UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEAN E. THOMPSON, JR.
United States Air Force

ACM 37380 (f rev)

22 August 2012

Sentence adjudged 20 November 2008 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael A. Burnat; Major Reggie D. Yager; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don. M. Christensen; Lieutenant Colonel Christopher T. Smith; Lieutenant Colonel Jeremy S. Weber; Major Naomi Porterfield; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

ORR, Chief Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of divers use of ecstasy and one specification of divers use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consists of a bad-conduct discharge, one year of confinement,

forfeiture of all pay and allowances, and reduction to the grade of E-1. After receiving the matters submitted by the appellant and his trial defense counsel requesting clemency, the convening reduced the amount of the appellant's adjudged confinement by three months. The approved sentence consisted of a bad-conduct discharge, 9 months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

This case is before this Court a second time for further review. In a published decision, issued 3 June 2010, this Court affirmed the approved findings and sentence. *United States v. Thompson*, 69 M.J. 516 (A.F. Ct. Crim. App. 2010), *rev'd*, 69 M.J. 456 (C.A.A.F. 2010) (mem.). By decision issued 20 December 2010, the Court of Appeals for the Armed Forces (CAAF) found that we failed to apply the "colorable showing of possible prejudice" standard when determining whether the appellant received ineffective assistance of counsel post-trial. *Thompson*, 69 M.J. at 456. As a result, our superior court vacated our decision and remanded the case to this Court for further review. *Id*. Finding no material prejudice to the appellant after applying the proper standard, we again affirmed the findings and the sentence, in an unpublished decision. *United States v. Thompson*, ACM 37380 (rem) (A.F. Ct. Crim. App. 27 July 2011) (unpub. op.), *rev'd*, 71 M.J. 93 (C.A.A.F. 2012) (mem.). On 5 January 2012, our superior court granted review and again set aside our decision. *Thompson*, 71 M.J. at 93. The CAAF returned the record of trial to the Judge Advocate General of the Air Force for remand to an appropriate convening authority to order a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to make findings of fact and conclusions of law related to whether the appellant received post-trial ineffective assistance of counsel and whether the appellant has made a colorable showing of possible prejudice. *Thompson*, 71 M.J. at 93. Consistent with the CAAF remand, a *DuBay* hearing was convened on 27 March 2012. On 30 March 2012, the military judge made his findings of fact and conclusions of law. He determined that the appellant received post-trial ineffective assistance of counsel and made a colorable showing of possible prejudice. We agree and remand the case for new post-trial processing.

Background

The appellant used ecstasy and marijuana with several Airmen while stationed in Monterey, California, on multiple occasions between 1 October 2007 and 29 February 2008. The United States Army Criminal Investigation Division (CID) discovered the appellant's drug use after Airman Basic (AB) PS and AB PD told CID agents that they used drugs with the appellant.

Post-Trial Ineffective Assistance of Counsel

In his original assignment of error, the appellant gave the following reasons why he believed his trial defense counsel were ineffective, in that they: (1) conducted a deficient cross-examination of AB WP, a co-actor; (2) inappropriately acquiesced to the

admission of two of the co-actors' pretrial agreements, did not request limiting instructions in findings or sentencing, and elicited details from the co-actors about their adjudged sentences, pretrial agreement limitations, and clemency even though their pretrial agreements did not require cooperation or testimony against the appellant; (3) failed to request a deferment/waiver of forfeitures; (4) without authority, conceded the appellant's guilt during the sentencing argument and clemency submission; (5) without authority, conceded the appropriateness of the appellant's punitive discharge and forfeitures during the clemency submission; and (6) committed cumulative errors. Consistent with CAAF's order, the post-trial issues the military judge addressed during the *DuBay* hearing were the appellant's request for a deferment/waiver of forfeitures and whether the appellant authorized his trial defense counsel to acknowledge the appropriateness of his punitive discharge and forfeitures.

First, the military judge addressed the deferment/waiver of forfeitures request issue. In his findings of fact, he determined that the trial defense counsel discussed deferments and waiver of forfeitures with the appellant before, during and after the trial. Both counsel clearly understood the appellant's stated desire to submit a request for the waiver of forfeitures to provide support for his spouse. Even though the trial defense counsel made numerous attempts to obtain the appellant's spouse's bank information throughout the trial and post-trial process, the information was not forthcoming for various reasons. While the appellant claims he provided the information to his counsel Major (Maj) T, the information provided by Maj T and the appellant's spouse "belie" the appellant's assertion. The clemency submissions were due and submitted on 16 January 2009 and did not include a request for a waiver of forfeitures. The military judge found that the blame for the failure of the bank account information to be in the possession of the defense counsel fell upon the appellant. Nevertheless, the military judge concluded that a reasonable attorney would have submitted the request without the information or at the very least discussed the issue with his client prior to submitting clemency matters. Because the failure to submit the request precludes any chance of the appellant receiving the waiver, his representation did not fulfill the appellant's ultimate desires. He concludes by stating:

> Based on the foregoing, this court finds that, in the absence of Appellant foregoing his request to submit waiver of forfeitures, Maj [T]'s failure to either: 1) Consult with Appellant on courses of action when the bank account information was not forthcoming; 2) Request a waiver of forfeitures without a bank account number; 3) Request additional time to submit clemency; or 4) Request relief of the convening authority after action, his performance fell below that of a reasonable professional defense attorney. Further, this court finds that Appellant made a colorable showing of possible prejudice.

