UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW J. VALLEJO (f. rev.)
United States Air Force

ACM 35842 (f rev)

14 September 2007

Sentence adjudged 20 November 2003 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: David F. Brash and Steven A. Hatfield (*Dubay* hearing).

Approved sentence: Bad-conduct discharge, confinement for 1 year, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major Sandra K. Whittington, Captain Griffin S. Dunham, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gerald R. Bruce, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Captain Daniel J. Breen, Captain Jefferson E. McBride, and Captain Stacey J. Vetter.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

On 7 September 2006, our superior court remanded this case for further appellate inquiry on whether trial defense counsel's failure to request waiver of automatic forfeitures was ineffective assistance of counsel. The remand specified that this Court should obtain affidavits from trial defense counsel relating to the granted issue, and if

necessary, order a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). This Court ultimately ordered a fact-finding hearing on 9 November 2006 and the authenticated record was submitted on 22 February 2007.

The appellant now renews his argument that his trial defense counsel provided ineffective post-trial assistance and asks that we return the case to the convening authority for new post-trial processing. We have reviewed the record of proceedings from the fact-finding hearing, and agree that corrective action is appropriate.

The military judge who conducted the hearing made detailed findings of fact, noting that prior to trial, the appellant told his defense counsel, Capt B, that he had a daughter for whom he provided financial support, and that the appellant wanted to continue providing support. The military judge also found that at sentencing the appellant informed the members in his unsworn statements that he provided financial support to his child and wanted to continue to support her. A letter submitted in sentencing by the mother of appellant's daughter confirmed that he provided financial support.

The military judge further found that prior to representing the appellant, Capt B had never requested waiver of automatic forfeitures on behalf of any client; that prior to his becoming a defense counsel, Capt B had never worked on such requests; and that Capt B had no knowledge of how the convening authority in the appellant's case or any other case viewed requests to waive automatic forfeitures. The military judge also found that the appellant was under the mistaken impression that since the members did not adjudge forfeitures, his pay would be provided to the mother of his daughter. While Capt B did provide a standard post-trial rights advisement letter which described automatic forfeitures, he did not discuss it with the appellant. Finally, the military judge determined that Capt B did not make a tactical decision to not request waiver of the automatic forfeitures in order to focus on asking the convening authority to disapprove the bad-conduct discharge. During the preparation of the appellant's clemency matters, Capt B never discussed requesting a waiver of automatic forfeitures with the appellant.

Analysis

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, appellant must show: (1) that "counsel's performance was deficient;" and (2) that counsel's "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong of *Strickland* requires that appellant show counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id.* at 688. The prejudice prong requires that appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385-86 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687).

The evidence is legally sufficient to support the military judge's conclusions and we find that his findings of fact were not clearly erroneous. As a result, we conclude on these facts that the trial defense counsel was deficient in his representation of his client. It is clear from his own testimony that Capt B failed to explain how automatic forfeitures would work in the appellant's case. While a client has the final decision as to what to submit in clemency, the defense counsel has a duty to provide advice. *United States v. Lee*, 42 M.J. 1, 4 (C.A.A.F. 1995). Here, Capt B failed to explore with the appellant whether or not asking for waiver would be appropriate. He simply asked the appellant what to put in the clemency request, and then included only that and no more. In discussing the clemency request, Capt B did not even raise with the appellant the possibility of including a request to waive the automatic forfeitures. This oversight spoiled the otherwise effective representation that Capt B provided to the appellant.

To establish prejudice where a defense counsel was ineffective during post-trial processing, an appellant must establish "some colorable showing of possible prejudice." *United States v. Chatman*, 46 M.J. 321, 324 (C.A.A.F. 1997). Due to the highly discretionary nature of a convening authority's clemency power, "the threshold for showing post-trial prejudice is low." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999).

The government argues that the appellant was not prejudiced because the convening authority was aware that the appellant had a daughter that he financially supported, but chose not to exercise his discretionary powers to waive forfeitures on his own. We are not persuaded by that argument. As the military judge who conducted the *DuBay* hearing in this case noted in analyzing his factual findings, convening authorities often give sympathetic consideration to requests for waiver of automatic forfeitures in favor of innocent dependents. We agree and find that there was more than a reasonable probability that the convening authority would have waived the automatic forfeitures if asked. Thus the appellant has demonstrated a colorable showing of possible prejudice.

Conclusion

The convening authority's action is set aside. The record of trial will be returned

to the convening authority for new post-trial processing under Article 60, UCMJ, 10 U.S.C. § 860. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court