

**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.**

**Derek A. SMITH  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200501482

Decided 6 June 2007

Sentence adjudged 26 May 2005. Military Judge: D.M. Jones.  
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial  
convened by Commanding Officer, Combat Service Support Group-11  
(1st TSB), 1st Force Service Support Group, Camp Pendleton, CA.

LT STEPHEN C. REYES, JAGC, USN, Appellate Defense Counsel  
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of failure to go to his appointed place of duty, making a false official statement, three specifications of wrongful use of marijuana, and larceny of personal property of a value less than \$500.00, in violation of Articles 86, 107, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, 912a, and 921. The military judge sentenced the appellant to 6 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved only so much of the sentence as extended to confinement for 5 months,<sup>1</sup> reduction to pay grade E-1, and a bad-conduct discharge. In accordance with the terms of a pretrial agreement,

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<sup>1</sup> The convening authority's action effectively disapproved one month of the adjudged confinement. The record indicates that the convening authority acted on the advice of his staff judge advocate, who recommended the corrective action "[i]n an abundance of caution" upon discovering that the military judge had admitted evidence of a "stale" nonjudicial punishment during presentencing. Staff Judge Advocate's Recommendation of 26 Jul 2005 at 4. We note with appreciation the staff judge advocate's initiative and attention to detail in attempting to identify and cure possible legal error in the record at this stage of the post-trial process.

the convening authority also suspended all confinement in excess of 90 days for a period of 12 months from the date of his action.

We reviewed the record of trial, submitted without specific assignment of error. Following our review, we specified three issues for briefing by appellate counsel:

1. WHETHER THE APPELLANT'S PLEAS OF GUILTY WERE PROVIDENT WHERE THE MILITARY JUDGE, AFTER BEING INFORMED BY THE APPELLANT'S SWORN TESTIMONY THAT HE SUFFERED FROM PTSD, FAILED TO EXPLAIN TO THE APPELLANT THAT HE HAD A POSSIBLE DEFENSE AND ACCEPTED HIS PLEAS WITHOUT SECURING ADMISSIONS FROM THE APPELLANT THAT WOULD NEGATE THE DEFENSE? See RCM 910(e), Discussion.

2. WHETHER ADMISSION ON SENTENCING OF A NONJUDICIAL PUNISHMENT THAT WAS GREATER THAN TWO YEARS PRIOR TO THE CURRENT OFFENSES, WITHOUT OBJECTION BY DEFENSE COUNSEL, CONSTITUTED PLAIN ERROR WHERE TRIAL COUNSEL USED, AGAIN WITHOUT OBJECTION BY DEFENSE COUNSEL, THE STALE NONJUDICIAL PUNISHMENT IN ARGUING FOR A BAD-CONDUCT DISCHARGE, A BAD-CONDUCT DISCHARGE WAS AWARDED BY THE MILITARY JUDGE, AND THE BAD-CONDUCT DISCHARGE WAS APPROVED BY THE CONVENING AUTHORITY.

3. WHETHER DEFENSE COUNSEL'S FAILURE TO PRESENT ANY DOCUMENTARY EVIDENCE OR EXPERT TESTIMONY REGARDING THE APPELLANT'S DIAGNOSED POST TRAUMATIC STRESS DISORDER AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

N.M.Ct.Crim.App. Order of 15 Feb 2006 at 2-3. Upon further review, we specified a fourth issue:

WHETHER THIS COURT SHOULD ORDER AN R.C.M. 706 BOARD ON THE APPELLANT.

N.M.Ct.Crim.App. Order of 26 Apr 2006 at 2.

Upon receipt of briefs by appellate counsel, we have again reviewed the record of trial, the appellant's brief on the four specified issues, and the Government's response. We conclude that the findings and the 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.

### **Background**

During the plea inquiry for the failure to go offense, the appellant explained that he had failed to report for a scheduled formation because he had overslept from a lunchtime nap. Noting that the appellant had mentioned taking a nap during the earlier plea inquiry into the larceny offense, the military judge asked the appellant whether he had any sort of medical condition that

made him go to sleep. The appellant responded that during this time he had been taking the prescription medications Ambien, for insomnia, and Lexapro, for post-traumatic stress disorder (PTSD). The military judge advised the appellant that he would consider this as an extenuating circumstance for the failure to go offense, but did not ask any questions related to the claimed PTSD diagnosis or discuss PTSD as it related to any of the other offenses to which the appellant had pleaded guilty. The military judge did not ask the appellant's trial defense counsel whether she had explored any defenses related to the diagnosis. Neither the trial defense counsel nor the trial counsel requested any further inquiry by the military judge.

