

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, KRAUSS, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 RANDY E. KRYSTYAN
United States Army, Appellant

ARMY 20110014

Headquarters, Fort Riley
Susan Arnold, Military Judge
Lieutenant Colonel Robert Borcharding, Staff Judge Advocate (pretrial)
Colonel Michael L. Smidt, Staff Judge Advocate (post-trial)

For Appellant: Colonel Mark Tellitocci, JA; Lieutenant Colonel Imogene Jamison, JA; Major Jennifer A. Parker, JA; Captain A. Jason Nef, JA (on brief).

For Appellee: Major Amber J. Williams, JA; Major Ellen S. Jennings, JA; Captain Bradley M. Endicott, JA (on brief).

24 April 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

JOHNSON, Senior Judge:

A military judge sitting as a special court-martial convicted appellant, pursuant to his plea, of one specification of absence without leave in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886 (2006) [hereinafter UCMJ]. Contrary to his pleas, appellant was also convicted of assault and unlawful entry in violation of Articles 128 and 134, UCMJ. The military judge sentenced appellant to a bad-conduct discharge and confinement for eleven months. In accordance with a pretrial agreement, the convening authority reduced the sentence of confinement to nine months and approved the remainder of the sentence. The convening authority also credited appellant with ninety-five days of confinement credit against the sentence to confinement.

Appellant raises two assignments of error, one of which merits discussion. Appellant alleges, *inter alia*, that his trial defense counsel was ineffective because he did not request deferment or waiver of automatic forfeitures to the convening authority on appellant's behalf. In his request for relief appellant asks, in part, that he be allowed to request waiver of automatic forfeitures, presumably through a new review and action. We disagree.

I. BACKGROUND

Three days before trial, appellant and his trial defense counsel (CPT M) filled out a detailed post-trial and appellate rights advisement form. On page four of that form, appellant indicated that he wanted his defense counsel to seek waiver and deferment of automatic forfeitures for the benefit of his dependents. The military judge discussed this form with appellant, and appellant indicated that he understood his post-trial and appellate rights. It is clear from the record that CPT M at no time requested a waiver or deferment of automatic forfeitures, but rather asked the convening authority to disapprove the adjudged bad-conduct discharge in his Rule for Court-Martial [hereinafter R.C.M.] 1105/1106 submissions.

On appeal, appellant claims (through counsel) that CPT M was ineffective for not requesting deferment and waiver of his automatic forfeitures. In response to appellant's allegation, this Court ordered an affidavit from trial defense counsel to explain why he did not do so. In response to that order, CPT M provided an affidavit in which he admitted knowing that appellant had dependents eligible to receive waived forfeitures. However, CPT M stated that following the trial and after consulting with appellant, they mutually agreed as a matter of strategy not to request deferment and waiver of forfeitures, but rather to concentrate on disapproval of the bad-conduct discharge, in hopes that the convening authority would be more likely to grant that specific relief.

II. LAW AND DISCUSSION

We reject appellant's claim of ineffective post-trial representation. Appellant is of course correct when he avers that his trial defense counsel did not assist him with requesting deferment and waiver of automatic forfeitures for the benefit of his dependents. However, we conclude that appellant understood his post-trial and appellate rights, decided not to request deferment or waiver of his automatic forfeitures, and, therefore, has failed to demonstrate his trial defense counsel's performance was deficient.

The Sixth Amendment guarantees an accused the right to the effective assistance of counsel. U.S. CONST. amend. VI; *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). In the military, this guarantee extends to assistance with the post-trial phase of a court-martial. *United States v. Lee*, 52 M.J. 51, 52 (C.A.A.F. 1999). We review

de novo claims that an appellant did not receive the effective assistance of counsel. *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009). “In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronin*, 466 U.S. 648, 658 (1984).” *Gooch*, 69 M.J. at 361. To overcome the presumption of competence, the *Strickland* standard requires appellant to demonstrate “both (1) that his counsel’s performance was deficient, and (2) that this deficiency resulted in prejudice.” *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687). If we conclude that appellant fails to satisfy one prong of the *Strickland* test, we need not analyze appellant’s showing on the remaining prong. *Strickland*, 466 U.S. at 697; *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001).

The mere failure to submit a request to a convening authority for deferral or waiver of automatic forfeitures does not, by itself, constitute ineffective assistance of counsel. It is well established that this Court will not second-guess strategic decisions made by defense counsel. *Mazza*, 67 M.J. at 475. This is especially true where, as in this case, appellant did not want his trial defense counsel to submit such a request, but rather to focus on disapproving appellant’s bad-conduct discharge.

