UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHARLES S. ROACH
United States Air Force

ACM S31143

13 September 2007

Sentence adjudged 20 June 2006 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: Jennifer Whittier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Mark R. Strickland, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, on 20 June 2006, the appellant was convicted of one specification of use of cocaine and one specification of willful dereliction of duty for using his Government Travel Card for personal purposes in violation of Articles 112a and 92, UCMJ, 10 U.S.C. §§ 912a, 892. His approved sentence consists of a bad-conduct discharge, confinement for 3 months, and reduction to E-1.

We have reviewed the record of trial pursuant to our authority and responsibility outlined in Article 66, UCMJ, 10 U.S.C. § 866. Despite having been assigned an appellate defense counsel and their having a copy of the record of trial since 14 November 2006, no brief has been filed on behalf of the appellant. Under Rule 15 of this Court, an assignment of errors in support of this case was originally due on 15 January

2007. After granting appellate defense counsel three enlargements of time, this Court denied an appellate defense counsel request for a fourth enlargement on 14 March 2007 because appellate counsel failed to advise the court if their client concurred with their requested enlargement. *See U.S. v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Subsequent to that denial, this Court completed its review in the normal course of appellate review based upon the Court's workload and the Rules of Practice and Procedure.[1] Concomitant with the Court's independent review of the record, appellate defense counsel made a separate motion, out of time, on 23 August 2007 requesting sixty additional days to complete a brief on their client's behalf. In this later request appellate defense counsel indicated that their client now "allows counsel to request all necessary enlargements of time." As for justification for the new request, appellate defense counsel simply cites to workload and that the ". . . appellant believes that his counsel may have been ineffective during post-trial stages of the case, and also challenges the trial counsel's qualifications . . . ." In light of the lack of a showing of good cause for providing appellate counsel with a new sixty day time period to submit a brief, out of time, this court on 30 August 2007 denied the new request for enlargement.

While this Court is well aware of the appellant's constitutional and statutory rights to effective counsel on appeal, that right is still subject to the rules of this Court. *See Douglas v. California*, 372 U.S. 353 (1963); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); Article 70, UCMJ, 10 U.S.C. § 870. This Court has had this case pending before it for nearly 10 months. The trial itself was over 14 months ago and the appellant pled guilty to two specifications before a judge during a trial that lasted less than three hours total. Lengthy delays in reaching final resolution on adjudged punitive discharges in straight-forward cases such as this case do not serve either the interests of the accused or the interests of the Air Force. Therefore this Court is taking action *sans* a brief appellate counsel.

Having completed our review, this Court finds one issue from the record needing comment. Specifically, the Assistant Trial Counsel (ATC) had not taken the Oath required by Article 42, UCMJ, 10 U.S.C. § 842, prior to serving in this court-martial. At the time of trial the ATC announced to the Court that "All members of the prosecution are qualified and certified under Article 27(b) and sworn under Article 42(b) of the Uniform Code of Military Justice . . . ." No one questioned this assertion until after trial when the Staff Judge Advocate advised the convening authority in the Staff Judge Advocate's Recommendation (SJAR) that the ATC had not been sworn in accordance with the Article 42(a), UCMJ requirement. The SJAR was served upon the Accused and the trial defense counsel submitted a clemency petition as part of a greater defense clemency package for the convening authority's consideration. The trial defense counsel did not object at the time to the lack of oath by the ATC. There being no evidence to the

[1] A.F. CT. CRIM. APP. R. PRAC. AND PROC. 15.4 (2007).

contrary we have accepted the SJA's assertion as a fact and evaluated the legal significance of this statutory violation.