The appellant's wife testified as a defense witness during presentencing. In response to questions asked by the military judge, the appellant's wife testified that the appellant suffered from extremely bad nightmares and was not sleeping, that he was being treated with Ambien and Lexapro, and that he had been treated for alcohol abuse after returning from his first tour in Iraq. The appellant did not raise the PTSD diagnosis in his unsworn statement, nor did his trial defense counsel offer any documentary evidence or expert testimony related to PTSD. In her sentencing argument, the trial defense counsel stated that: "You heard from [the appellant's] wife that he suffers from some pretty severe PTSD, post traumatic stress disorder and extreme nightmares, things of that nature. Again, that is not an excuse for the misconduct here today, but it is something of an explanation for and [sic] it." Record at 76.

In aggravation, the trial counsel offered service record documents that contained evidence of a nonjudicial punishment which took place in 2002, more than 2 years prior to the charged offenses.<sup>2</sup> These documents also included evidence of a second nonjudicial punishment in 2005 that involved offenses committed after the appellant's return from his second tour in Iraq. The appellant's trial defense counsel did not object to the introduction of these documents. During sentencing argument, the trial counsel asserted, again without objection from the defense, that:

A BCD here is appropriate because [the appellant] has shown a very low ability to be rehabilitated and the fact that he has gone through two NJP's, and those two NJP's would have given him an opportunity to get himself back on track, but yet he didn't get himself back on track. He continued to do more misconduct.

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<sup>2</sup> The military judge noted that evidence of the 2002 nonjudicial punishment was "old," but admitted the entire exhibit and stated that he would review it more closely "later." Record at 67-68.

In addition, a BCD is appropriate in this case because of the number of offenses, the type of offenses that a BCD is adequate punishment because of this Marine's misconduct.

*Id.* at 75. The staff judge advocate's recommendation (SJAR) advised the convening authority that evidence of the appellant's 2002 nonjudicial punishment was "stale" and "should not have been admitted into evidence." SJAR of 26 Jul 2005 at 4; *see* Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0141 (15 Mar 2004).

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. The appellant did not submit matters in clemency to the convening authority. In response to an order from this court, the Government submitted the appellant's medical records, in relevant part, and a detailed affidavit from the appellant's trial defense counsel. The appellant's medical records confirm that he was being treated for PTSD during the timeframe of the charged offenses. In her affidavit, the appellant's trial defense counsel states that she was aware of the appellant's PTSD diagnosis, that she discussed this with him multiple times in preparing for trial, and that the manner in which she presented evidence of the diagnosis to the military judge was a calculated tactical decision based on her experience with other cases involving PTSD. Notably, the appellant's trial defense counsel assures the court that she would have requested an immediate R.C.M. 706 inquiry had she at any point questioned the appellant's mental competency.

### **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 the plea inquiry 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 virtually identical facts. In *United States v. Shaw*, \_\_\_ M.J. \_\_\_, No. 06-0403, 2007 CAAF LEXIS 537 (C.A.A.F. Apr. 24, 2007), the appellant mentioned for the first time during his unsworn statement that he had been diagnosed with bipolar disorder. *Id.* at 3. Although the military judge did not conduct any inquiry into the claimed diagnosis, the record contained no other evidence to substantiate the appellant's statement. *Id.* at 4, 8. Finding that the appellant had never asserted that 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 that 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 9. The court explained that given these facts, a military judge could safely presume that 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 that the evidence of PTSD 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. *See id.* at 13. We are particularly persuaded by the fact that, given the opportunity, the appellant has failed on appeal to produce any evidence or even allege that evidence exists to prove that he could satisfy the requirements of the affirmative defense of lack of mental responsibility. The detailed affidavit of his trial defense counsel also tends to negate any argument that he lacked mental responsibility for his offenses or the mental capacity to plead guilty to them. Accordingly, we conclude that the appellant's pleas are provident.

#### **Improper Evidence in Aggravation**

In response to the second specified issue, the appellant alleges that he was materially prejudiced by the erroneous admission of a "stale" nonjudicial punishment as evidence in aggravation. We disagree.

