

**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.

**Richard S. ROWE
Chief Hospital Corpsman (E-7), U.S. Navy**

NMCCA 200600184

Decided 26 June 2007

Sentence adjudged 30 March 2005. Military Judge: R.G. Johnson. Staff Judge Advocate's Recommendation: CAPT D.L. Bailey, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Jacksonville, FL.

CAPT EDWARD S. MALLOW, JAGC, USN, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of attempted indecent communication with a child under the age of 16, and knowingly attempting to persuade or induce an individual under the age of 18 to engage in sexual activity, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, and a dishonorable discharge. Consistent with the pretrial agreement (PTA), the convening authority approved only so much of the sentence as provides for confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge.¹

¹ The convening authority also suspended execution of the adjudged and automatic reduction below E-5 in accordance with the PTA.

We have reviewed the record of trial, the appellant's four assignments of error,² the Government's response, and the record of a limited post-trial *DuBay*³ hearing. The appellant declined to submit any additional assignments of error following his receipt of the *DuBay* hearing record. 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.

Facts

The appellant pled guilty at a general court-martial to attempting to communicate indecent language to a child under the age of 16, and attempting to knowingly persuade and induce an individual under the age of 18 to engage in sexual activity. The events which formed the basis for these charges happened between August and December 2003.

The appellant, a chief petty officer corpsman in the United States Navy, had over 20 years of active service on the date of trial. His end of active obligated service (EAOS) date was in October 2003.⁴ In January 2004, the appellant's command formally placed him in a legal-hold status pending "trial by court-martial and completion of any sentence thereof." Appellate Exhibit XXXI. The charges were subsequently referred to trial

²I. APPELLANT'S PLEAS OF GUILTY ARE IMPROVIDENT SINCE THEY WERE BASED UPON A MATERIAL MISUNDERSTANDING OF A TERM IN THE PRETRIAL AGREEMENT, NAMELY, THAT THE PROTECTIONS IN THE REDUCTION IN RANK [SIC], WOULD STILL PERMIT THE APPELLANT'S FAMILY TO RECEIVE PAY WHILE HE WAS IN CONFINEMENT.

II. THE TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO THE APPELLANT BY FAILING TO EXPLAIN THAT THE SUSPENSION OF REDUCTION IN RANK [SIC] BELOW E-5 PROMISED IN THE PRETRIAL AGREEMENT WAS MEANINGLESS DUE TO THE EXPIRATION OF THE APPELLANT'S ENLISTMENT. MOREOVER, COUNSEL'S ADVICE THAT HIS PLEAS WOULD NOT REQUIRE APPELLANT TO REGISTER AS A "SEX OFFENDER" WAS INCORRECT, CAUSING APPELLANT'S PLEAS TO BE MADE WITHOUT A CLEAR UNDERSTANDING OF THE CONSEQUENCES OF HIS PLEAS [SIC].

III. A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE FOR APPELLANT WITH TWENTY FIVE YEARS OF EXEMPLARY SERVICE, WHO COMMITTED THE CRIME BY WAY [SIC] PRIVATE INTERNET CONVERSATIONS.

IV. THE TRIAL DEFENSE COUNSEL PROVIDED INADEQUATE ASSISTANCE TO THE APPELLANT BY FAILING TO INVESTIGATE POTENTIAL EVIDENCE AND DEFENSES, AND DID NOT PROVIDE ADEQUATE ADVICE AS TO ALL THE APPELLANT'S RIGHTS AND OPTIONS.

³ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968)

⁴ Documentation in the record reflects that the charges against the appellant were preferred on 19 Oct 04 and he was informally extended on active duty to stand trial by court-martial.

by general court-martial. After consultation and discussion with his trial defense counsel, the appellant entered into a PTA. In exchange for his pleas of guilty to the aforementioned charges and specifications, the convening authority agreed, *inter alia*, to suspend any reduction in rate below pay grade E-5. There was no protection on adjudged or administrative forfeitures or fines.

After the appellant commenced serving his confinement, he was placed in a no-pay status due to the expiration of his EAOS. The appellant claims that it wasn't until after his trial that he was ever informed his pay would stop and he would not receive pay while in confinement.

Procedural History

This record is with this court for a second time following our 7 February 2007 order returning the record to the Judge Advocate General of the Navy for remand to an appropriate convening authority, who was authorized to either order a *DuBay* hearing on the appellant's claim of ineffective assistance of counsel, or to order a rehearing on sentence. On 27 March 2007, a *DuBay* hearing was conducted. The record was subsequently returned to this court for further review.

The military judge made detailed findings of fact and conclusions of law. Appellate Exhibit XXXIV. We have carefully reviewed the record of the *DuBay* hearing to include the military judge's findings of fact. The appellant does not contest these findings and we find them adequately supported by the record. We adopt them as our own. Having carefully reviewed the record of trial, the appellant's assignments of error and the Government's response, we concur with the military judge that the appellant has not demonstrated his pleas were improvident or that his trial defense counsel was ineffective.

Improvident Pleas

In his initial assignment of error, the appellant avers that his pleas to the charges and specifications were improvident because they were based on a misunderstanding of a material term in the PTA. In short, the appellant contends that the primary impetus for his entering into this PTA was his misunderstanding that his family would continue to receive his pay while he was incarcerated.

