IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Kenneth E. POORMAN
Lieutenant (O-3), U.S. Navy

NMCCA 200201136 Decided 23 July 2004

Sentence adjudged 26 July 2001. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

The appellant was initially tried on 10 April 2001, by a military judge sitting as a general court-martial. Pursuant to his pleas, the appellant was convicted of two specifications of committing indecent acts with a child under the age of 16 years and one specification of taking indecent liberties with a child under the age of 16 years, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to 15 years confinement, forfeiture of all pay and allowances, and a dismissal from the Naval Service.

Before the convening authority could take action on the findings and sentence, the Government inadvertently destroyed the audiotapes of the proceedings. *See* Convening Authority's Letter 5811 Ser N02L3/452 of 9 May 2001. However, a summary record of the court-martial proceedings was prepared and authenticated by both the military judge and the trial counsel. *See* Appellate Exhibit I. Satisfied that the summary of evidence supported the initial findings of guilty, the convening authority ordered a rehearing. Convening Authority's Letter 5811 Ser N02L3/452 of 9 May 01; *see* RULE FOR COURTS-MARTIAL 1103(f)(2), MANUAL FOR COURTS-

MARTIAL, UNITED STATES (2000 ed.). The convening authority's directive properly noted that the maximum sentence faced by the appellant at the rehearing was limited to that awarded by the military judge during the initial hearing.

On 25-26 July 2001, before a different military judge sitting as a general court-martial, the appellant was once again convicted, in accordance with his pleas, of identical violations of Article 134, UCMJ. The military judge sentenced the appellant to 12 years confinement, forfeiture of all pay and allowances, and a dismissal from the Naval Service. On 7 March 2002, the convening authority approved the sentence as adjudged and, with the exception of the dismissal, ordered the sentence executed. In accordance with the terms of the pretrial agreement, the convening authority suspended all confinement in excess of eight years for a period of eight years from the date the sentence was adjudged.[1]

This matter was docketed with this court on 12 June 2002. The defense brief was filed on 17 March 2003, and the government's response thereto was submitted on 11 September 2003. On 24 June 2004, the appellant filed a Petition for Extraordinary Relief with out superior court in which he complained of undue delay in the appellate review of his case.

After carefully considering the record of trial, the appellant's two assignments of error, and the Government's response, we conclude that the appellant received ineffective assistance of counsel during the post-trial review of his case. Thus, we will set aside the convening authority's action. We also agree with the appellant that, under the unique facts of this case, he is entitled to additional "good time" credit.

Background

The appellant is a commissioned officer and graduate of the United States Naval Academy. While stationed at the Naval Nuclear Power Training Command in Goose Creek, South Carolina, the appellant became a foster parent. At times, state officials entrusted the appellant with caring for three foster children in his on-base quarters.

[1] Although not assigned as an error, we note that the convening authority's action fails to specify whether the suspension period will run from the date the appellant's sentence was initially announced or from the date of his rehearing. Since the Government was at fault in destroying the audiotapes, thus leading to the rehearing, the military judge concluded that the appellant should be spared all resulting consequences of the Government's failure to preserve the record of proceedings. Record at 175-76. We concur. Therefore, the suspension period will run from 10 April 2001, the date on which the appellant's initial sentence was announced.

Through one of his foster children, the appellant met and befriended the victim, a 13-year-old boy whose family had stumbled financially. After caring for the victim on a part-time basis for a period of months, the child's mother agreed to grant the appellant temporary guardianship over the boy.

Over the next year, the appellant committed a long series of escalating sexual crimes against his youthful ward. The appellant's misconduct included touching the child's clothed private area, masturbating the child, lying in the young boy's bed and rubbing his own erect penis against the child's clothed buttocks, and masturbating himself in the immediate proximity of the boy. All of these offenses occurred at night in the victim's bedroom.

During the initial presentencing hearing, the appellant's civilian defense counsel presented good military character testimony from two of the appellant's superior officers at the Nuclear Power Training Command and the expert testimony of Dr. Louis R. Waid, Ph.D., a licensed clinical psychologist. Appellate Exhibit I. No documents from the appellant's service record were entered into evidence.

At the rehearing, a different civilian defense counsel represented the appellant. On this occasion, neither good military character testimony nor service record documents were presented. The sentencing case for the defense consisted of Dr. Waid's testimony, his curriculum vitae, the report Dr. Waid prepared concerning the appellant, a letter from the appellant's counselor, and a lengthy unsworn statement by the appellant. Record at 113-22; Defense Exhibits A-C.

