UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUSTIN L. COUNTS
United States Air Force

ACM S30689

31 January 2006

Sentence adjudged 16 July 2004 by SPCM convened at McChord Air Force Base, Washington. Military Judge: Glenn L. Spitzer (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 5 months.

Appellate Counsel for Appellant: Lieutenant Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major L. Martin Powell, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer. Finding no error, we affirm.

The appellant was convicted of, among other offenses, stealing from his friends, in violation of Article 121, UCMJ, 10 U.S.C. § 921. He was sentenced to a bad-conduct discharge and confinement for 5 months. The convening authority approved the findings and sentence as adjudged. At trial, the appellant claimed that he turned to thievery in an effort to provide better financial support for his 11-month-old dependent son. The record does show the appellant sold most of the stolen items for cash rather than keeping them for his own use. The appellant now contends that, under the circumstances, his trial defense counsel should have submitted a request for waiver of automatic forfeitures and

that her failure to do so amounted to ineffective assistance of counsel. He also argues his trial defense counsel did not tell him about his right to submit a request for deferral or waiver of forfeitures.[1]

Unquestionably, the appellant's right to effective assistance of counsel extends to post-trial representation. *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997). Counsel is presumed competent, and this presumption continues unless the appellant can show his counsel was deficient and that he was prejudiced by the deficiency. *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). There is no evidence of such deficiency here. Instead, there is a reasonable explanation for counsel's actions. *See generally United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant received written notification that he could request a waiver of automatic forfeitures in his case. His signature appears on the document entitled Post-Trial and Appellate Rights. He did not request a waiver, nor did his trial defense counsel request one on his behalf. Instead, the post-trial petition to the convening authority focused on one thing: removal of the bad-conduct discharge. The defense chose to focus on one area of relief, rather than diffusing their position by giving the convening authority a laundry list of requests. This is their right and we have no reason to second-guess their decision. *See United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993). The appellant's disappointment with the result of his decision cannot, without more, somehow ripen into an argument for ineffective assistance of counsel.

The appellant cites *United States v. Short*, 48 M.J. 892 (A.F. Ct. Crim. App. 1998), in support of his ineffective assistance claim. In *Short*, the military judge strongly recommended that the convening authority waive automatic forfeitures. No such recommendation exists in the appellant's case, nor does the evidence suggest such a recommendation would have been appropriate. Consequently, we find *Short* inapplicable.

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); *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

[1] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).