The appellant specifically contends that he thought that by the convening authority agreeing to limit any reduction in pay grade, including any automatic reductions, his family would still receive E-5 pay during his incarceration. He further contends that he was misinformed regarding his exact EAOS. Had he known he was beyond his EAOS and that he would receive no pay during his confinement, he states that he would never have signed the agreement. His trial defense counsel disputes this allegation and maintains that the appellant's focus during the pretrial negotiation with the convening authority was on limiting confinement and trying to save his retirement pension. Trial Defense Counsel Affidavit of 29 Sep 2006 at 1. The trial defense counsel asserted that the appellant's main concerns and the defense strategy was to get the convening authority to give protection on reduction in rate and then put on a strong case during the sentencing phase in hopes that the appellant would not receive a punitive discharge and he could draw retirement pay at the E-5 rate. The TDC's version of events is consistent with the record. The appellant's contentions are not only contradicted by his trial defense counsel, they are not supported by either the trial record or the record of the *DuBay* hearing.

We first note that the PTA offered no protection to the appellant for forfeitures or fines. Had the military judge awarded forfeitures, the appellant would have forfeited his pay whether or not his EAOS had elapsed. Although he now contends that he did not go over the provisions of the PTA with his counsel and did not understand it,⁵ the military judge specifically walked the appellant through the provisions of his PTA to include the provisions dealing with forfeitures. The appellant indicated on the record that he had discussed this with his trial defense counsel and that he understood what the military judge had explained.⁶ We found nothing in the trial record or the limited *DuBay* hearing which would support the appellant's contention that he misunderstood a material provision of the PTA. We therefore find no substantial basis in law or fact to question the appellant's pleas. *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004).

Ineffective Assistance of Counsel

In assignments of error II and IV, the appellant makes a related contention that he was denied effective assistance of

⁵ *DuBay* hearing at 146

⁶ Record at 238-39, 243

counsel. Specifically, the appellant avers that he was misled by his trial defense counsel into entering into the PTA and did not fully understand the terms of the PTA; that his trial defense counsel erroneously advised him that he did not have to register as a sex offender given that these were only "attempt" charges; and that his trial defense counsel did not fully investigate potential defenses and did not advise the appellant as to all of his rights and options. Appellant's Brief of 31 Jul 2006 at 5-8, 10-11.

In reviewing allegations of ineffective assistance of counsel, we conduct a *de novo* review and apply the standards established in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). 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. The appellant has the burden of demonstrating: (1) that his counsel was deficient; and (2) that 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)).

"The *Strickland* test governs ineffective assistance of counsel claims in cases involving guilty pleas." *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006)(citing *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)). In a guilty plea case, an appellant must show that his counsel's performance was deficient, and "must also meet the prejudice prong under *Strickland*, which requires appellant to show specifically that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Alves*, 53 M.J. at 289 (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

We concur with the military judge's findings in the *DuBay* hearing that the appellant's trial defense counsel were not ineffective. As we discussed in the previous assignment of error, the appellant's testimony during the *DuBay* hearing

appears to be inconsistent with, and in some instances contradictory, to his testimony at trial. The appellant's contention of ineffective assistance of counsel, like his contention that his pleas were improvident, is unpersuasive.

The inconsistencies and contradictions in the appellant's testimony notwithstanding, it is clear that the trial defense counsel erroneously told the appellant that he would not have to register as a sex offender.⁷ This point is conceded by the Government. While the TDC's advice was inaccurate, we do not find that the appellant was materially prejudiced. Both the appellant and his counsel agree that limiting confinement and attempting to save the accused's retirement were of primary interest to the appellant. Based on these charges, the appellant's punitive exposure included 32 years of confinement. His PTA limited his confinement to one year. We find the appellant's claims that he would not have pled guilty had he been informed that he had to register as sex offender to be unconvincing. The Government's case was strong. Therefore, the appellant has not demonstrated that he was harmed by this erroneous advice. We find even though trial defense counsel's advice was erroneous; it was harmless beyond a reasonable doubt.

In assignment of error IV, the appellant further avers that the trial defense counsel provided inadequate assistance by failing to investigate and develop evidence and defenses, and did not adequately advise him of his rights and options. Appellant's Brief at 10.⁸ We find this allegation incredible given the appellant's representations at trial. The military judge specifically asked the appellant after he entered pleas if he had enough time to discuss his case with his counsel and if he felt their advice had been in his best interest. The appellant answered in the affirmative to both questions.⁹ Consequently, we find the appellant's assignments of error II and IV to be without merit.

Sentence Appropriateness

Finally, in his third assignment of error, the appellant argues that a sentence which includes a punitive discharge is inappropriately severe and requests that the bad-conduct

⁷ It is noted that this case was tried prior to our superior court's decision in *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006).

⁸ Issue raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

⁹ Record at 189-90

discharge not be affirmed. We have considered the appellant's record and the entire record of trial as well as the seriousness of his offenses.

After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268, 14 M.J. 267, 268 (C.M.A. 1982).

Accordingly, the approved findings and sentence are affirmed.

Senior Judge GEISER and Judge Bartolotto, concur.

For the Court

R.H. TROIDL
Clerk of Court