UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain MARK R. WIMMER
United States Air Force

ACM 35138

30 June 2004

Sentence adjudged 12 July 2001 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Dismissal and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

PER CURIAM:

A court-martial composed of a military judge sitting alone found the appellant guilty, consistent with his pleas, of conduct unbecoming an officer and gentleman, fraternization, and false swearing, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934. The appellant's sentence included a dismissal and confinement for 10 months. The convening authority approved the sentence, except that he reduced the confinement to 6 months.

The appellant claims, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his trial defense counsel was ineffective. He complains he did not know his guilty plea would waive an appellate issue; that advice regarding a judge alone forum was erroneous; and that trial defense counsel failed to call important witnesses during the sentencing phase of trial.

The appellant submitted an affidavit outlining his complaints. He believes the assertions made in the affidavit establish ineffective assistance of counsel. He states the defense counsel convinced him to enter guilty pleas without explaining that his speedy trial motion would not be preserved for appeal. He also asserts defense counsel convinced him to change his forum selection from members to judge alone because they believed the military judge would be favorably disposed towards him. Further, he alleges defense counsel provided ineffective assistance by failing to call certain witnesses to testify during the sentencing portion of the trial.

The test for ineffective assistance of counsel is (1) whether defense counsel's performance was so deficient that he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) whether the deficient performance prejudiced the defendant, i.e. whether the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We conclude that we can resolve this issue without ordering post-trial fact finding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). Some of the assertions of the appellant would not merit relief even if true. *See United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (a court may examine prejudice without first determining whether counsel's performance was deficient). Other assertions are merely speculative or conclusory observations; or, even if arguably raising an issue of ineffective assistance of counsel on their face, the appellate filings and record as a whole "compellingly demonstrate" their improbability. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant testified at trial that he was satisfied with the advice from his trial defense team. He also testified that he had had enough time and opportunity to discuss his case with his trial defense team and he was satisfied that the legal advice he received was in his best interest. His clemency submission to the convening authority did not express complaints about trial defense counsel and the clemency letter submitted by post-trial civilian defense counsel makes no comment about the adequacy of the representation.

The appellate filings submitted by trial defense counsel provide a well-reasoned explanation for only submitting statements of three of the five sentencing witnesses the appellant alleges should have been called to testify. The positive aspects conveyed by the witnesses were presented to the military judge during sentencing and any negative information from the witnesses was foreclosed from submission. The filings further show a reasonable perception of the judge's favorable disposition towards the appellant. The filings and the record do not support the appellant's assertions of ineffective assistance of counsel. We conclude the facts asserted by the appellant fail to demonstrate deficient performance or sufficient prejudice within the meaning of *Strickland*.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator