

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROB B. YAMMINE
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200800052
GENERAL COURT-MARTIAL**

Sentence Adjudged: 2 September 2010.

Military Judge: Maj R.G. Palmer, USMC.

Convening Authority: Commanding General, Marine Corps
Recruit Depot, Eastern Recruiting Region, Parris Island,
SC.

Staff Judge Advocate's Recommendation: Col W.A. Stafford,
USMC (15 Nov 2007); LtCol E.R. Kleis, USMC (27 Sep 2010).

For Appellant: Capt Michael Berry, USMC.

For Appellee: LCDR Clay Trivett, JAGC, USN; Capt Robert
Eckert Jr., USMC.

31 May 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

On 10 June 2010, the Court of Appeals for the Armed Forces (CAAF) set aside the findings as to the appellant's 2007 general court-martial conviction for indecent acts with a child under the age of 16 (specification dismissed with prejudice) and sodomizing a child under the age of 16 (specification dismissed without prejudice), and affirmed the appellant's conviction for larceny. That court also set aside the original sentence and remanded the case with a rehearing authorized.

Pursuant to an agreement between the appellant and the convening authority (CA), the remaining sodomy charge was dismissed with prejudice once the new sentence was announced. At the September 2010 rehearing, the military judge, sitting as a general court-martial, resentenced the appellant, for the affirmed larceny charge, to 90 days of confinement, reduction to pay grade E-1, total forfeitures, and a bad-conduct discharge. On 22 October 2010 the CA approved the adjudged sentence and, except for the punitive discharge, ordered it executed.

The appellant assigns one error: that trial defense counsel, Major (Maj) M, was ineffective for failing to submit matters in clemency to the CA following the rehearing. The appellant requests that we set aside the most recent action and order new post-trial processing. Although we decline to find that Maj M was ineffective, we shall grant the appellant's request and order new post-trial processing.

Facts

Prior to the appellant's rehearing, his trial defense counsel¹ negotiated a most favorable pretrial agreement that protected him from a dishonorable discharge, any confinement in excess of one year, or exposure to any crime that could potentially require him to register as a sex offender. Counsel also ably represented the appellant at the sentencing hearing and garnered a relatively favorable outcome. Maj M was served with a copy of the staff judge advocate's recommendation on 28 September 2010 and initially indicated that she intended to submit a response, but ultimately did not file either a response or clemency matters.

In an unsworn declaration submitted with his current appeal, the appellant states that he informed Maj M that he intended to "submit clemency."² The appellant states that he "planned to ask the convening authority to not approve the Bad Conduct Discharge [sic]." Appellant's Unsworn Declaration (emphasis added). The appellant does not claim to have made this specific plan known to Maj M, but avers that she "assured me that she would put my clemency package together and submit it when it is time." *Id.* He alleges to have spoken to her on three occasions thereafter,

¹ The appellant was represented by two military detailed defense counsel, Major M and Major H, and a civilian defense counsel, Mr. S. In the short-form Appellate rights Statement signed by the appellant after his original trial he requested that the staff judge advocate's recommendation be served on his detailed defense counsel, Maj M. Appellate Exhibit LXXI at 2. He did not execute a new short-form Appellate Rights Statement following the rehearing, but on 9 September 2011 executed a long-form Appellate Rights Statement as part of his application for appellate leave, in which he stated that he had not retained civilian counsel at trial and that his "Principal detailed defense counsel" was Major H. The long-form statement was witnessed by a Captain G, who listed himself as "Defense Counsel."

² Appellant's Motion to Attach Unsworn Declaration executed on 7 November 2010.

but that several subsequent attempts to contact Maj M were to no avail.

In view of the appellant's allegations, the court ordered that Maj M respond to the allegations of ineffective assistance of counsel. In a sworn declaration under penalty of perjury,³ Maj M concurs, in the main, with the appellant's rendition of events, but supplies the court with some valuable amplifying information. Maj M explains that she did speak to the appellant about clemency, but that he wished to argue for leniency based on combat-related post-traumatic stress disorder (PTSD), an argument that appears to have been unbuttressed by his medical record. Sworn Declaration at 3. Maj M stated that all the available information relating to the appellant's PTSD (or lack thereof) was already presented in sentencing and thus, a matter of record before the convening authority. She explained that the trial defense team submitted all the extenuation and mitigation evidence they had available to them during the sentencing hearing and had nothing new left to offer in a clemency request. *Id.* at 5. This assertion is not challenged by the appellant.

Maj M states that she provided the appellant with her professional and personal e-mail address, and her office phone number. *Id.* at 6. The appellant called and left messages for her, but she states that he never supplied his contact information. All parties agree that the appellant and Maj M did speak after the rehearing. The appellant does not articulate what those conversations consisted of, but Maj M insists that they revolved around the appellant's insistence that he suffered from PTSD and questions related to back-pay to which he might be administratively entitled; matters that it appears from the record Maj M had already thoroughly addressed during the sentencing hearing, or was in the process of sorting out via appropriate channels.

Ineffective Assistance of Counsel

Service members have the right to effective assistance of counsel at their courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We presume on appeal that trial defense counsel provided effective assistance throughout the trial; this presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). We also recognize that the tactical and strategic choices made by defense counsel need not be perfect; instead, they must be judged by a standard ordinarily expected of fallible lawyers. See *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001);

³ Government Response to Court Order filed on 3 December 2010.

United States v. Curtis, 44 M.J. 106, 119 (C.A.A.F. 1996). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Davis*, 60 M.J. at 473 (citations omitted).

Ineffective assistance of counsel involves a mixed question of law and fact, which requires a *de novo* review. *Id.* (citing *Anderson*, 55 M.J. at 201). In review, a three-prong test is used to determine if the presumption of competence has been overcome:

- (1) Are the allegations true; if so, is there a reasonable explanation for counsel's actions?;
- (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?; and
- (3) If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (citations and internal quotation marks omitted).

It stands undisputed that a clemency request was not submitted to the CA in this case following the rehearing in conflict with the appellants expressed wish. However, we find that the appellant's trial defense counsel has articulated a reasonable explanation which we discern to be a misunderstanding between counsel and her client. Clemency is a servicemember's opportunity to bring "matters in mitigation which were not available for consideration at the court-martial" to the attention of the convening authority. See Rule for Courts-Martial 1105(b)(2)(C), Manual for Courts-Martial, United States (2008 ed.). In his unsworn declaration, the appellant does not identify specific information that he wished to be presented to the CA. Maj M appears to have believed, and not without some basis, that all matters that the appellant wished to have addressed in a clemency request had already been addressed during sentencing and therefore memorialized in the record of trial. Moreover, we note that rather refreshingly in this case, the record was meticulously scrutinized and summarized by the staff judge advocate for the CA's review before his action.

Assuming, therefore, that all the allegations advanced by the appellant are true, we cannot say that Maj M's performance fell measurably below the performance ordinarily expected of fallible lawyers. Indeed, in the main, her professional conduct was worthy of praise. Nonetheless, even in the absence of any new information, it would have been both prudent and good practice for Maj M to have submitted *some* clemency request on the appellant's behalf. See *United States v. Stephenson*, 33 M.J. 79, 83 (C.M.A. 1991).

We conclude that under the very unique facts of this case, the misunderstanding which obviously took place appropriately precludes this court from concluding that the appellant has waived his right to post-trial clemency. See R.C.M. 1105(d)(1) ("failure to submit matters within the time prescribed by the rule shall be deemed a waiver of the right to submit such matters."). Clearly, there were matters the appellant wished to have submitted on his behalf, yet were never presented to the CA due to a breakdown in communication between counsel and client. That omission can easily be remedied.

Conclusion

The CA's action of 22 October 2010 is set aside. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate CA for a new post-trial review and action. The record will then be returned to the court for completion of appellate review.

For the Court

R.H. TROIDL
Clerk of Court