

**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.

**Jeremy G. BUCK
Private (E-1), U. S. Marine Corps**

NMCCA 200600951

Decided 28 February 2007

Sentence adjudged 08 December 2005. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, School of Infantry, Training Command, Camp Pendleton, CA.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of going from his appointed place of duty, wrongful use of methamphetamine, and dishonorably failing to pay a debt, in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 934. The appellant was sentenced to a bad-conduct discharge and confinement for 60 days. The convening authority approved the sentence as adjudged.

The appellant asserts that due to the effects of the prescribed drugs he was taking, he was not competent to stand trial. The appellant also asserts that his trial defense counsel was ineffective insofar as he did not pursue an Article 706, UCMJ, board when he became aware that the appellant had mental health issues.

We have examined the record of trial, the assignment of error, and the Government's response. We conclude that the findings and sentence 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.

Competency to Stand Trial

The appellant asserts that he was so heavily medicated that he was not competent to plead providently. He requests that this court either set aside the findings and sentence or order an Article 706, UCMJ, mental health evaluation of the appellant. If a substantial question is raised as to the requisite mental capacity of an accused, an appellate authority may direct that the record be forwarded to an appropriate authority for an examination of the accused. *United States v. Massey*, 27 M.J. 371, 373 (C.M.A. 1989). In resolving the issue of mental competence, we are not limited to the record of trial, but may also consider documents and other material submitted outside the record. *Id.*; see *United States v. Murphy*, 50 M.J. 4, 6 (C.A.A.F. 1998); *United States v. Van Tassel*, 38 M.J. 91, 93 (C.M.A. 1993).

In support of his contention, the appellant offers an unsworn and undated document purporting to be his personal statement and two chronological record of medical care forms (SF 600, Rev. 5). The first describes an outpatient visit the appellant made to the Camp Pendleton Mental Health Clinic on 13 October 2005. The second reflects an outpatient visit the appellant made to the Camp Pendleton Primary Care Clinic on 14 October 2005. The appellant's unsworn and undated statement is not proper evidence and will not be considered.¹

The medical record documenting the appellant's 13 October 2005 visit to the mental health clinic indicates the visit was for sleep and anxiety issues. The treating physician concluded, *inter alia*, that the appellant's speech was normal, that he demonstrated no psychomotor agitation, that his remote and recent memory were not impaired, that no thought disorder was noted and that he did not suffer from delusions, suicidal ideation or homicidal ideations.

The medical record documenting the appellant's 14 October 2005 visit to the Primary Care Clinic reflects a finding that the appellant reported being unhappy, depressed, sad and quiet. The doctor, nonetheless, noted that the appellant was responsive to questioning, unguarded, non-defensive, cooperative, and calm. He further opined that the appellant's level of consciousness was normal with no delusions.

We find nothing in either of the medical record documents that raises a substantial question as to whether the appellant had the requisite mental capacity to comprehend or participate in his defense due to the medications he had been prescribed.

¹ N.M.Ct.CRIM.APP. RULE OF PRACTICE AND PROCEDURE 4-8.3b (affidavits must be dated and notarized by notary public or officer in the armed forces, or submitted as an unsworn declaration under penalty of perjury pursuant to 28 U.S.C § 1746).

Specifically, there is no evidence that any of the medications were for anything other than sleeplessness, mild pain relief, and gastric discomfort. Neither of the documents reflected adverse side effects which might have impacted the appellant's ability to understand and participate in his court-martial proceedings.

In considering the record of trial, we note that the appellant's brief asserts that the "only mention" of the appellant's mental health issues was a single exchange between trial defense counsel and the military judge on pages 10-11 of the record. This is a bald mischaracterization of the record.

The exchange noted in the appellant's brief put the court on notice that the appellant had a mental health visit and that the trial defense counsel had talked with the treating physician. The trial defense counsel indicated that the treating mental health professional did not believe there was any cause to direct an Article 706, UCMJ, evaluation of the appellant. Record at 10-11.

Contrary to the appellate defense counsel's assertion, there was an additional colloquy between the trial defense counsel and the military judge in which the military judge specifically inquired into what, if any, medications the appellant was currently taking. The military judge was provided a list of the medications and was informed they were for insomnia and anxiety related to the appellant's sleep issues. Trial defense counsel again asserted he had discussed the matter with the treating mental health professional who agreed that there was no basis to question the appellant's ability to understand and assist in the proceedings. *Id.* at 20-21.

Further, during the providence inquiry the military judge referred the appellant back to the mental health visit he had around the time of the offenses to ensure that the appellant, himself, did not perceive he was suffering from some sort of mental health episode that might have impacted his ability to understand the nature and wrongfulness of his actions. The appellant expressly stated that he understood what he was doing at the time. *Id.* at 33.

Having carefully reviewed the record of trial and the medical documents submitted by the appellant, we find the appellant has failed to raise a substantial question as to whether he had the requisite mental capacity to comprehend or participate in his defense. *Massey*, 27 M.J. at 374; *United States v. Thomas*, 32 C.M.R. 163, 169 (C.M.A. 1962). We further find no substantial basis in law or fact to question the appellant's guilty plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F. 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Finally, we find that the appellant has failed to show his counsel was deficient and has not, therefore, 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). This assignment of error is wholly without merit.²

Conclusion

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court

² We are compelled to observe that the appellate defense counsel's bold misstatement of the record borders on a lack of candor to this tribunal. We further note that the appellate defense counsel's brief both misstated the findings of the trial court and cited to an inapplicable punitive article. Further, we are very troubled that the appellate defense counsel submitted an unsworn and undated letter in an apparent belief that it constituted admissible evidence before this court. This combination of shoddy draftsmanship, inaccurate assertions regarding the record of trial, and a basic lack of understanding of appellate rules wasted this court's time and the time of the appellate government counsel who was forced to respond to it.