

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

**Before  
W.L. RITTER, E.S. WHITE, B.G. FILBERT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CLIFTON D. GREEN  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200600843  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 22 November 2005.

**Military Judge:** LtCol David Jones, USMC.

**Convening Authority:** Commanding Officer, 1st Marine Regiment, 1st Marine Division (Rein), MarForPac, Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** Capt K.M. Navin, USMC.

**For Appellant:** LT Aimee Souders, JAGC, USN.

**For Appellee:** LT Derek Butler, JAGC, USN.

**27 September 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

FILBERT, Judge:

Pursuant to his pleas, the appellant was convicted by a military judge, sitting as a special court-martial, of unauthorized absence, wrongful use of cocaine and marijuana, and breaking restriction. His offenses violated Articles 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 934. He was sentenced to confinement for 135 days and a bad-conduct discharge.

After reviewing the record of trial, submitted without specific assignment of error, we specified two issues for briefing:

- I. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO REOPEN THE PROVIDENCE INQUIRY TO RESOLVE ANY ISSUE REGARDING THE APPELLANT'S POST-TRAUMATIC STRESS DISORDER, DEPRESSION, AND USE OF MARIJUANA FOR CHRONIC BACK PAIN?
  
- II. WHETHER THE APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO PRESENT THE ISSUES OF THE APPELLANT'S POST-TRAUMATIC STRESS DISORDER AND DEPRESSION, AND THE EFFECT OF A PUNITIVE DISCHARGE ON THE APPELLANT'S RIGHT TO FURTHER MEDICAL TREATMENT?

After reviewing the record of trial again, together with the appellant's brief on the specified issues, and the Government's response, we conclude the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Background**

The appellant stated the following in his unsworn statement to the military judge during sentencing:

On top of this, I had sustained a back injury just prior to Iraq that just constantly persisted, so I started to use marijuana for chronic back pain. But not before I had told my superiors of my use. I was also still using my medication for PTSD and depression.<sup>1</sup>

The military judge did not reopen the providence inquiry following these statements by the appellant. The military judge also did not ask the appellant's trial defense counsel whether he had explored any defenses related to post-traumatic stress disorder (PTSD), depression, or use of marijuana for chronic back pain. Neither the trial defense counsel nor the trial counsel requested any further inquiry by the military judge on these topics.

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<sup>1</sup> Record at 43.

There is no evidence in the record that an inquiry into the appellant's mental capacity or mental responsibility pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), was conducted, or that anyone had ever requested such an inquiry, before or after trial. No medical records of the appellant were introduced at trial.

### **Improvident Pleas**

In response to this court's first specified issue, the appellant asserts that his pleas of guilty are improvident because his comments during his unsworn statement raised the potential affirmative defense of lack of mental responsibility. We disagree.

Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); see R.C.M. 910(e). "If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense." R.C.M. 910(e), Discussion. A guilty plea is provident unless the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). We will not reverse a military judge's decision to accept a guilty plea unless we find "a substantial conflict between the plea and the accused's statements or other evidence of record." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). "A 'mere possibility' of such a conflict is not a sufficient basis to overturn the trial results." *Id.* (quoting *Prater*, 32 M.J. at 436).

After we specified the issues to be briefed by appellate counsel, our superior court decided a case involving similar facts. In *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007), the appellant mentioned for the first time during his unsworn statement that he had been diagnosed with bipolar disorder. The military judge did not conduct any inquiry into the claimed diagnosis, and the record contained no other evidence to substantiate the appellant's statement. Finding that the appellant had never asserted he was unable to appreciate the nature and quality or wrongfulness of his acts as a result of mental disease or defect, and that the record was devoid of any

evidence to suggest the condition impacted the appellant's capacity to plead guilty, the court held that the appellant's statement, standing alone, was insufficient to raise an apparent inconsistency with his plea. *Id.* at 464. The court explained that, given these facts, a military judge could safely presume an accused is sane and represented by a competent trial defense counsel who would have investigated the possibility of such a defense. *Id.*

In light of *Shaw*, we hold the evidence of PTSD, depression and marijuana use for chronic back pain presented at the appellant's trial raised only the "mere possibility" of a conflict with his pleas and thus did not require further inquiry by the military judge. The appellant has failed on appeal to produce any evidence, or even allege, that evidence exists to prove he could satisfy the requirements of the affirmative defense of lack of mental responsibility. Accordingly, we conclude the appellant's pleas are provident.

#### **Ineffective Assistance of Counsel**

In response to the second specified issue, the appellant argues that his trial defense counsel was ineffective because he failed to present additional evidence regarding the appellant's PTSD and depression, and because he did not argue the effect of a punitive discharge on the appellant's future medical treatment. We disagree.

The United States Supreme Court has articulated a two-pronged test for determining whether there has been ineffective assistance of counsel; that is, deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* This constitutional standard applies to military cases. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). Reasonable strategic or tactical decisions by counsel do not constitute deficient performance. *See United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Scott*, 24 M.J. at 188. In order to show ineffective assistance, an appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

The appellant argues his trial defense counsel should have presented evidence of the appellant's "mental health issues during trial or in extenuation or mitigation." Appellant's Brief of 4 Jan 2007 at 9. The appellant claims the failure to do so rendered the trial defense counsel's performance deficient. We find this argument unpersuasive because the appellant even now fails to show that additional evidence of the appellant's PTSD or depression actually exists. The appellant also provides no evidence suggesting his trial defense counsel failed to properly analyze the existing evidence concerning his mental health or to make sound tactical decisions regarding the presentation of evidence or argument on this subject, including the effect of a punitive discharge on future medical treatment. Further, we find the appellant has made no showing he was prejudiced in any way by his trial defense counsel's performance. Accordingly, we find the appellant has failed to demonstrate either deficient performance or prejudice.

#### **Conclusion**

We affirm the findings and sentence, as approved by the convening authority.

Chief Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL  
Clerk of Court