While we agree with the military judge's findings of fact, we disagree with his conclusions of law, in part. Under the facts and circumstances of this case, we are reluctant to find the defense counsel's performance prior to the convening authority's action deficient. While the appellant clearly stated he wanted to request a waiver of forfeitures to support his spouse, his inaction to obtain the bank account information is indicative that obtaining a waiver was not his ultimate desire. A thorough reading of the record of trial indicates that the appellant's ultimate desire in this case was to minimize the amount of time he would have to serve in confinement. Consistent with the stated goal of reducing the amount of confinement the appellant would have to serve, his trial defense counsel made the strategic decision not to request additional time to submit clemency or submit an incomplete request for a waiver. The appellant's trial defense counsel were concerned that choosing either of the two options listed above would jeopardize the appellant's chances of receiving a reduction of his adjudged confinement. Given the fact that this strategy ultimately proved to be successful, we will not second guess the trial defense counsel's decision and find that their performance prior to the convening authority's action was not deficient.

During the *DuBay* hearing, Maj T testified that he told the appellant that it was not a good strategy to submit a request for a waiver without his spouse's bank account information. Because the appellant had not provided the bank account information to Maj T, on 8 January 2009, Maj T requested the information directly from the appellant's spouse. When Maj T informed the appellant that his spouse had not responded to his e-mail requesting the information, Maj T took the appellant's reaction as an implicit request to give up on the waiver. The appellant's testimony corroborated Maj T's version of the events and conversations leading up to the clemency submission. The appellant also conceded that Maj T may have made a reasonable assumption, but he made it clear that he did not intend to forfeit the waiver request. On 31 January 2009, the appellant's spouse replied to the e-mail stating "dean [sic] told me that he sent you my bank information.do [sic] you need me to send it again?" Because the convening authority took action in this case on 26 January 2009, Maj T took no action on the e-mail believing that the information was no longer necessary.

It is this inaction that causes us to give the appellant the benefit of the doubt and concur with the military judge's conclusion that the appellant has made a colorable showing of possible prejudice. *See United States v Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999) (the threshold for showing prejudice in clemency matters is low). There is a possibility that the convening authority may have also granted a supplemental request for waiver of forfeitures:

> The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority may also recall and modify any action at any time prior to forwarding the record for

> review as long as the modification does not result in action less favorable to the accused.

Rule for Courts-Martial 1107(f)(2). Armed with the knowledge that the convening authority had already reduced the appellant's sentence by the three months requested, the trial defense counsel could have freely requested the waiver, with or without the bank information, at no risk of an increase to the approved sentence.

Next, the military judge addressed the appellant's contention that his trial defense counsel made concessions in his in his clemency submissions without his authorization. Specifically, his trial defense counsel acknowledged the appropriateness of his punitive discharge and forfeitures by including the following statement in the clemency request: "AB Thompson has not requested that the Bad Conduct Discharge be cancelled, that his rank be restored, or that his forfeitures be lifted. He recognizes and accepts that for the crimes he was convicted of, he must be punished and that the punishment must be severe." In response, the trial defense counsel testified that they made the concessions with the appellant's informed consent because the appellant disagreed with their original strategy designed to convince the convening authority to disapprove the punitive discharge. We find that the trial defense counsel made a strategic decision to forego seeking relief from the punitive discharge and forfeitures in an attempt, which proved successful, to reduce the appellant's confinement. In fact, the convening authority granted all of the appellant's requested relief. As a result, we will not second-guess this strategic decision. Moreover, while the military judge found the trial defense counsel's performance deficient because he did not explain all the long term ramifications of a punitive discharge in great detail to the appellant, we disagree. The appellant testified that his trial defense counsel read him the entire clemency submission over the phone verbatim and that it was consistent with their strategy of reducing the confinement of the appellant. After hearing what his counsel proposed to submit in clemency, he did not ask his counsel to change a thing. In fact, on cross-examination, the appellant acknowledged that he told Maj T that the most important thing to the appellant was getting his confinement reduced. Even if we assume arguendo that the appellant's counsels' performance was deficient, given the appellant's crimes as well as the crimes and approved sentences of his co-actors, it is highly unlikely that the convening authority would have disapproved, mitigated, or suspended the appellant's adjudged punitive discharge and forfeitures.[*] Therefore, we find that the appellant has not made a colorable showing of possible prejudice based upon the clemency matters his counsel actually submitted to the convening authority.

[*] The appellant has failed to provide this Court with the information he would have submitted to the convening authority to convince him to grant relief from the adjudged punitive discharge and forfeitures. "In most ineffectiveness cases, an [appellant] is in the best position to identify relevant information and present it to the appellate court. When factual information is central to an ineffectiveness claim, it is the responsibility of the [appellant] to make every feasible effort to obtain that information and bring it to the attention of the appellate court." *United States v. Moulton*, 47 M.J. 227, 230 (C.A.A.F. 1997). On this point, the appellant has fallen woefully short and this, in part, causes us to find no prejudice.

Conclusion

The approved findings 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, we affirm the findings. Because the appellant has made a "colorable showing of possible prejudice" during the post-trial proceedings, we return the record of trial to The Judge Advocate General for remand to the convening authority for new post-trial processing. Thereafter, Article 66(c), UCMJ, shall apply.

OFFICIAL

STEVEN LUCAS
Clerk of the Court