

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Stephon S. BECKHAM
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200501356

Decided 15 August 2007

Sentence adjudged 05 October 2004. Military Judge: D.J. Daugherty. Staff Judge Advocate's Recommendation: Col B.D. Landrum, USMC. Addendum: LtCol D.S. Jump, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Aircraft Wing, Okinawa, Japan.

LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel
LT JENNIE GOLDSMITH, JAGC, USN, Appellate Defense Counsel
CAPT FREDERIC MATTHEWS, JAGC, USN, Appellate Government Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent to his pleas, of conspiracy to commit an indecent act, violation of two lawful general orders, making a false official statement, use of marijuana, distribution of marijuana, indecent acts, and endeavoring to impede an investigation, in violation of Articles 81, 92, 107, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, 912a, and 934. The appellant was sentenced to a dishonorable discharge, confinement for six years, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First, he alleges that he was denied effective assistance of counsel. Second, the appellant asserts a summary claim that he was denied due process by the combined effects of trial defense counsel's

errors. Third, he avers that this court lacks jurisdiction over this case. Finally, the appellant alleges the convening authority's action was deficient in that it did not list the sentence from a companion case and did not reflect that the convening authority considered the results of the companion case prior to taking action.

Upon consideration of the record of trial, the pleadings of the parties, and the conflicting affidavits of the appellant and his trial defense counsel, the court determined that additional facts were necessary to resolve the assigned error alleging ineffective assistance of counsel. On 7 September 2006, we ordered the record of trial returned to the Judge Advocate General for remand to an appropriate convening authority who was empowered to direct a *DuBay*¹ hearing. The convening authority subsequently directed such a hearing which was conducted on 16-17 November and 21 December 2006. The authenticated record of the hearing and the original record of trial were returned to this court on 23 March 2007. The appellant was provided an opportunity to submit additional matters but declined to do so.

We have examined the record of trial, the four assignments of error, the appellant's affidavit of 13 January 2006, the Government's response, the affidavit of the appellant's trial defense counsel of 8 August 2006, and the record of the post-trial *DuBay* hearing. We conclude that the findings are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense counsel was ineffective due to her inadequate pretrial investigation and preparation. He further states that his trial defense counsel inappropriately ordered or attempted to coerce the appellant to enter into a pretrial agreement and that the appellant was improperly prevented from replacing his defense counsel. Appellant's Brief of 30 Jan 2006 at 5-7.

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived

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

him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must 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)).

We conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice. The military judge that conducted the post-trial *DuBay* hearing reduced over 180 pages of testimony and proceedings into 17 pages of findings of fact and conclusions of law. Appellate Exhibit XXIV. The appellant does not contest the accuracy of the findings of fact and our own review of the record convinces us that the military judge's findings are fully supported by the record. We adopt them as our own.

The findings of fact reflect that the trial defense counsel conducted adequate pretrial investigation and preparation. She interviewed all relevant witnesses except those who expressly refused to speak with her. She communicated regularly with the appellant in person, by telephone and by email. We agree with the military judge that she was adequately prepared to go to trial on the merits. The record also reflects that the appellant was fully apprised of his counsel rights on numerous occasions by numerous parties including his counsel, the military judge, the Article 32 investigating officer, the senior defense counsel, and the regional defense counsel.

The record further reflects that, contrary to his assertion on appeal, the appellant never requested that his detailed defense counsel be relieved or that an IMC be assigned. While the appellant was clearly frustrated during the weeks leading up to his trial, his frustration emanated more from what he perceived as limited and unappealing options than any attempt by his trial defense counsel to coerce him into a particular course of action. We find that the appellant has failed to demonstrate that his trial defense counsel was unprepared, ordered him to sign a pretrial agreement, or otherwise provided ineffective representation. We further find that the appellant was well-aware of his counsel rights and was not prevented by his trial defense counsel or anyone else from exercising them. In view of the overwhelming Government evidence, the appellant has further failed to demonstrate any possible prejudice from the trial defense counsel's representation.

Conclusion

The appellant's remaining three assignments of error are without merit. The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLLOTO concur.

For the Court

R.H. TROIDL
Clerk of Court