

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER J. CALDARARO
United States Air Force

ACM S31275

19 June 2008

Sentence adjudged 25 January 2007 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Jennifer Whittier.

Approved sentence: Bad-conduct discharge and confinement for 30 days.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Vicki A. Belleau, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Brendon K. Tukey.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his plea, the appellant was found guilty of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, and confinement for 30 days.¹

The issue certified by this Court is whether the appellant's post-trial rights were violated when there was no waiver of submission for clemency matters, Rule for Courts-Martial (R.C.M.) 1105(d), and the ten-day period had not expired, R.C.M. 1105(c), prior to the convening authority taking action. A supplemental error raised is whether trial

¹At the request of the trial defense counsel, mandatory forfeitures were waived. Additionally, 60 days of hard labor without confinement was not approved.

defense counsel was ineffective when he concurred with the Staff Judge Advocate Recommendation (SJAR) which recommended the convening authority approve the appellant's bad conduct discharge.

Background

The appellant was previously court-martialed on 31 August 2006 for one-time marijuana use and one-time cocaine use. The officer members sentenced him to two months confinement and reduction E-1. The charge in this case occurred before that court-martial,² but the results of a urinalysis had not yet been received. In the second court-martial, the appellant providently pled to the wrongful use of cocaine, and was sentenced by a panel of officer members.

At the conclusion of trial, the trial defense counsel successfully requested waiver of mandatory forfeitures for the appellant. But there was no documentation in the record to indicate the appellant's waiver of his right to submit clemency matters. The Staff Judge Advocate Recommendation (SJAR) was served on the appellant on 6 March 2007 and on the trial defense counsel 12 March 2007. The convening authority's action was signed on 13 March 2007.

Discussion

The appellant claims his post-trial rights were violated when there was no waiver of submission for clemency matters, R.C.M. 1105(d), and the ten-day period had not expired, R.C.M. 1105(c), prior to the convening authority taking action. Prior to taking final action, the convening authority must consider matters submitted by the accused under R.C.M. 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). An appellant may waive his right to submit clemency matters. R.C.M. 1105(d). We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)).

Documentation³ has been attached to the record showing the appellant waived his right to submit clemency matters prior to the convening authority taking action; hence this issue is now without merit. Based upon this documentation, the appellant raises the issue of ineffective assistance of counsel.

We review claims of ineffective assistance of counsel de novo, applying the two-part test enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668

² In this court-martial, the appellant was charged with wrongful use of cocaine between on or about 13 August and on or about 21 August 2006.

³ The documents include an email from the trial defense counsel which states "the defense concurs with the SJAR." There is an affidavit from trial defense counsel which explains that the e-mail was for the purpose of waiving clemency.

(1984). *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007); *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). Under *Strickland*, the appellant bears the burden of establishing: 1) that the performance of his counsel was deficient; and 2) that he was prejudiced by that deficiency. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). Appellants who seek to meet this burden “must surmount a very high hurdle,” due to a “strong presumption that counsel was competent.” *United States v. Dobson*, 63 M.J. 1, 10 (C.A.A.F. 2006) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) and *United States v. Grigoruk*, 56 M.J. 304, 306-07 (C.A.A.F. 2002)).

The appellant has failed to meet his burden establishing his counsel was ineffective. Assuming arguendo, he was, there is no showing of prejudice and as such this issue is without merit.

The 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, and sentence, are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court