UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ZACHARY C. WEATHERS
United States Air Force

ACM S29986

19 June 2002

Sentence adjudged 30 April 2001 by SPCM convened at RAF Molesworth, United Kingdom. Military Judge: Mark L. Allred (sitting alone).

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Major Patricia A. McHugh.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BURD, ROBERTS, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

The appellant pled guilty to introduction of hashish onto a military installation, distribution of hashish, use of hashish, to two specifications of marijuana use, and to one specification of marijuana use on divers occasions. Article 112a, UCMJ, 10 U.S.C. § 912a. His adjudged and approved sentence was a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1. The appellant contends that he was denied effective assistance of counsel during the post-trial processing of his case when his trial defense counsel failed to timely compile and submit clemency matters under Rule for Courts-Martial 1105.

It is undisputed that the appellant's clemency matters were submitted a day late and after the convening authority had approved the findings and sentence of the court-martial. The late clemency matters consisted of a two-paragraph memorandum signed by the trial defense counsel, requesting the bad-conduct discharge be disapproved, and six attachments. The attachments consisted of the appellant's three enlisted performance reports, two letters from non-commissioned officers, and a copy of the short unsworn statement the appellant made at trial. All of the attachments were admitted at trial and were part of the trial record. The trial defense counsel's clemency submission was substantially similar to his sentencing argument at trial.

The United States Supreme Court has established a two-part standard to determine whether an individual has been denied the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). An appellant must identify acts or omissions by his attorney, and he then bears the burden of persuading the court that, based on the facts as counsel knew them and eliminating the distortion of hindsight, those "acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. An appellant must also show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is defined as a "probability sufficient to undermine confidence in the outcome." *Id*. In short, an appellant must show that counsel was deficient and that counsel's deficiency prejudiced the appellant.

There should be no debate that the failure to provide timely assistance to an appellant in preparing his post-trial submissions constitutes a deficiency by counsel. *United States v. Robertson*, 34 M.J. 1206, 1211 (A.F.C.M.R. 1992), *aff'd*, 39 M.J. 211, 218 (C.M.A. 1994). We must determine, however, whether the deficiency prejudiced the appellant. In doing so, we recognize that the best hope for sentence relief after trial rests with the convening authority. *United States v. Lee*, 50 M.J. 296, 297 (1999).

Our analysis is aided by the existence of a pretrial agreement in this case. Prior to trial, the convening authority agreed to limit the period of confinement to four months. The agreement placed no limitation on the convening authority's discretion to approve a bad-conduct discharge. Our experience teaches us that the drug usage in this case, combined with the fact the appellant involved other military members in the introduction and usage of drugs on a military installation, would result in the approval of a punitive discharge in the vast majority of cases. *See United States v. Toro*, 34 M.J. 506, 521 (A.F.C.M.R. 1991). The late clemency submission, already considered in substance by the military judge prior to imposing sentence, contained nothing persuasive that would convince a convening authority to disapprove a punitive discharge. Accordingly, we conclude that the appellant has not met his burden of showing that the deficiency of counsel had any prejudicial effect. No relief is warranted. Article 59(a), UCMJ, 10 U.S.C. § 8599a). *See Strickland.*

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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator