UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHANNON M. ARTHUR
United States Air Force

ACM S30931

26 February 2007

Sentence adjudged 15 April 2005 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $823.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

In accordance with her pleas, the appellant was convicted of one specification of use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. She was found not guilty of one specification of possession of marijuana and one specification of introducing marijuana on to a military installation. A special court-martial composed of officer members sentenced the appellant to a bad-conduct discharge, confinement for 2 months, reduction to the grade of E-1, and forfeitures of $823.00 pay per month for 2 months. The convening authority approved the findings and sentence as adjudged.

The appellant does not challenge the findings of her court-martial; instead, she contends that: (1) she received ineffective assistance of counsel and; (2) that her sentence is inappropriately severe. Finding error as to the first issue, we defer consideration of the second issue until post-trial processing is complete and the case is returned to us for further review under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Background

At trial the appellant was represented by Captain (Capt) M, the trial defense counsel, and by Capt T, a circuit defense counsel. During the discussion of the appellant's post-trial rights, Capt M stated that he would be responsible for post-trial actions in the case. In a memorandum dated 21 June 2005, more than two months after the trial ended, the appellant requested that the record of trial be forwarded to Capt M in lieu of her personally receiving the record. She acknowledged that receipt by her counsel would be viewed as her having received it for determining the time provided to her "to submit matters to the convening authority." On 1 July 2005, Capt M, in an indorsement to a memorandum from the wing legal office, acknowledged receipt of the staff judge advocate's recommendation and record of trial, but indicated that he did not intend to submit comments on the recommendation. No clemency matters were submitted and there is no record, written or otherwise, of the appellant having waived her right to submit matters in clemency.

The appellate filings in this case contain a sworn affidavit from the appellant. In that document she states that while in a civilian confinement facility following her trial, she attempted to contact Capt M regarding her clemency, but was told he was on leave. The appellant states that Capt M did not get in touch with her until the opportunity to submit clemency had passed. She further states that had she been able to contact Capt M she would have asked him to submit matters in clemency, and that she would have asked the convening authority to dismiss the charge and substitute non-judicial punishment under Article 15, UCMJ, or in the alternative disapprove or suspend the bad-conduct discharge. In its answer brief, the government indicates it was unable to contact Capt M, who apparently has separated from the Air Force, and thus the factual assertions by the appellant are unrebutted.

Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). An accused is entitled to effective assistance of counsel during post-trial processing. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000); *United States v. Carter*, 40 M.J. 102, 105 (C.M.A. 1994). 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. There is a "strong presumption" that counsel was competent. *Id.* at 689. 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 she was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687).

Because the appellant raised this issue by submitting a post-trial affidavit, we will resolve the issue in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). In *Ginn*, our superior court announced six principles to be applied by courts of criminal appeals in disposing of post-trial, collateral, affidavit-based claims. We believe this Court may decide the appellant's claim of ineffective assistance without ordering a factfinding hearing as authorized by *United States v. DuBay*, 37 C.M.R. 441 (C.M.A. 1967), under the third *Ginn* principle, which states:

> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Ginn, 47 M.J. at 248. As noted above, the government was unable to locate Capt M and therefore the facts alleged by the appellant are uncontroverted. Based on the record before us we conclude the appellant was denied effective post-trial representation.

Having found the representation to be deficient, we now examine whether the appellant was prejudiced. Our superior court has held that in cases where there is no representation of the servicemember during the clemency process, prejudice may be presumed. *Knight*, 53 M.J. at 342. *See also United States v. Johnston*, 51 M.J. 227, 229 (C.A.A.F. 1999).

Accordingly, the convening authority's action is set aside. The record of trial is returned to The Judge Advocate General for new post-trial processing consistent with this opinion. Thereafter, Article 66, UCMJ, shall apply.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator