UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GREGORY D. WEBB
United States Air Force

ACM 38071 (recon)

18 July 2013

Sentence adjudged 17 November 2011 by GCM convened at Eglin Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL[1]
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of committing indecent acts, communicating indecent language to a child under the age of 16 years, inducing a minor to engage in sexually explicit conduct, and possessing child pornography, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The court sentenced him to a bad-conduct discharge, confinement for 18 months, and reduction to E-1. In accordance with a pretrial agreement, the convening authority approved the bad-conduct discharge and reduction to

[1]Upon our own motion, this Court vacated the previous decision in this case for reconsideration before a properly constituted panel. Our decision today reaffirms our earlier decision.

E-1 but only 12 months of the adjudged confinement. The appellant argues that he received ineffective assistance of counsel in the post-trial clemency phase.

In a declaration submitted in support of his assignment of errors, the appellant states that his counsel explained the clemency process but failed to discuss his clemency submissions with him. In a responsive declaration, the appellant's trial defense counsel states that he discussed clemency by phone with the appellant and that the appellant sent a personal clemency letter to him for submission to the convening authority. The trial defense counsel made a reasoned tactical decision to submit the appellant's letter unpolished with legalese to convey a "more honest" perception of the appellant. In his clemency statement, the appellant asked for a further reduction in confinement, explaining, as he did at trial, that he recognized the wrongfulness of his conduct and would work with sex offender counselors.

"[T]he military accused has the right to the effective assistance of counsel during the pretrial, trial, and post-trial stages" of his court-martial. *United States v. Hicks*, 47 M.J. 90, 92 (C.A.A.F. 1997) (citing *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994); *United States v. Fluellen*, 40 M.J. 96, 98 (C.M.A. 1994)). "Counsel is presumed competent until proven otherwise." *United States v. Gibson*, 46 M.J. 77, 78 (C.A.A.F. 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982)).

To determine if counsel was ineffective, the Supreme Court adopted a two-prong test in *Strickland*:

> First, the [appellant] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [appellant] by the Sixth Amendment.[2]
>
> Second, the [appellant] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. If the appellant fails to satisfy one prong of the *Strickland* test, we do not need to analyze the appellant's showing on the remaining prong. *Id*. at 697; *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001).

When errors occur in the post-trial stage of a court-martial, the threshold for showing resulting prejudice is low "because of the highly discretionary nature of the convening authority's clemency power." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F.

[2] U.S. CONST. amend. VI.

1999). Where such errors occur, "material prejudice to the substantial rights of an appellant [is shown] if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id*. (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998); *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F. 1997)) (internal quotation marks omitted). Taking the appellant's affidavit at face value and considering the allegations of prejudice contained therein, we hold the appellant has failed to demonstrate prejudice.

We "need not decide if defense counsel was deficient . . . because the second *Strickland* prong is not met." *Lee*, 52 M.J. at 53. The appellant contacted the 13-year-old daughter of a close family friend by text message, induced her to send sexually explicit photographs to him, sent her a photograph of his exposed penis, and exchanged sexually explicit text messages with her. He faced a maximum punishment which included confinement for 47 years, but the convening authority agreed to cap confinement at 12 months if the appellant pled guilty. Before taking action, the convening authority considered the appellant's clemency petition. Under these circumstances, the prospect of a further reduction in confinement by submission of additional clemency matters is extremely remote, and we find that the appellant has failed to make a colorable showing of possible prejudice. *See Wheelus*.

Conclusion

The approved findings and the 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). Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court