

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

**Airman Basic ZACHARY B. EMERICK**  
**United States Air Force**

**ACM 37060**

**09 September 2008**

Sentence adjudged 18 June 2007 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Bryan Watson (sitting alone).

Approved sentence: Dishonorable discharge and confinement for 36 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

BRAND, FRANCIS, and JACKSON  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of carnal knowledge and one specification of sodomy, both with JMB,<sup>1</sup> a person over the age of 12 but under the age of 16, in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925. The approved sentence consisted of a dishonorable discharge and confinement for 36 months.

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<sup>1</sup> JMB was the appellant's half-sister. They had the same father. She was four years younger than the appellant.

On appeal, the appellant avers that his trial defense counsel was ineffective during the post-trial clemency process. Finding no merit to this assertion, we affirm the findings and sentence.

### *Background*

The appellant, through his post-trial affidavit, states that he specifically asked his trial defense attorney what he had to do about getting disability benefits for his back condition, but claims that his trial defense attorney never provided him with direct answers and told him that he would have to look into it. In his affidavit, the appellant states:

My defense attorney never explained anything to me about veteran's benefits. At the time of the court-martial it was never explained to me that if I received a bad-conduct discharge I would be eligible to apply for [v]eteran's disability compensation, but with a dishonorable discharge I would not be eligible to apply for compensation. If I would have known at the time that I requested clemency that I was not eligible for veteran disability compensation because of my dishonorable discharge, I would have presented this information to the convening authority along with my medical records. I would have wanted the convening authority to know that with a bad conduct discharge I would at least be eligible for compensation for the injury to my back.

The trial defense counsel submitted an affidavit in response to the appellant's claim.

### *Ineffective Assistance of Counsel*

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The two prong test set out in *Strickland* that the appellant must satisfy is that the counsel was so deficient that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment<sup>2</sup> and the deficient performance prejudiced the appellant. *Id.* at 701. Counsel are presumed to be competent. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). The right to effective representation extends to post-trial proceedings. *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999) (citing *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997)). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687. *See also United States*

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<sup>2</sup> U.S. CONST. amend. VI.

*v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); See also *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Attached to the affidavit of the appellant is an information sheet from the Department of Veterans Affairs entitled *Disability Compensation Benefits*. This information sheet states, under the headline *Who is Eligible?*, “You may be eligible for disability compensation if you have a service-related disability and *you were discharged under other than dishonorable conditions.*” (emphasis added). According to the Code of Federal Regulations (C.F.R.), Title 38, §3.12 (c), *Pensions, Bonuses, and Veterans’ Relief*, “Benefits are not payable where the former service member was discharged or released . . . by reason of the sentence of a general court-martial.” 38 C.F.R. § 3.12(c)(2) (2004). The Code further provides that a discharge is deemed to have been dishonorable where the underlying offense involved moral turpitude. *Id.* at §3.12(d). “This includes, generally, conviction of a felony.” *Id.* at §3.12(d)(2).

Applying the *Ginn* standards, we find the appellant’s claim would not result in relief even if the factual dispute was resolved in the appellant’s favor. In his post-trial clemency submission, the appellant clearly informed the convening authority of his back trouble, including that he was in excruciating pain prior to trial. The appellant and his counsel requested that no punitive discharge be approved and that if one had to be approved, that it be a bad-conduct discharge. If we assume *arguendo* that the trial defense counsel was deficient, this issue is still without merit. There is absolutely no evidence of any prejudice to the appellant.

#### *Conclusion*

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, 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



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