On the facts of this case, we hold appellant’s defense counsel was not ineffective. After consulting with his client, CPT M focused on disapproval of appellant’s bad-conduct discharge, rather than deferral and waiver of automatic forfeitures. CPT M did this because his client told him that he was not concerned with forfeitures of pay and allowances, but only with the bad-conduct discharge. Furthermore, CPT M’s affidavit is not rebutted as to appellant’s decision and expressed desire to forgo requesting deferral or waiver of automatic forfeitures to emphasize the importance of appellant’s hope to stay in the Army. Appellant submitted nothing in his R.C.M. 1105/1106 submission to contradict CPT M’s affidavit, and did not, nor does he now, personally allege that this was not the strategy agreed upon by both appellant and his defense counsel. Of course, when an accused makes specific elections on the post-trial and appellate rights form it would be better practice to obtain written verification if those elections change at a later date, but this does not by itself make counsel ineffective.

CONCLUSION

On consideration of the entire record, the assigned errors, and the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we find appellant’s arguments to be without merit. We hold the

findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.*

Judge BURTON concurs.

Judge KRAUSS, dissenting:

I respectfully dissent and consider a *DuBay*¹ hearing warranted under the circumstances.

Appellant's brief properly makes reference to the record of trial to establish the fact that appellant both requested his trial defense counsel to request deferral and waiver of automatic forfeitures and that appellant wanted such monies to be provided to his dependent children.² The record also establishes the fact that appellant's trial defense counsel never requested either deferral or waiver of automatic forfeitures.

On 26 July 2011, on motion from government appellate counsel, we ordered appellant's trial defense counsel to provide an affidavit answering a series of questions intended to elicit the facts of the matter involving appellant's request for deferral and waiver of automatic forfeitures. The affidavit of Captain M, appellant's trial defense counsel, dated 10 August 2011, states, in relevant part, the following:

I did not submit the request because after the sentence but prior to action I spoke with PVT Krystyan regarding what matters and requests he wanted to make to the Convening Authority. PVT Krystyan explicitly stated that he was not concerned with the forfeitures of pay and allowances. He stated that his only concern was with the Bad Conduct Discharge that had been adjudged. In order to not detract from the request to disapprove the Bad Conduct

* We have also reviewed this case in light of *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225; *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011); *United States v. Fox*, 34 M.J. 99 (C.M.A. 1992); *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); and *United States v. Berner*, 32 M.J. 570 (A.C.M.R. 1991), and find no prejudice to the appellant and no relief warranted.

¹ *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

² See R. at 79 and 84, Defense Exhibit A, and Appellate Exhibit (AE) VI; see also R. at 87-89, where appellant endorses his post-trial and appellate rights form (AE VI).

Discharge, no request for deferral or waiver of forfeitures was submitted. The only request that was made in the 1105 matters was for the disapproval of the Bad Conduct Discharge. I discussed this with PVT Krystyan and we believed that strategy might work and gave him the best chance of success in what he wanted. I do not recall any prior conversations with PVT Krystyan regarding deferment or waivers after sentence.

Based upon the above, a *DuBay* hearing is required because we are faced with a post-trial affidavit concerning appellant's allegations of ineffective assistance of counsel that conflicts with facts established in the record of trial. Under such circumstances, it is inappropriate for this court to find the facts necessary to resolve the matter. *See generally United States v. Ginn*, 47 M.J. 236, 243 and 248 (C.A.A.F. 1997); *United States v. Gunderman*, 67 M.J. 683, 686-87 (Army Ct. Crim. App. 2009).

I do not think it necessary or appropriate to expect appellant to provide an affidavit in response to that of the trial defense counsel. The facts necessary for appellant are established by the record of trial and absent withdrawal of the assigned error by appellant, the conflict remains. *See id.* Because a defense counsel's failure to request deferment or waiver of automatic forfeitures, despite appellant's express wish to do so, may constitute either a professional deficiency or prejudicial error otherwise, a fact-finding hearing on the matter is warranted. *See id.*; *United States v. Fordyce*, 69 M.J. 501, 504-06 (Army Ct. Crim. App. 2010).

Such order would require a *DuBay* military judge to determine the following:

- a. Did appellant direct his trial defense counsel to forgo submission of requests for deferral or waiver of automatic forfeitures?
- b. Did appellant actually agree to seek disapproval of the bad-conduct discharge alone instead of seeking approval for deferral or waiver of automatic forfeitures alone or in combination with disapproval of the bad-conduct discharge?

For the above reasons, I respectfully dissent.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE
Deputy Clerk of Court