UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW J. VALLEJO
United States Air Force

ACM 35842

30 November 2005

Sentence adjudged 20 November 2003 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Dawn R. Eflein and David F. Brash.

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

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

We have reviewed the record of trial, the appellant's assignments of error, and the government's reply thereto. Finding no error, we affirm.

The appellant alleges that he was prejudiced because the staff judge advocate recommendation (SJAR) to the convening authority does not properly advise that the appellant has a child. The appellant received a copy of the SJAR and raised no objection prior to the convening authority's action. In the absence of plain error, this issue is waived. Rule for Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Wilson*, 54 M.J. 57, 59 (C.A.A.F. 2000).

Considering the record as a whole, we find no such error. It is clear that the convening authority was well aware of the child's existence: the personal data sheet admitted at the appellant's court-martial and included with the SJAR indicates that he has a child living with another active-duty Air Force member; the appellant's clemency package makes reference to his daughter, as did his unsworn statement at trial; and the defense submitted several letters that mention the child, and even provided three color photographs of her. Under the circumstances, we find no reason to believe the convening authority was misinformed or that the appellant was prejudiced thereby. *See United States v. Chatman,* 46 M.J. 321, 324 (C.A.A.F. 1997).

The appellant further contends that his post-trial representation was ineffective because his counsel did not ask for a waiver of automatic forfeitures on behalf of the appellant's daughter. However, the appellant was unable to secure an agreement waiving forfeitures during negotiations for his pretrial plea agreement and neither the appellant nor the child's mother made any mention of a need for such a waiver in the appellant's clemency package. In light of the pretrial history of the case and the absence of any averment of need from either parent, we conclude that the appellant's counsel acted reasonably in pursuing other forms of clemency. *See United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). Furthermore, we see no reasonable probability that the convening authority would have been moved to grant a waiver without some evidence from the child's mother or the appellant himself supporting the request. *See Id.*

The 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

ANGELA M. BRICE
Clerk of Court