane M. Paskey, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major C. Taylor Smith.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

A general court-martial, consisting of a military judge sitting alone, convicted the appellant in accordance with his pleas of one specification of indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The judge sentenced the appellant to a bad-conduct discharge, confinement for 15 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant has submitted two assignments of error: (1) That he was denied conflict free counsel during post-trial processing; and (2) That both his trial defense attorneys were ineffective in advising him to plead guilty. This second issue was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding error as to the first issue, we order corrective action in the form of new post-trial processing. We defer consideration of the second issue until post-trial processing is complete and the case is returned to us for further review under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Background

Captain ME and Captain KE represented the appellant during trial on the merits. At the conclusion of trial Captain KE advised the military judge that he would be responsible for representing the appellant during post-trial processing. Subsequently, the appellant submitted a written request for clemency, to which 19 documents were attached. The submission included letters as well as copies of defense exhibits used at trial. At least some of these documents were submitted directly to the base legal office by the appellant's wife.

There are two documents that bear examination pertaining to the first assignment of error. In her memo to the convening authority, the appellant's wife stated, "Although he pled guilty to the charge I feel his lawyers immensely misrepresented him. I find his lawyer to be very incompetent. He did not help my husband [in] the best way he could. I feel he slacked in his position as a defense counsel for my husband."

Another memo, composed by the appellant's father-in law, a retired Master Sergeant, contained the following: "This is nothing personal toward the JAG office but I expressed my concern to [the appellant] from the beginning that his defense counselor appeared to be inept or did not care about his case enough to properly defend it. These allegations I believe have been borne out by the continued late or total lack of action by this attorney." The appellant's clemency package contained no cover memo or other document signed by Captain KE. Furthermore, the addendum to the staff judge advocate recommendation (SJAR), made no reference to the expressions of dissatisfaction with defense counsel included in the clemency package.

The appellate filings in this case contain an affidavit from the appellant. In that document he states that, while in confinement following trial, he notified Captain KE that he was dissatisfied with the representation he received at trial. The appellant stated that he wanted Captain KE to release a copy of the case file to the appellant's wife so that she could obtain a new attorney. The appellant states that his wife was unable to find a civilian attorney whom they could afford and that Captain KE "never advised me that I had the option of requesting new military counsel to handle my post trial matters." The appellant contends that he only received minimal assistance in preparation of his

clemency petition from Captain KE, who was performing temporary duty (TDY) at the time. He states that his attorney “did not submit a letter directly . . . to the convening authority. He did not advise me that he would not submit anything from him on my behalf. In the end, I did not receive any form of clemency from the convening authority.”

The appellant’s wife submitted an affidavit in which she stated that she gathered up clemency material on her husband’s behalf, having received guidance from Captain KE’s paralegal but not from Captain KE himself. She also stated that she had previously advised Captain KE that she was going to look for another attorney to assist her husband in the post-trial process.

Captain KE submitted his own affidavit, in which he claimed that the appellant had never expressed any dissatisfaction with his representation, nor had the appellant’s wife. He stated that, had they done so, he would have informed them of how to go about requesting new counsel. He stated that he did not find out about the allegations of ineffective assistance of counsel in the appellant’s clemency package “until much later.” “Had they raised these issues earlier, I would have asked for an extension, got him an attorney and obtained a release.” He also stated that he had not submitted a memo of his own because he believed that it would not have done any good.

Discussion

This Court reviews post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). An accused is entitled to effective assistance of counsel during post-trial processing. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000); *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994). Effective assistance of counsel includes conflict free counsel. *Carter*, 40 M.J. at 105; *see also*, *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

In *Carter*, 40 M.J. at 105, our superior court described the proper course of action for Air Force officials when an accused raises ineffective assistance of counsel post-trial. In *Carter* an accused sent a letter after trial to the convening authority complaining about the quality of his defense counsel’s services. In commenting on the staff judge advocate’s (SJA) failure to address this complaint, the Court said:

Upon notification of a potential conflict, the SJA should have notified defense counsel of appellant’s complaint so that the issue of further representation could have been resolved. Upon such notification, the ABA Model Rules of Professional Conduct would require defense counsel to determine if he has been discharged or whether his withdrawal is permissible . . . Thus, the SJA, knowing of the right to conflict-free counsel, erred in not advising defense counsel of the apparent dissatisfaction.

Id. (internal citations omitted).

Admittedly in this case the appellant's own clemency memo said nothing about any alleged ineffective assistance of counsel. However, we conclude that such references in the documents attached to the appellant's petition, coupled with the absence of a memo from the defense counsel, were sufficient to place the SJA on notice that there was, at the very least, the appearance of an attorney-client conflict in the case. Had the SJA notified Captain KE, it is probable that the issue under consideration could have been obviated.

Normally, in resolving disputed matters of material fact contained in appellate filings, this Court orders post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, we conclude that, in this case, the best interests of the appellant, as well as that of judicial economy, are better satisfied by ordering new post-trial processing, with the appellant represented by different, conflict-free counsel. We are not basing this decision on any alleged ineffectiveness of Captain KE in his post-trial representation of the appellant, but on the narrower question of the unresolved appearance of a conflict. As stated above, we will defer deciding the remaining issue until the case is returned to us following the new post-trial processing.

Conclusion

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court