

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

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**David R. FARIS
Private First Class (E-2), U. S. Marine Corps**

NMCCA 200601065

Decided 12 April 2007

Sentence adjudged 22 March 2006. Military Judge: E.H. Robinson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

CDR MICHAEL WENTWORTH, JAGC, USN, Appellate Defense Counsel
LtCol R.R. POSEY, USMC, Appellate Defense Counsel
LCDR IAN K. THORNHILL, JAGC, USN, Appellate Government Counsel
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his plea, of one specification of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 90 days, reduction to pay-grade E-1, forfeiture of \$848.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the findings and the sentence as adjudged, but suspended all confinement in excess of 45 days pursuant to the terms of a pretrial agreement.

After considering the record of trial, the appellant's two assignments of error, the Government's response, and declarations from the appellant and trial defense counsel, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

BCD Striker Colloquy

The appellant's first assignment of error alleges that the military judge erred when he inquired "whether the appellant preferred a bad-conduct discharge to going to confinement or extended confinement." Appellant's Brief and Assignment of Error of 10 Oct 2006 at 6. As relief, the appellant requests that we not affirm any sentence which includes a bad-conduct discharge. *Id.* at 8. We disagree and therefore decline to grant relief.

The appellant pled guilty to an unauthorized absence from his unit for 10 months, having left the School of Infantry after two months of training. Record at 13-14. During the sentencing phase of the trial, the appellant introduced a letter from his father which describes the appellant's disillusionment after suffering leg injuries during boot camp, and the assessment that "months in medical was a waste of his time." Defense Exhibit B at 7. The appellant also introduced a letter from his uncle, a university educator, that states, "Today, [the appellant] wants out of the Marines. This is his decision." *Id.* at 8. The appellant also made an unsworn statement which included the following:

I have a lot of opportunities just waiting for me. All that I ask is for leniency....Please, have some consideration in my case. *I just want to go home."*

Record at 28 (emphasis added).

In response to the appellant's sentencing evidence, the military judge conducted a colloquy in which he explained to the appellant the ramifications of a bad-conduct discharge, including the adverse stigmatization of his military service, future effects, and loss of benefits. He also explained to the appellant administrative separations as well. The military judge inquired whether the appellant had discussed his desires with his defense counsel, and he replied that he had. *Id.* at 29-30. The colloquy ended with the following exchange:

MJ: PFC Faris, knowing all that I and your defense counsel have explained to you, is it your expressed desire to be discharged from the service with a bad-conduct discharge, if it will preclude you from an extended period of confinement?

ACC: Yes, sir.

MJ: Do you consent to your defense counsel stating an argument that you desire to be discharged with a bad-conduct discharge if it would preclude you from going to confinement or extended confinement?

ACC: Yes, sir.

MJ: Very well. The Court is prepared to receive argument.

Id. at 30. The defense counsel never affirmatively argued for her client to receive a bad-conduct discharge, but argued instead for the court to award minimal confinement if any, and to let "[t]he stigma of the federal conviction alone to be sufficient punishment for this military specific offense." *Id.* at 31.

After announcement of sentence, the military judge made a recommendation that the punitive discharge be suspended, or disapproved and the appellant processed for an administrative separation. *Id.* at 33. The military judge opined that the appellant had "a genuine desire to be a Marine, but unfortunately, due to this physical condition, that may not be possible." *Id.* The military judge concluded his comments on his recommendation with the following:

I think also that based on the information that's been presented, the accused may have been provided some guidance or instruction... that unfortunately he adhered to. That again, was not wise guidance or counsel regarding what he could do to be able to get out of the Marine Corps in light of his physical condition.¹

Id.