During the post-trial review process, the detailed defense counsel asked for two extensions of time to submit clemency matters. *See* Detailed Defense Counsel Letters of 25 Jan 2002 and 11 Feb 2002. The convening authority granted the appellant's first request for a 20-day extension, until 14 February 2002, but denied his subsequent request for an additional 30 days. *See* Convening Authority's Letters 5811 Ser N02l3/079 of 19 Jan 2002 and 5811 Ser N02l3/146 of 12 Feb 2002; *see also* R.C.M. 1105(c) (conferring upon the convening authority the power to grant a 20-day extension of time for the submission of clemency matters). On 7 March 2002, not having received any clemency matters, the convening authority took action on the appellant's case.

On 1 July 2002, the detailed defense counsel submitted a belated request for clemency in which he explained that both of the appellant's civilian defense counsel had experienced health-related problems, thus preventing the timely filing of a clemency petition. *See* Detailed Defense Counsel's Letter 5800 of 1 Jul 2002. The petition contained three character reference letters

from the appellant's family members as well as his own request for clemency. Since the convening authority had already taken action and forwarded the record of trial to this court for review, he did not consider the appellant's request for clemency. *See* Convening Authority's Letter 5814 Ser N02l3/645 of 9 Jul 2002; *see also* R.C.M. 1007(f)(2).

Ineffective Assistance Of Counsel

In his first assignment of error, the appellant argues that he was denied the effective assistance of counsel during the 25-26 July 2001 rehearing as well as during the post-trial review by the convening authority. Specifically, the appellant contends that his counsel failed him by not offering evidence of his exemplary military performance to either the military judge or the convening authority.

With respect to the rehearing phase of the appellant's court-martial, we will not second-guess civilian defense counsel's tactical decision to forego providing the military judge with evidence of the appellant's good military character. Hence, we find no ineffective assistance of counsel during the court-martial itself.

On the other hand, we agree with the appellant that he was denied effective assistance of counsel during the post-trial review process. In particular, we find that the appellant was prejudiced by the deficient performance of his defense team by their failure to submit a timely clemency petition to the convening authority.

A. Standard Of Review And Burden Of Proof.

A military accused is entitled to effective assistance of counsel at all stages of his court-martial process and such assistance post-trial is considered a "fundamental right." *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001); *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000). At the same time, the defense counsel enjoys a strong presumption of competence. *United States v. Cronic*, 466 U.S. 648, 658 (1984); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998); *see also United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999)(holding that competence is equally presumed during post-trial processing). To overcome the presumption of competence, an appellant must satisfy the two-part test handed down in *Strickland v. Washington*, 466 U.S. 668 (1984), and demonstrate: (1) a serious deficiency in counsel's performance that deprived the appellant of his Sixth Amendment guarantee to representation; and (2) that the deficient performance prejudiced the defense to such an extent as to deprive the appellant of a fair court-martial whose result is reliable. *United States v. Adams,* 59 M.J. 367, 370 (C.A.A.F. 2004).

Generally, an appellant who claims ineffective assistance during trial or sentencing is viewed as having to "surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). In contrast, when an appellant asserts ineffective assistance during post-trial representation, the discretionary nature of the convening authority's clemency powers justifies a lowering of the threshold showing of prejudice. *Lee*, 52 M.J. at 53; *see also United States v. Passmore*, 54 M.J. 515, 517 (N.M.Ct.Crim.App. 2000). Thus, with respect to his post-trial ineffective assistance of counsel claim, the appellant will be afforded the "'benefit of the doubt'" and this court will find "'material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Lee*, 52 M.J. at 53 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998), quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)).

B. The Presentencing Phase Of The Rehearing.

With respect to the presentencing phase of a court-martial, counsel may be ineffective where he fails to adequately investigate the possibility of extenuating and mitigating evidence, or having discovered such evidence, fails to bring the evidence to the attention of the sentencing authority. *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998). In the case at bar, the appellant argues that his civilian defense counsel failed him by not presenting evidence of his exemplary military service during the presentencing portion of the rehearing. This stands in contrast to the first hearing of the appellant's court-martial where two superior officers testified concerning his outstanding performance as an instructor at the Nuclear Power Training Command. Moreover, the appellant contends that counsel should have presented documentary evidence from his service record. As support for his position, the appellant has supplemented the record on appeal by successfully moving to attach a series of documents, including, among other items, several Officer Fitness Reports, citations for two Navy-Marine Corps Achievement Medals, citations for two Meritorious Unit Commendations, and the appellant's Naval Academy transcript.

