

**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.

**Kristopher T. HARTLEY
Private (E-1), U.S. Marine Corps**

NMCCA 200601202

Decided 24 April 2007

Sentence adjudged 8 February 2006. Military Judge: D.A. Winklosky. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Lejeune, NC.

LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
Capt JAMES WEIRICK, USMC, 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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, following mixed pleas, of failure to obey a lawful order, failure to obey a lawful general order, selling military property, and drunken operation of a motor vehicle (DUI), in violation of Articles 92, 108, and 111, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 908, and 911. The appellant was sentenced to confinement for 200 days, forfeiture of \$849.00 pay per month for a period of 12 months, and a bad-conduct discharge. The convening authority disapproved the finding of guilty of the failure to obey a lawful order and dismissed that specification, and approved the sentence as adjudged.

The appellant raises four assignments of error. He first argues that the evidence relating to the DUI charge was legally and factually insufficient to support a finding of guilty. Second, the appellant asserts that his trial defense counsel was ineffective. Third, the appellant claims a denial of due process due to "cumulative errors." Finally, the appellant avers that

the convening authority erred by failing to consider the appellant's 14 March 2006 clemency request in the context of the convening authority's action.

We have examined the record of trial, the assignments 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.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

As charged, there are two elements to the offense of drunken operation of a vehicle: (1) that the appellant was operating or in physical control of a vehicle; and (2) that while operating or in physical control of a vehicle, the appellant was drunk or impaired. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 35b. "Drunk or impaired" is defined as "any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties." MCM, Part IV, ¶ 35c(6).

The appellant asserts that there is at best conflicting circumstantial evidence that he was drunk or that he operated his motor vehicle while drunk. Appellant's Brief of 19 Oct 2007 at 7. We disagree.

A sworn statement from Mr. Paul Wojciak stated that he was working as a janitor in an on-base convenience store during the early morning hours of 5 September 2005. The statement further indicates that between 0400 and 0500, Mr. Wojciak personally witnessed the appellant drive into the parking lot of the store in a truck and exit from the driver's side of the vehicle. Prosecution Exhibit 2. A military policeman (MP) was inside the store at the time. While the MP did not personally see the appellant drive the vehicle, he testified that at approximately 0439, the appellant approached him inside the store to see if the MP would buy the appellant some cigarettes because he didn't have his identification. The MP did so and testified at trial that the appellant was intoxicated, "smelled like alcohol," and that

the smell was "surrounding his whole body, you could just smell it without a doubt, his eyes were red, slurred speech and his demeanor was slow." Record at 92.

A third witness called by the defense testified that the appellant had been drinking with him in his barracks room that morning and had, in a period of 1 to 1.5 hours, consumed 6-8 beers. Record at 141. The witness also indicated that when the appellant arrived, there was no smell of alcohol or any indication that the appellant had been drinking. *Id.* at 142. The witness further testified that when the appellant left his apartment after having consumed 6-8 beers that the appellant was feeling the effects of alcohol. *Id.* at 143, 145.

The appellant asserts on appeal that the third witness' testimony establishes that the drinking bout described above occurred "after the timeframe in which he was supposedly seen driving his vehicle." Appellant's Brief at 6-7. While it is true that the third witness testified that the drinking could have taken place between the 0400 and 0500, the timeframe during which Mr. Wojciak's sworn statement and the MP's testimony had the appellant at the convenience store, it is also true that following cross-examination and redirect examination the witness acknowledged that he really wasn't sure about the time and that the appellant could have arrived in his room any time between 0300 and 0500. The third witness also specifically agreed with the prosecutor that the drinking session could have lasted as little as an hour and that it was possible the appellant arrived at 0300 and left around 0430. Record at 146. In response to a question by the military judge, the witness noted that the appellant may have gotten a couple cigarettes from him while they were drinking. *Id.* at 151.

Given this flexible timeframe, it is entirely possible the appellant consumed 6-8 beers with the third witness between 0300 and 0430; drove to the convenience store to get more cigarettes between 0400 and 0500 as noted by Mr. Wojciak; and was drunk, red eyed and slurring his speech at about 0439, as noted by the MP. In fact, this scenario is the only one that harmonizes the testimony of all the witnesses. The appellant's contention that he actually drank 6-8 beers with the third witness sometime shortly after his encounter with the MP would put the third witnesses' recollection that the appellant was sober and didn't smell of alcohol when he arrived in direct conflict with the MP's recollection that the appellant was drunk during their encounter at the convenience store. The fact that the appellant had to borrow cigarettes from the third witness is also consistent with a later visit to the convenience store as opposed to an earlier one.

Taken together with the rest of the record, the sworn statement and testimony above provides strong circumstantial evidence that the appellant operated his truck shortly after having consumed 6-8 beers. This court is convinced that a

rational fact finder could have found the appellant guilty of this offense. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to Charge III.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense counsel was ineffective when he: (1) failed to object to Mr. Paul Wojciak's written statement (PE 2) on the basis of hearsay, foundation, authenticity, and the best evidence rule; (2) failed to demand the right to confront Mr. Wojciak; (3) failed to move to suppress the breathalyzer test reflected in PE 3 for lack of probable cause; and (4) failed to object to PE 3 on the basis of hearsay, foundation, and authenticity.

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 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 failure to make an objection or otherwise pursue a legal claim is not necessarily deficient conduct by counsel. If a claim is not shown to have a reasonable probability of being found meritorious as a matter of law and fact, the failure to pursue it is not error and certainly not ineffective assistance of counsel. *United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002).

In the instant case, the record suggests that Mr. Wojciak was employed locally. There is no evidence in the record or offered by the appellant that the witness could not have been called to either lay a proper foundation for PE 2 or to testify to the matters contained therein. Similarly, with respect to confrontation, there is no evidence in the record or offered by the appellant that, if confronted, Mr. Wojciak would have changed his story in any way. Absent evidence that the asserted objections would have a reasonable probability of being found meritorious, we find no error. With respect to the breathalyzer test, we find the statement of Mr. Wojciak and the testimony of

the MP provide ample probable cause to support the test. We find this assignment of error without merit.

Conclusion

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

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court