Where, as here, the appellant raised no objection to the evidence at trial, we must review the alleged error under the "plain error" standard. *United States v. Tovar*, 63 M.J. 637, 641

(N.M.Ct.Crim.App. 2006)(citing *United States v. Birdsall*, 47 M.J. 404, 409-10 (C.A.A.F. 1998)), *rev. denied*, 64 M.J. 233 (C.A.A.F. 2006). "To overcome waiver, appellant must convince us that (1) there was error; (2) that it was plain or obvious; and (3) that the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Schlamer*, 52 M.J. 80, 85-86 (C.A.A.F. 1999)); *see also United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). The Government concedes that the military judge erred when he admitted evidence of the appellant's 2002 nonjudicial punishment during presentencing, and that this error was plain or obvious. However, the Government argues that the error did not materially prejudice any substantial right of the appellant.

Assuming, without deciding, that the military judge erred when he admitted this evidence and that his error was plain or obvious, we find that the appellant has failed to demonstrate that he was materially prejudiced in any way. While the trial counsel did argue that the appellant's two nonjudicial punishments showed a lack of rehabilitative potential, she also argued that the number and type of the appellant's offenses warranted a bad-conduct discharge. Given the facts of this case, we find no reasonable probability that the appellant would not have received a bad-conduct discharge for his numerous offenses even if the stale nonjudicial punishment had been excluded. We also find it highly unlikely that the military judge even considered the improperly admitted evidence, given his comment that the 2002 nonjudicial punishment was "old". Record at 67. Finally, we are disinclined to grant relief for this alleged error where the convening authority has already done so. *See Convening Authority's Action of 26 Aug 2005 at 2.*

### **Ineffective Assistance of Counsel**

In response to the third specified issue, the appellant argues that his trial defense counsel was ineffective because she failed to present documentary evidence or expert testimony regarding his diagnosed PTSD. We disagree.

The U.S. 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 that his trial defense counsel failed to present the military judge with evidence as to the nature and extent of his condition, a mitigating factor that he suggests "could have affected the adjudged sentence." Appellant's Brief of 13 Jul 2006 at 6. In her affidavit to this Court, the appellant's trial defense counsel explains that PTSD is and was a very common issue among Marines facing court-martial at Camp Pendleton, and that she had handled many cases involving this issue. She notes that in her experience and professional opinion, documentary evidence of and expert testimony about PTSD was of negligible mitigation value before the military judges at Camp Pendleton due to the frequency with which this issue appeared. For these reasons, the appellant's trial defense counsel made a tactical decision to present evidence of the appellant's PTSD through his wife, who she believed would be a more sympathetic witness. We will not second-guess this well-reasoned tactical decision. Further, we find the appellant's claim that he "could have" been prejudiced to be vague and entirely speculative. Accordingly, we find that the appellant has failed to demonstrate either deficient performance or prejudice.

#### **R.C.M. 706 Inquiry**

In response to the fourth and final specified issue, the appellant urges this Court to order an inquiry into his mental capacity and mental responsibility pursuant to R.C.M. 706 and 1203(c)(5). We decline to do so.

R.C.M. 1203(c)(5) provides, in relevant part, that:

An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the appellate authority may direct that the record be forwarded to an appropriate authority for an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings.

The appellant asserts that the medical records submitted by the Government in response to our order now provide this court with documentary evidence as to the severity and symptoms of his condition. The appellant alleges that this evidence raises a

substantial question as to his mental state at the time of his offenses, during his trial, and at the present. However, the appellant has failed to present this court with any argument whatsoever as to how his PTSD might have impacted his mental responsibility for his offenses, his mental capacity to plead guilty at trial, or his mental capacity to cooperate intelligently in his defense on appeal. We have previously concluded that the evidence of PTSD presented at trial was insufficient to merit further inquiry, and the appellant's trial defense counsel has assured us that she was fully aware of the appellant's condition and never saw any reason to request an inquiry pursuant to R.C.M. 706. Indeed, we note that the appellant's first appellate defense counsel appeared to have no concerns about the appellant's mental capacity or mental responsibility until this court specified the issue.<sup>3</sup> Having reviewed the medical records submitted by the Government, we find that they do not present a substantial question as to the appellant's capacity to understand and cooperate intelligently in the appellate proceedings. Accordingly, we find no cause to order an examination of the appellant pursuant to R.C.M. 706.

#### **Conclusion**

We affirm the findings and the sentence, as approved by the convening authority. As the record of trial contains the appellant's medical records, which were produced in response to this Court's order, we now order that portion of the record sealed.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>3</sup> The counsel responding to the specified issues was assigned to represent the appellant after the court specified the issues in this case.