

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

BEFORE

D.A. WAGNER

K.K. THOMPSON

R.E. VINCENT

UNITED STATES

v.

**Christopher O. BOWENS
Corporal (E-4), U.S. Marine Corps**

NMCCA 200602386

Decided 18 July 2007

Sentence adjudged 01 August 2005. Military Judge: D.M. Jones. Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Wing Support Group 37, 3d Marine Aircraft Wing, MCAS, Yuma, AZ.

LCDR M EVERSOLE, JAGC, USN, Appellate Defense Counsel
LT R.W. WEILAND, JAGC, USN, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

THOMPSON, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence terminated by apprehension in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 75 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. First, he alleges that he received ineffective assistance of counsel when, during the post-trial clemency process, his counsel advised the convening authority that the appellant was listed by his unit as being in a deserter status. Second, he alleges excessive post-trial delay. In his third assignment of error, the appellant contends that his sentence is inappropriately severe.

We have examined the record of trial, the appellant's assignments of error, and the Government's response. We concur

that the appellant was denied effective assistance of counsel and will take remedial action in our decretal paragraph. See Arts. 59(a) and 66(c), UCMJ.

Ineffective Assistance of Counsel

The appellant was represented by the same trial defense counsel for both his trial and post-trial proceedings. After the conclusion of his court-martial, the appellant apparently left his unit without authorization and was declared a deserter. His trial defense counsel advised the staff judge advocate (SJA), in writing, that she had been advised by the appellant's command that he was in a deserter status and that she had been unable to make contact with the appellant and therefore would not provide clemency matters to the convening authority. The SJA informed both the original convening authority and his successor of the appellant's deserter status in making his recommendation, referencing the letter from the trial defense counsel. The appellant contends that this constituted deficient post-trial representation. We agree.

Trial defense counsel has the responsibility to make tactical and strategic post-trial decisions, including making sound judgments with regard to the best course of action for the appellant. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). The opportunity for the trial defense counsel to submit matters to be considered by the convening authority in taking action on the court-martial one of the appellant's last best chances to be afforded clemency. *Id.* Trial defense counsel are presumed to be competent. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). In determining whether that presumption is overcome by the appellant, trial counsel's actions in the post-trial arena are measured by the same standard with which we measure counsel performance at trial, the three-pronged test established by our superior court:

- (1) Are appellant's 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. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000).

In the instant case, the trial defense counsel stated in her submission to the substitute convening authority that the appellant's unit had informed the trial defense counsel that the appellant was in a deserter status. Such a pronouncement could

have no other practical result than to eliminate any possibility of clemency being awarded. In defense of the counsel's statement, the Government urges us to consider that, because the appellant's unit knew he was in a deserter status, we should presume that the substitute convening authority, as another member of the Government hierarchy, would have known, as well. We would decline to follow this line of thinking. The substitute convening authority was two levels of command above the appellant's unit. It is not clear that the substitute convening authority knew about the appellant's deserter status independently of the clemency submission.

The Government also states that the convening authority knew of the appellant's deserter status independently of the clemency matters because certain service records documents attached to the record of trial make reference to this status. Again, this line of thinking is flawed. There is no indication in the record of trial as to when the service record entries were attached or by whom. In addition, the convening authority's action states that he considered the results of trial, recommendation of the staff judge advocate, and the clemency matters submitted by the trial defense counsel in taking action on the case. He does not indicate that he considered the record of trial or any other attachments thereto.

Under the circumstances of this case, there is no apparent benefit to the appellant from the trial defense counsel informing the substitute convening authority of the appellant's deserter status. There can be no question that such information would act to the detriment of the appellant. There is no evidence that the substitute convening authority otherwise knew of the appellant's status. Prejudice is clear.

Additionally, we find the trial defense counsel was deficient in her failure to submit any clemency matters to the convening authority. The appellant is entitled to representation of counsel at this critical stage of the court-martial proceedings. See *United States v. Palenius*, 2 M.J. 86, 90 (C.M.A. 1977). She had represented the appellant at trial and was aware of his record and circumstances surrounding the offense. Lack of contact with the appellant does not allow the defense counsel to *sua sponte* terminate her obligation to represent the appellant in this regard. *Id.* Based on this record, it appears that counsel could have made a presentation of some substance to the convening authority. *United States v. Howard*, 47 M.J. 104, 108 (C.A.A.F. 1997); see also *United States v. Hickok*, 45 M.J. 142, 145 (C.A.A.F. 1996). In this case, the appellant was doubly damned by the action and inaction of his trial defense counsel.

Conclusion

Accordingly, the convening authority's action is set aside. The record of trial is returned to the Judge Advocate General of the Navy, for remand to a different convening authority for

proper post-trial processing, to include the assignment of a substitute defense counsel, preparation of a new SJA's recommendation and a new convening authority's action.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court