We note that the appellant has not provided any sort of affidavit in which he contends that he expected his defense counsel to present good military character evidence to the military judge or that his counsel disobeyed his wishes in any respect during presentencing. *See United States v. Starling*, 58 M.J. 620, 622 (N.M.Ct.Crim.App. 2003)(noting that bare allegations of appellate defense counsel may be insufficient to support a finding of deficient performance and that the appellant should, where appropriate, provide an affidavit). Nor has the Government provided us with an affidavit from any member of the

defense team despite facing this allegation of ineffective assistance of counsel. S*ee, e.g., United States v. Alves*, 53 M.J. 286, 288 (C.A.A.F. 2000)(affidavit of trial defense counsel submitted and accepted in response to a pleading-based allegation of ineffective assistance of counsel). The appellate defense counsel's effort in supplying this court with service record material not presented to the military judge, although commendable, is not, in this particular case, sufficient proof of deficient performance by prior counsel. Were we to hold otherwise, virtually every case we review might contain an ineffective assistance of counsel claim because appellate counsel could easily offer some piece of evidence that was withheld, either accidentally or intentionally, by the trial defense counsel. After all, rare is the case where every single vein of potentially extenuating and mitigating evidence is fully mined and offered to the sentencing authority.

It goes without saying that a defense counsel should present the evidence that will most benefit his client. Simply presenting every piece of possibly relevant evidence and trusting that the military judge will discern the most persuasive theme(s) may, however, do more harm than good to a client's case. Hence, a defense counsel is required to make choices and develop strategies that pare-down the universe of available evidence to that which best serves his client's interests. Simply put, counsel must make tactical decisions. Normally, we will not second-guess the strategic or tactical decisions made by defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

In this case, the appellant twice watched his case go to the military judge for sentencing without any documentation from his service record, and then declined to file an affidavit or other complaint. In the absence of such a complaint from the appellant that the defense team acted contrary to his wishes or expectations, we are compelled to view the failure to present good military character evidence as nothing more than a tactical decision.

The record supports our finding that the decision against offering service record documents was a tactical maneuver rather than a deficient omission on the part of counsel. Prior to closing the court-martial for deliberations on sentencing, the military judge engaged in the following exchange with counsel:

> MJ: Now, again, before I close I just want to make sure since I have not been provided with the accused's service record in this case, has the accused served in any areas where he would have then [been] authorized to receive combat pay?

TC: Not that I'm aware of, sir.

MJ: Is there anything of that nature that either party feels needs to be brought to my attention?

TC: Nothing from the Government, sir.

CC: No, sir. I thought that in the April proceedings and this is something I was referring to a moment ago, that there was at least a summary of the service record reflecting that Lieutenant Poorman has had exemplary service in this --

MJ: Let me provide you with Appellate Exhibit I. For one thing in Appellate Exhibit I, I have not viewed and will not view is the Sentence Limitation Portion of the appellate exhibit.

CC: Right.

MJ: The Sentence Limitation Portion of the Pretrial Agreement that is contained within Appellate Exhibit I.

TC: There was nothing admitted in the first trial regarding service record documents sir, or no summaries.

CC: Is that right?

MJ: And I'm certainly not saying that has to be admitted but I just want to make sure that I --

CC: I understand.

MJ: Have given you an opportunity to cover it.

CC: Yes, sir, thank you.
MJ: All right. So it is my understanding that there is nothing to be offered in that area.

TC: Not from the Government, Sir.

DC: Defense Counsel has nothing else, sir.

CC: Thank you, Your Honor.

Record at 164-65. This colloquy establishes that the civilian defense counsel was presented with the opportunity to offer good military character evidence and made a conscious decision against doing so. Our finding that this was a defense team decision is further supported by the fact that the detailed defense counsel interjected himself into the conversation to confirm that the defense had nothing further to present.

Assuming for the moment that failing to present the service record material rises to the level of deficient performance, we are unconvinced that the appellant was prejudiced by counsel's supposed shortcomings. *See Strickland*, 466 U.S. at 687. The military judge did not disavow intent to review the presentencing evidence contained in Appellate Exhibit I. Instead, the military judge stated his intention to ignore only the Sentence Limitation Portion of the pretrial agreement presented to his predecessor. We find that the military judge considered the prior testimony of good military performance offered by officer witnesses. Additionally, the appellant sat in open court wearing all of the awards and decorations to which he was entitled, including his warfare designation pins, deterrent patrol pin, Meritorious Unit Commendation ribbon, and a Navy-Marine Corps Achievement Medal with gold star in lieu of second award. Record at 6. Finally, Dr. Waid's testimony and his medical report both mention the appellant's graduation from the Naval Academy and exemplary military service. Record at 119; Defense Exhibit B. Under these circumstances, it would have been virtually impossible for the military judge to remain ignorant of the appellant's outstanding military character. Therefore, even if the performance of appellant's counsel during the presentencing phase of the rehearing was deficient, we do not find that the appellant suffered any resulting prejudice.

