UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
W.L. RITTER, E.S. WHITE, B.G. FILBERT
Appellate Military Judges

UNITED STATES OF AMERICA

v.

NICHOLAUS I. JONES
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200700516
SPECIAL COURT-MARTIAL

Sentence Adjudged: 14 February 2007.
Military Judge: Col Ralph Kohlmann, USMC.
Convening Authority: Commanding Officer, 2d Maintenance Battalion, Combat Logistics Regiment 25, 2d Marine Logistics Group, Camp LeJeune, NC.
Staff Judge Advocate's Recommendation: LtCol J.L. Gruter, USMC.
For Appellant: Capt Sridhar Kaza, USMC.
For Appellee: LT Justin Dunlap, JAGC, USN; LT Christopher Burris, JAGC, USN.

18 March 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

The appellant was tried by a special court-martial composed of a military judge. Contrary to his pleas, the appellant was convicted of two specifications of wrongful use of cocaine. His offenses violated Article 112a, Uniform Code of Military Justice 10 U.S.C. § 912a. The military judge adjudged a sentence of confinement for ninety days, reduction to pay grade E-1,

forfeiture of $800.00 pay per month for three months, and a bad-conduct discharge.

The appellant claims he was denied effective assistance of counsel due to the failure of his trial defense counsel to submit clemency matters to the convening authority. We have carefully examined the record of trial, the appellant's assignment of error, the Government's response, and the appellant's reply. We find the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. *See* Arts. 59(a) and 66(c), UCMJ.

Ineffective Assistance of Counsel

A. Facts

The appellant's trial defense counsel submitted a request for a twenty-day extension to submit clemency matters to the convening authority. In the request, counsel stated the extension would allow him time to receive documentation from the appellant's family members and friends. The trial defense counsel ultimately did not submit clemency matters prior to the convening authority taking action on the case.

The appellant did not submit an affidavit to this court in support of his claim that his trial defense counsel's failure to submit clemency matters was contrary to his desires. He also did not submit to the court the letters referenced in the extension request and the appellant's brief does not even describe the contents of these letters.

B. Law

We determine *de novo* whether trial defense counsel was ineffective, and if so, whether the error was prejudicial. *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999); *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997); *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996). Counsel are strongly presumed to have provided adequate representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998); *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). Conclusory allegations of ineffective assistance are not sufficient to overcome the presumption of competence afforded to counsel. The appellant has the obligation to bring the appellate court's

attention to facts rather than mere speculation. *Russell*, 48 M.J. at 140-41.

Mere failure to submit clemency matters, by itself, does not automatically establish deficient representation. Each such failure must be assessed on a case-by-case basis. *United States v. Cobe*, 41 M.J. 654, 655 (N.M.Ct.Crim.App. 1994)(citing *United States v. Robertson*, 39 M.J. 211, 218 (C.M.A. 1994)). As we have stated in the past, claims of inadequate representation based on failure to exercise post-trial rights will not be seriously entertained without an affidavit from the appellant stating how counsel's inaction contrasted with his wishes. Further, if the claim involves counsel's failure to submit clemency matters for consideration, the appellant must detail the content of the matters that would have been submitted. *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003).

C. <u>Analysis</u>

In this case, the appellant fails to rebut the presumption of competence with respect to the lack of a clemency submission. The appellant has neither submitted an affidavit, nor pointed to any other evidence that demonstrates counsel's failure to submit clemency matters was contrary to his wishes.

The appellant argues the request for an extension to submit clemency matters submitted by his trial defense counsel demonstrates his desire to submit clemency matters to the convening authority. He also asserts the extension request proves the existence of several letters from the appellant’s family and friends which should have been submitted to the convening authority. We do not draw such conclusions from the extension request. The request simply asks for more time for counsel to gather letters from family and friends. It in no way establishes the appellant conveyed to his counsel he wanted clemency matters submitted. The request also does not explain the contents of the letters or show the letters ever actually existed. Our refusal to broadly interpret the extension request as urged by the appellant is supported by the fact he did not provide an affidavit to the court stating his counsel failed to submit clemency matters contrary to his wishes. Our interpretation is also supported by the failure of the appellant to anywhere describe the contents of the referenced letters or to provide the supposed letters to the court.

We find no prejudice to the appellant. The appellant bears the burden of establishing prejudice, and he has failed to meet that burden in this case. *See United States v. Moulton*, 47 M.J. 227, 230 (C.A.F.F. 1997). He has provided no showing of the evidence he would have submitted to the convening authority. The assignment of error is without merit.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Chief Judge RITTER and Senior Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court