This case raises again the issue of how far a military judge should go in their colloquy when confronted with a "BCD striker."² We have previously recognized that it may be appropriate, in some instances, for a military judge to make inquiry of an appellant or of trial defense counsel about an appellant's request in an unsworn statement for a bad-conduct discharge. *United States v. Adame*, 57 M.J. 812, 814 (N.M.Ct.Crim.App. 2003). A punitive discharge may not be adjudged solely because an accused requests one. *United States v. Evans*, 35 M.J. 754, 761 (N.M.C.M.R. 1992). The request for a punitive discharge is only a factor to be considered, albeit generally a significant one, along with all other appropriate facts and circumstances before the sentencing authority. *Id.* (citations omitted)

We disagree with the appellant's claim that the military judge's questions forced him to make a "Hobson's Choice" between a bad-conduct discharge or an extended period of confinement. Appellant's Brief at 7. At this juncture, the appellant (but not the military judge) was aware that any confinement awarded by the military judge which exceeded 45 days would be suspended, pursuant to the sentence limitation portion of his pretrial agreement with the convening authority. Appellate Exhibit II;

¹ We are uncertain what "guidance or instruction" the military judge is referring to, as we could not find it in our review of the record.

² A "BCD striker" is a term originating in the Naval Service to describe an accused who actively seeks a punitive discharge. *United States v. Smith*, 34 M.J. 247, 248 (C.M.A. 1992).

Record at 17-19. Despite his assertions now on appeal, the appellant had no "choice" to make between extended confinement or a punitive discharge. The appellant's unsworn statement that he "just want[ed] to go home" clearly identified him as a probable BCD striker to the military judge. The only way the appellant could "just go home" was to be discharged, and, as explained to him by the military judge, the only discharge the court-martial could award was a bad-conduct discharge.

Given the appellant's comments during his unsworn statement, we find that the military judge correctly explained to the appellant, and inquired into his understanding of, the consequences of a bad-conduct discharge. We do not find the question whether the appellant wanted a bad-conduct discharge if it would preclude extended confinement to be an invitation by the military judge for him to request a discharge - - in essence, he had already done that in his unsworn statement. The military judge's question was a reasonable and justified clarification of the appellant's intent, given his own statements that implied he desired a discharge be given by the court.

The appellant further contends that the military judge's recommendation for clemency represents "some evidence that [he] believed that administrative separation of the Appellant was more appropriate in light of the Appellant's medical history." Appellant's Brief at 7. While the military judge apparently believed that clemency from the convening authority was appropriate, we are convinced that he awarded a punitive discharge in this case because it was an appropriate punishment, not solely because the appellant requested one.

Contrary to appellate defense counsel's claim of absence of any prior misconduct by the appellant, *id.* at 10, the record clearly shows the appellant received nonjudicial punishment for a 16-day unauthorized absence a mere 17 days before he again left his unit, this time for 10 months.³ Prosecution Exhibit 1 at 6. Moreover, in his post-trial affidavit filed with this court, the appellant states he did not want a bad-conduct discharge at all, yet at the same time admits that he commenced a 10-month-long unauthorized absence "because it was taking them too long to medically discharge me, and I thought with the UA it would speed things up." Declaration of Appellant of 17 Sep 2006 at 2. We conclude that the military judge did not commit error in his "BCD striker" inquiry with the appellant, and that under the circumstances presented, we agree with the military judge that a bad-conduct discharge was an appropriate punishment for this offender and his offense. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

³ We remind appellate defense counsel of their duty to ensure factual assertions are true.

Ineffective Assistance of Counsel

The appellant's second assignment of error alleges ineffective assistance of counsel by his trial defense counsel because she failed to contact the appellant and consult with him regarding the submission of additional clemency matters pursuant to RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Appellant's Brief at 10. We disagree.

In support of his assertion, the appellant provided an unsworn declaration under penalty of perjury in which he claims he had no contact with his trial defense counsel after he went into confinement, and that he has "no recollection of her asking whether I wanted to request clemency after my trial." Unsworn Declaration of Appellant of 17 Sep 2006 at 1. The appellant avers that in light of the military judge's recommendation:

... I would have submitted a clemency request asking the convening authority to suspend or disapprove the bad-conduct discharge and give me either a medical discharge or an administrative discharge. I would have also submitted medical records showing my history of leg and foot injuries.

Id.