This Court and the Court of Appeals for the Armed Forces have addressed both Article 27 and Article 42 deficiencies in the past and reached the conclusion that the failure to comply with these UCMJ provisions does not affect the jurisdiction of the Court but are errors to be tested for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a). Specifically our superior court found that counsel are not an ". . . integral part of the adjudicating tribunal known as a court-martial, the jurisdictional existence of which requires that it be properly convened and constituted . . . . Article 16 of the Uniform Code specifies that a court-martial consists of a military judge and court members, not counsel." *United States v. Wright*, 2 M.J. 9, 10 (C.M.A. 1976). *See also United States v. Walsh*, 47 C.M.R. 926 (C.M.A. 1973); *United States v. Daigneault*, 18 M.J. 503 (A.F.C.M.R. 1984).

Finding no jurisdictional defect, we now test for prejudice. The accused's pleas of guilty were provident and voluntarily made. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). His pleas were entered into pursuant to a valid pretrial agreement from which he benefited. *United States v. Green*, 1 M.J. 453 (C.M.A. 1976). The sentence adjudged was below the amount requested by the ATC and well below the maximum authorized. The ATC's role in this case was very limited, the most significant of which was to introduce four exhibits, cross-examine a single defense witness in sentencing, and make sentencing argument before a military judge. No prosecutorial misconduct is alleged or otherwise indicated. Therefore, we do not find any error materially prejudicing the substantial rights of the accused regarding this defect. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We also do not find any error with the trial defense counsel failing to address this issue in his clemency petition. Considering the case law is clear, it is reasonable to assume that the trial defense counsel did not want to distract the convening authority on a technicality when they were presenting a substantive clemency petition.

Finally, we must address the impact of the appellate defense counsel's failure to file a timely brief. This Court believes that the failure of assigned appellate defense counsel to submit a brief in time is evaluated following the ineffective assistance of counsel framework outlined in *Strickland v. Washington*, 466 U.S. 668 (1984) and applied to appellate defense counsel in *Flores-Ortega*, 528 U.S. 470. *Strickland* specifically provides that the appellant must be able to show (1) that counsel's representation "fell below an objective standard of reasonableness" and (2) that counsel's deficient performance prejudiced the defendant. 466 U.S. at 688, 694.

Despite the clear expression by the appellant that he desired to be represented by counsel before this Court, we do not presume a breach of the reasonableness standard.[2] The unique stature of this Court and the Court rules themselves make that issue more complex and the presumption impossible to reach. Under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1), this Court is required by law to review the appellant's case once referred to the Court by the Judge Advocate General. That referral has occurred. Appellate defense counsel is well aware of our obligation. In addition, under Rules 15(b) and 15.4 of this Court's Rules of Practice and Procedure, it is clear that if no brief is filed by appellate defense counsel then it is presumed to constitute a submission on the merits. Considering the extremely limited record in this case and the lack of any substantive issues, a submission on the merits is reasonable. As for the failure to expressly file a merits brief, it is impossible to speculate whether we have a deficiency of counsel, a strategy to create an issue, or a delay tactic for the benefit of their client.[3] *See Flores-Ortega*, 528 U.S. at 484. Thus we do not find that the appellant has met his burden of establishing a breach of the standard. Nevertheless, we looked to the second prong of the *Strickland* analysis. Having done so, we also find no prejudice to the appellant. Notwithstanding appellate defense counsel's failure to file a brief, the appellant in this case still actually received the benefit of the appellate process. There is no evidence to support a contention that this appellate proceeding is "unreliable or entirely nonexistent" as was the case in *Flores-Ortega*. *Id.* We have reviewed the entire Record of Trial for errors and find none. The appellant pled guilty. The trial lasted less than three hours in length before a certified military judge and trial defense counsel made no objections or motions before, during, or after the trial.

Conclusion

The approved 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, 10 U.S.C. § 866(c); *United States v Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

S. T. L. UCAS, GS-11, DAF
Clerk of the Court

[2] Appellant requested Counsel on an AF IMT 304, *Request for Appellate Defense Counsel,* immediately after trail.
[3] Delays in reaching final action in military courts-martial results in appellants and their families continuing to receive significant installation benefits, i.e. medical, until final review is complete.