UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW C. BELL
United States Air Force

ACM S31885

30 August 2012

Sentence adjudged 1 November 2010 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: William C. Muldoon (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni; Captain Thomas Franzinger; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ORR, STONE, and HARNEY
Appellate Military Judges

PER CURIAM:

The appellant pled guilty to wrongful use of methamphetamine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. At the time of trial, the appellant had 11 years and 9 months of service. A military judge sitting alone sentenced him to a bad-conduct discharge, confinement for 7 months, and reduction to E-1. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 6 months, and reduction to E-1. The appellant raises one issue before the Court: whether his trial defense counsel was ineffective for failing to request deferral and waiver of automatic forfeitures from the convening

authority for the benefit of the appellant's dependents. Specifically, he asks this Court to determine whether the trial defense counsel was ineffective because he failed to advise the appellant on the right to request such deferment and waiver of automatic forfeitures. We find that the appellant's claim is without merit and affirm.

We review claims of post-trial ineffective assistance of counsel de novo. *See United States v Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). When the appellant makes factual claims but "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts, the Court may discount those factual assertions and decide the legal issue." *United States v. Ginn*, 47 M.J. 236, 348 (C.A.A.F. 1997).

At trial, in response to the military judge's inquiry, the appellant admitted that his defense counsel did explain his post-trial and appellate rights to him. Additionally, he advised the military judge that he did not have any questions about his post-trial rights. The appellant also acknowledged receipt of a Post-Trial and Appellate Rights Advice memorandum that he had previously signed which provided written notice of his right to request deferment and waiver of automatic forfeitures. That document clearly states that the convening authority may waive mandatory forfeitures.

Furthermore, in a post-trial affidavit to this Court, the trial defense counsel stated that, prior to trial, he covered post-trial and appellate rights with the appellant, and he also discussed the sentence and its ramifications with the appellant immediately after trial, to include clemency options. He stated that he "challenged" the appellant on his decision to request a reduction in confinement and the set aside of his punitive discharge, as opposed to requesting a deferral and waiver of loss of rank and forfeitures in pay. Defense counsel may not submit clemency matters over the client's objection. *United States v. Hood*, 47 M.J. 95, 97 (1997).

In light of the credible evidence in the record of trial that run contrary to the appellant's claim, we find that we have sufficient information to decide the issue and we determine that the appellant's claims are without merit. Trial defense counsel was not ineffective and no post-trial relief is warranted.

Appellate Delay

We note that the overall delay of over 18 months between the time this case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This

approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

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

STEVEN LUCAS
Clerk of the Court

[*] We note that the court-martial order (CMO) erroneously reflects a finding of "not guilty" to Charge II and its Specification, coupled with language correctly indicating that they were "withdrawn after arraignment." The latter is correct regarding the withdrawn and dismissed charge and specification. We order the promulgation of a corrected CMO.