Pursuant to our order, the Government provided an unsworn declaration under penalty of perjury from the trial defense counsel in which she states that on the morning of the appellant's court-martial, she fully discussed with him his rights to submit post-trial matters and request clemency from the convening authority, to include possible suspension or disapproval of the punitive discharge. Declaration of Trial Defense Counsel of 4 Dec 2006. The trial defense counsel states that the appellant "unequivocally stated that he did not want to submit matters or seek clemency," and that he waived his right to request clemency.⁴ *Id.*

The trial defense counsel's declaration is also buttressed by Appellate Exhibit III, which states the appellant's understanding of his rights to submit matters after trial to the convening authority, and the actions the convening authority can take, including suspending or disapproving any part of the sentence. The appellant signed this document on 21 March 2006, the day before his trial. He told the military judge that he had read it over completely and discussed it with his counsel. Record at 36. We note that the trial defense counsel's endorsement upon service of the Staff Judge Advocate's Recommendation (SJAR) indicates that the appellant in fact waived

⁴ The trial defense counsel states, "I believe that [the appellant] then signed a letter containing written clemency waiver indicating his decision." *Id.* While such document is not present in the record, we are satisfied that we can still resolve the appellant's claim without it.

clemency. Staff Judge Advocate Memorandum 5814 SJA of 27 Jun 2006.

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). Considering that the convening authority's action provides the accused's "best hope" for clemency, we recognize that a trial defense counsel's failure to submit clemency matters, absent a knowing and intelligent waiver by an accused, could constitute ineffective assistance of counsel. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005).

When an ineffective assistance claim is raised by an affidavit submitted by the appellant, we can resolve that legal issue without requiring a post-trial evidentiary hearing by using one of six principles set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). The first *Ginn* principle permits us to reject the claim of ineffective assistance of counsel "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor." *Id.* at 248. Under the second principle, "if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *Id.* Under the fourth principle, we may discount the appellant's affidavit and decide the legal issue "if the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts." *Id.* Under the fifth principle, "when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id.*

Applying these *Ginn* principles, we conclude that the appellant's claim of ineffective assistance of counsel lacks merit. The appellant is not entitled to relief under the first principle because, even if we assume the he did not waive his right to submit clemency matters and the trial defense counsel should have submitted a clemency request to the convening authority, we fail to see how anything she could submit would be appreciably different than what the convening authority ultimately considered before he approved the appellant's punitive discharge. The SJAR clearly states the recommendation of the military judge that the punitive discharge be suspended or disapproved and the appellant processed for an administrative separation. The record contains several references to the appellant's medical issues during training, and his rationalization for leaving his unit. The record also reflects

the appellant's request "to go home" and the subsequent BCD striker colloquy between him and the military judge. The convening authority's action states that, before taking his action, he carefully considered the recommendation of the military judge, the results of trial, the SJAR, and the entire record of trial, which includes the prior misconduct of the appellant. We find that the appellant is unable to make "some colorable showing of possible prejudice" for his alleged denial of his right to submit clemency. *Rosenthal*, 62 M.J. at 263 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

Applying the second *Ginn* principle, we find that the appellant's declaration fails to make a specific assertion that he did not waive his right to submit clemency. Simply because the appellant cannot recall waiving his right to submit clemency to his trial defense counsel does not compel us to infer that he, in fact, did not. Again, the appellant is unable to show specifically what information he would have submitted to the convening authority as clemency matter that was significantly different than what was already in the record.

Application of the fourth *Ginn* principle renders the same result. The appellant stated that he was satisfied with his trial defense counsel, and that he understood his appellate rights. Record at 19, 36; Appellate Exhibit I at ¶ 4; Appellate Exhibit III. The trial defense counsel's endorsement signifying her receipt of the SJAR indicates the appellant waived clemency. See R.C.M. 1105(d)(3); see also *Rosenthal*, 62 M.J. at 262. We conclude that the record as a whole compellingly demonstrates the improbability that the appellant did not waive his right to submit clemency.

We conclude that the appellant was afforded effective assistance of counsel, and this assignment of error is without merit.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge VOLLENWEIDER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court