UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DEREK M. SMITH
United States Air Force

ACM S30581

6 February 2006

Sentence adjudged 22 January 2004 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and forfeiture of $795.00 pay per month for 8 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Andrew S. Williams, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Major Lane A. Thurgood.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

We have reviewed the record of trial, the appellant's assignment of errors, and the government's reply thereto. The appellant complains that his trial defense counsel and defense counsel who represented him during the submission of his clemency matters were ineffective. We review such claims de novo; the appellant bears the burden of persuasion when challenging his counsel's performance. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005); *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). We find the appellant has not met his burden and affirm.

The appellant first complains that his trial defense counsel "did not present any evidence in extenuation or mitigation" during presentencing, "except for Appellant's unsworn statement." He further complains that his post-trial defense counsel did not seek deferment or disapproval of

adjudged forfeitures, or waiver of automatic forfeitures. Initially, we look to see whether these allegations are true; and if so, whether there are reasonable explanations for counsel's tactics. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

Examining the trial tactics of the appellant's trial defense counsel, we conclude that the allegation is true, but there is a reasonable explanation for counsel's tactics. The appellant's unsworn statement was indeed the sole evidence offered in extenuation and mitigation during pre-sentencing. This is hardly surprising, for the appellant's record included a plethora of misconduct that severely constrained his counsel's range of options. That record included two letters of counseling, five letters of reprimand, punishment on two occasions under Article 15, UCMJ, 10 U.S.C. § 815 (including an incident in which he kicked a female airman in the head), a civilian misdemeanor conviction, and a two-count civilian felony conviction. This posed a daunting challenge for the appellant's trial defense counsel: how to put on *any* sentencing case without opening the door to the details of the appellant's prior criminality. To his counsel's credit, those doors remained firmly shut. The appellant placed his life's story before the military judge in an unsworn statement taking up 14 of the transcript's 71 pages. This obvious strategy of damage containment was by no means deficient. *See United States v. Stephenson*, 33 M.J. 79, 82 (C.M.A. 1991).

We likewise find no deficiency in the conduct of the appellant's post-trial defense counsel. The appellant signed a memorandum outlining his post-trial rights that specifically stated he could seek deferment or waiver of forfeitures, and disapproval of any part of his sentence. Although the appellant now claims his counsel should have sought relief from the forfeitures so he could provide for his family, that is not the relief he asked for in his letter to the convening authority. In that letter, the appellant contended his family's financial and emotional well-being would best be served by a reduced sentence to confinement and disapproval of his punitive discharge. His counsel eloquently supported and expanded on that theme. It is not ineffective assistance of counsel for a lawyer to advocate in favor of the result sought by the client -- even when, as here, the client later decides he would have preferred something else. Even had the appellant's counsel requested the relief he now would prefer, there is no reason to believe he would have achieved a more favorable outcome. *Cf. Polk*, 32 M.J. at 153.

The findings and 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