UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ISMAEL PEREZ
United States Air Force

ACM S32074

7 October 2013

Sentence adjudged 29 May 2012 by SPCM convened at Joint Base San Antonio-Lackland, Texas. Military Judge: Donald R. Eller, Jr. (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $994.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

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

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of three specifications of attempted wrongful distribution of anabolic steroids and two specifications of wrongful use of marijuana, in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 2 months, forfeiture of $994.00 pay per month for 2 months, and reduction to E-1. This sentence coincided with the

terms of the pretrial agreement (PTA), which stated the convening authority would not approve confinement in excess of 2 months if a punitive discharge was adjudged.

During post-trial processing, trial defense counsel submitted clemency matters that consisted of letters from the appellant and defense counsel. The convening authority did not grant clemency and approved the sentence as adjudged. On appeal, the appellant argues that his trial defense counsel was ineffective for failing to submit appropriate materials in clemency. We disagree and affirm.

Ineffective Assistance of Counsel

This court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The right to effective representation extends to post-trial proceedings. *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997). Defense counsel is responsible for post-trial tactical decisions but should act "after consultation with the client where feasible." *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994). Defense counsel may not submit matters over the client's objection. *United States v. Hood*, 47 M.J. 95, 97 (C.A.A.F. 1997).

We need not decide if defense counsel was deficient during post-trial representation if the second prong of *Strickland* regarding prejudice is not met. *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005). Our superior court has held that errors in post-trial representation can be tested for material prejudice, which will be found if the appellant "makes some colorable showing of possible prejudice." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

The appellant argues that his trial defense counsel failed to submit "appropriate materials" to the convening authority as part of the clemency process. He cites counsel's failure to submit the defense sentencing package to the convening authority, which included three character letters, his awards and decoration information, family photographs, and his written unsworn statement. The appellant also cites defense counsel's failure to include the transcribed testimony of his father or his Enlisted Performance Reports. He claims trial defense counsel told him the convening authority

would review his entire case, which is what prompted him to not repeat any of his background information in his one-page letter to the convening authority.

We find that the appellant has not made a colorable showing of possible prejudice. Instead, we find that the appellant's trial defense counsel, Captain (Capt) CE, properly represented the appellant during the post-trial process. In his declaration, Capt CE states that he discussed clemency with the appellant before trial, immediately after the sentence was announced, and during in-person visits at the confinement facility. During one in-person visit, Capt CE states he advised the appellant that his chances for clemency were "low," because he received a sentence within the PTA from a military judge, but "it was still worth a shot." He encouraged the appellant to draft a clemency letter and to ask his father to also write a letter on his behalf.

During a second in-person visit, Capt CE asked the appellant about the progress of his clemency letter. The appellant told him that he had not worked on his clemency request and that his father would not be submitting a letter. The appellant asked Capt CE to draft a letter for him "because he did not want to take the time to draft a clemency submission." Capt CE advised the appellant that he [Capt CE] would write an area defense counsel memo and would help the appellant with his memo, but would not write the appellant's memo for him. The appellant told Capt CE he did not want to submit a clemency request. Capt CE advised the appellant that not submitting any clemency might be seen as a tacit acceptance of his punishment; the appellant acknowledged that he understood.

Concerned over the impact of not submitting clemency in a bad-conduct discharge case, Capt CE drafted a short memorandum from the appellant to the convening authority asking that the discharge be set aside. He also drafted a short memorandum of support to the convening authority in his capacity as the appellant's counsel. Capt CE showed the memoranda to the appellant and explained he thought a short, simple clemency letter asking the convening authority to set aside the discharge "was the best way to balance [the appellant's] desire not to submit clemency, while not waiving any potential appellate right by failing to request the BCD be set aside." According to Capt CE, the appellant agreed with this strategy and the limited scope of the submission.

Moreover, Capt CE states he told the appellant the record of trial was available to and could be reviewed by the convening authority, if he chose to do so. Capt CE states that the appellant "did not express any concern over that matter or any desire to ensure that portions of the [record of trial] or his sentencing package be presented to the convening authority." In Capt CE's view, the appellant "did not seem to care very much" about submitting clemency and only agreed to do so after Capt CE drafted the letter for him and agreed to the short, focused strategy for relief.

In conclusion, we find that Capt CE effectively represented the appellant during the post-trial clemency process. His performance was not deficient, and the appellant has failed to make a colorable showing of prejudice.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.* Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

*We note the physical record of trial erroneously contains, as Appellate Exhibits III and IV, a PTA offer and PTA quantum portion rejected by the convening authority on 17 May 2012. The agreed-upon PTA, identified at trial as Appellate Exhibits III and IV, is not in the record. Because of the thorough, line-by-line inquiry conducted by the military judge regarding the contents of Appellate Exhibit III, and the unequivocal statements of the military judge and parties referring to the contents of Appellate Exhibit IV, the record of trial is sufficient to incorporate the substance of these exhibits. *See United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). Nevertheless, we remind counsel of the care that must be exercised when marking, handling, and preserving exhibits.