C. Post-Trial Review.

In the post-trial arena, ineffective assistance can arise where the defense counsel fails to maintain or establish an attorney-client relationship with the accused or inexcusably fails to act on the accused's behalf with respect to the staff judge advocate's recommendation and/or clemency matters. *See United States v. Howard*, 47 M.J. 104, 106 (C.A.A.F. 1997); *United States v. Miller*, 45 M.J. 149, 151 (C.A.A.F. 1996). In this case, the appellant argues that his counsel's performance was deficient because he failed to bring the appellant's outstanding military record to the convening authority's attention and failed to file any sort of clemency petition. Appellant's Brief at 6. We agree.

The detailed defense counsel twice asked the convening authority for extensions of time to submit clemency matters. The convening authority accommodated these requests to the maximum extent permitted under R.C.M. 1105(c). Additionally, one of the character references actually submitted to the convening authority, a letter from the appellant's mother and two brothers, is dated 12 August 2001, well in advance of any possible action by the convening authority. *See* Bowers/Poorman Letter of 12 Aug 2001. From these facts, we conclude that the appellant fully expected a clemency petition to be submitted to the convening authority, and that either the appellant personally, or persons working on his behalf, were gathering documents to support his request for relief. Finally, the appellant devoted a significant portion of his own clemency letter to describing his prior service. *See* Appellant's Letter of 20 Jun 2002. Even though this last item was drafted after the convening authority took action, it demonstrates that the appellant wanted his exemplary military record highlighted for the convening authority.

The record establishes a clear desire on the appellant's part to seek clemency. However, his defense team filed a petition for relief nearly four months after the convening authority took action. We are unmoved by the detailed defense counsel's explanation that both civilian counsel were unable to submit the petition due to sickness. Detailed defense counsel was equally responsible for the appellant's legal well-being as his civilian counterparts, and should have filled the void left by their respective absences. In short, the detailed defense counsel was deficient by failing to "step-up to the plate" when his obligations as a judge advocate required him to do so. *United States v. Flowers*, 789 F.2d 569, 571 (7th Cir. 1986)(once appointed, counsel shall continue to represent his client unless and until relieved by competent authority).

The right to seek clemency from the convening authority has often been described as a military accused's best chance for post-trial relief. *United States v. Key*, 57 M.J. 246, 253 (C.A.A.F. 2002); *Wheelus*, 49 M.J. at 287; *United States v. Lowe*, 50 M.J. 654, 656-57 (N.M.Ct.Crim.App. 1999). The appellant's opportunity to seek the favor of his convening authority was squandered through no apparent fault of his own. In light of the discretionary nature of the convening authority's clemency powers, we are satisfied that the appellant has made a colorable showing of possible prejudice. *Howard*, 47 M.J. at 106. The appellant is, therefore, entitled to a second round of post-trial review where his desires with the respect to the submission of a clemency petition can be honored.

Confinement Credit

The appellant was initially tried, convicted, sentenced, and confined on 10 April 2001. On 24 May 2001, the convening authority ordered a rehearing, thus causing the appellant's status to revert from post-trial confinee to pretrial detainee. Between the time period of 10 April 2001 and 23 May 2001, the appellant earned 14 days of "good time" towards his then-unsuspended 15-year sentence to confinement. *See* Commanding Officer, Naval Consolidated Brig Letter 5800 Ser 02/034 of 5 Mar 03 (explaining that, on a 15-year sentence, a post-trial confinee accrues good time at a rate of 10 days per month). The military judge viewed the appellant as a pretrial detainee from 10 April 2001 to 26 July 2001, when the rehearing proceedings concluded and, thus, ordered 107 days of credit under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Record at 176-77. The military judge further stated that the appellant is entitled to any good time he accrued between the date of his initial court-martial and the rehearing. *Id*. The trial counsel explicitly agreed with the military judge. *Id*.

We concur. This court directs that, in addition to the 107 days credited for pretrial confinement, the appellant is to be credited with the 14 days good time he earned while serving confinement under the sentence imposed on 10 April 2001.

Conclusion

Accordingly, the convening authority's action is set aside. The record of trial will be returned to the Judge Advocate General of the Navy for remand to the convening authority for a new staff judge advocate's recommendation and convening authority's action. In light of the relief granted, this Court denies the appellant’s motion for oral argument without prejudice to his renewing the motion when the record returns to this court.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court