UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GARY D. SIMMONS, JR.
United States Air Force

ACM 37967

27 June 2012

Sentence adjudged 11 May 2011 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Charles G. Warren; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant according to his pleas of sodomy on a child under the age of 16 years and possession of child pornography in violation of Articles 125 and 134, UCMJ, 10 U.S.C. § 925, 934. The court sentenced the appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. A pretrial agreement capped confinement at eight years, and the convening authority approved the sentence adjudged. In a supplemental assignment of error, the appellant claims that his

counsel was ineffective by not submitting a clemency petition regarding substandard conditions during 27 days of post-trial confinement in a local jail.[1]

The appellant engaged in oral and anal sodomy with a 13-year-old military dependent child. Text messages discovered by the boy's mother alerted her to the crime, and a subsequent search of the appellant's computer found 18 videos portraying oral and anal sex acts with underage boys. Pending transfer to the United States Disciplinary Barracks, the appellant was confined post-trial for 27 days in Cook County Jail, Cook County Georgia.

In his clemency petition the appellant asked the convening authority to consider that he spent significant periods in solitary confinement during the 27 days he was in the Cook County Jail. He attached four character letters to his petition, but his counsel did not provide a separate letter. The convening authority considered the matters submitted by the appellant, and approved the sentence adjudged.

While conceding that his clemency petition "speaks for itself" in describing the conditions of his post-trial confinement, the appellant argues that he was prejudiced in two respects by not having a separate clemency petition from his counsel. First, he argues that if his counsel had also complained of the confinement conditions he would have had a "real possibility" of relief from the convening authority. Second, he argues that by not filing a separate clemency petition his counsel failed to preserve the issue for appeal. In support of his argument the appellant submitted a 9 December 2010 affidavit by a Cook County Jail official who stated that all military prisoners would be kept in isolation to prevent possible commingling with foreign nationals because the jail had no procedure to identify foreign nationals.

In response to the appellant's argument, the appellant's counsel responsible for clemency matters submitted an affidavit in which he described his role in the appellant's clemency process. He first noted that the policy complained of by the appellant as referenced in the 2010 affidavit had been rescinded on 25 March 2011, almost two months before the appellant entered the facility. Therefore, he elected not to make a clemency argument based on a policy that no longer existed. However, he remained concerned about conditions at the jail and encouraged the appellant to document how he was treated. Based on his long working relationship with the convening authority, counsel believed the best hope for any relief in clemency was a personal appeal from the appellant rather than a "sterile legal justification" for reduced confinement. He discussed this personal appeal strategy with the appellant and advised him to describe the conditions of his post-trial confinement among other things in a handwritten petition. The clemency petition submitted by the appellant tracks with this advice.

[1] The appellant's counsel filed a merits brief on 17 January 2012. We granted his motion to file a supplemental assignment of error on 1 February 2012.

Generally, claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was in fact deficient, and, if so, (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687. Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). The appellant bears the heavy burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted). However, the threshold for finding prejudice stemming from ineffective assistance of counsel for post-trial proceedings is lower.

The convening authority is the appellant's best hope for relief. *See United States v. Bono*, 26 M.J. 240, 243 n.3 (C.M.A. 1988); *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958). As a result, our superior court imposed a lower threshold for claims of post-trial ineffective assistance of counsel: "However, because of the highly discretionary nature of the convening authority's clemency power, the threshold for showing [post-trial] prejudice is low." *United States v Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Therefore, the appellant gets the benefit of the doubt and needs to make only a "colorable showing of possible prejudice." *Id.* (internal quotation marks and citations omitted). Here, the appellant's claim falls short.

The appellant's claims do not create a factual dispute which would require a post-trial hearing. *See United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). The appellant states that his counsel should have filed a post-trial clemency petition, and his counsel explains why he did not. The appellant's trial defense counsel made a sound strategic and tactical decision to present the conditions of post-trial confinement in a personal appeal by the appellant. The appellant described those conditions, and the convening authority considered them. An additional letter from the appellant's counsel reiterating the conditions described by the appellant would have added nothing in the circumstances of this case.

As his petition to the convening authority provided sufficient information as a possible basis for clemency, it is also sufficient to preserve the issue for appeal. *See United States v. Towns*, 52 M.J. 830 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 361 (C.A.A.F. 2001) (mem.) (Clemency submissions complaining of post-trial confinement treatment are sufficient to exhaust administrative remedies for Article 55, UCMJ, violations.).[2] We find no colorable showing of possible prejudice from defense counsel's

[2] The appellant does not assert an Article 55, UCMJ, 10 U.S.C. § 855, violation of cruel and unusual post-trial punishment, nor do we find an Article 55, UCMJ, violation. *See United States v. Lovett*, 63 M.J. 211 (C.A.A.F. 2006).

decision not to file a separate clemency petition which would have simply reiterated the conditions complained of by the appellant as well as referencing a policy which was no longer in force.

Conclusion

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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court