

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

**Before  
J.F. FELTHAM, J.D. HARTY, R.G. KELLY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JUSTIN R. STRAYER  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200602358  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 20 July 2005.

**Military Judge:** LtCol T.A. Daly, USMC.

**Convening Authority:** Commanding Officer, 3d Battalion, 11th Marines, 1st Marine Division (REIN), FMF, MCAGCC, Twentynine Palms, CA.

**Staff Judge Advocate's Recommendation:** LtCol D.J. Erickson, USMC.

**For Appellant:** CDR Brent Filbert, JAGC, USN; Capt Sridhar Kaza, USMC.

**For Appellee:** CDR R.J. Verby, JAGC, USN; LCDR G.J. Rojas, JAGC, USN; LT Jessica Hudson, JAGC, USN; LT Justin Dunlap, JAGC, USN.

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

HARTY, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence terminated by apprehension and one specification of missing movement through design, in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887.

The appellant was sentenced to confinement for 90 days, reduction to pay grade E-1, forfeiture of \$700.00 pay per month for three months and a bad-conduct discharge. As the appellant's pretrial agreement had no impact on the sentence, the convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's original assignment of error<sup>1</sup> and three supplemental assignments of error,<sup>2</sup> the Government's Answers, the appellant's Reply, and the post-trial affidavits. 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.

### **Background**

The appellant was assigned to 3d Battalion, 11th Marines, 1st Marine Division, located at Marine Corps Air Ground Combat Center, Twentynine Palms, California (29 Palms). The appellant left 29 Palms for a 72-hour liberty and failed to return on 19 April 2005 as required. Several days into his unauthorized absence, the appellant spoke with his platoon sergeant, who advised him to return to his unit, which was set to deploy to Okinawa on 29 April 2005. On 20 June 2005, local law enforcement arrested the appellant at his home in Macon, Georgia, for being a deserter from the Marine Corps.

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<sup>1</sup> WHETHER APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING?

<sup>2</sup> I: WHETHER THE APPELLANT'S PLEAS OF GUILTY WERE PROVIDENT WHERE THE MILITARY JUDGE, AFTER HAVING BEEN INFORMED BY WAY OF THE APPELLANT'S UNSWORN STATEMENT THAT THE APPELLANT WAS DIAGNOSED WITH POST-TRAUMATIC STRESS DISORDER, FAILED TO REOPEN PROVIDENCE TO QUESTION THE APPELLANT AND TRIAL DEFENSE COUNSEL CONCERNING A POSSIBLE MENTAL RESPONSIBILITY DEFENSE?

II: WHETHER DEFENSE COUNSEL'S FAILURE TO PRESENT ANY EVIDENCE REGARDING THE APPELLANT'S DIAGNOSED POST-TRAUMATIC STRESS DISORDER, EITHER AS A DEFENSE AT TRIAL, AS MITIGATION IN SENTENCING, OR IN POST-TRIAL REPRESENTATION AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL?

III: WHETHER A SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE IN THIS CASE WHERE THE APPELLANT WAS A VETERAN OF TWO COMBAT TOURS IN IRAQ, WAS AWARDED THE COMBAT ACTION RIBBON, AND HAD BEEN DIAGNOSED WITH A POST-TRAUMATIC STRESS DISORDER?

## Post-Trial Delay

For his original assignment of error, the appellant claims that his right to speedy post-trial review was violated by the Government taking more than 16 months to docket this case on appeal,<sup>3</sup> resulting in material prejudice in the form of lost employment opportunity. In the alternative, the appellant argues that if there is no due process violation, the length of delay impacts the sentence that should be approved pursuant to Article 66(c), UCMJ. Appellant's Brief and Assignment of Error of 29 Dec 2006 at 3-8; Motion to Attach Declaration of Appellant of 29 Dec 2006. The Government argues that the appellant's self-serving declaration is too speculative to establish the prejudice required for a due process violation. Government's Answer of 17 Jan 2007 at 5-6. We do not find a due process violation, and we do not believe the delay impacts the sentence that should be approved.

In cases involving speedy post-trial review due process issues, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006); *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). Assuming, without deciding, that the delay in this case resulted in constitutional error, we find any possible error was harmless beyond a reasonable doubt based on the appellant's own filings.

The appellant argues that he applied for and was rejected for employment because he had not received his DD-214 discharge paperwork. To support this argument, the appellant provides a sworn declaration in which he lists employers that have rejected him for employment. That declaration, however, provides nothing more than the potential employers' names. The appellant does not provide application dates, employer addresses, or contact information for the referenced employers. Nor are there any affidavits from the named employers. Although the appellant states that it is his understanding that he was denied employment due to not having a DD-214, he does not state what supports that understanding. In essence, the appellant has failed to provide sufficient detail upon which his assertions can be verified, and they are speculative at best. Under these circumstances, we conclude that the appellant has failed to show even the slightest prejudice, and, therefore, we find that the record as a whole demonstrates that any error was harmless beyond a reasonable doubt. See *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005)(on-going prejudice established by detailed affidavit and potential employer affidavits).

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<sup>3</sup> The appellant was tried on 20 July 2005 and his case was docketed with this court on 28 November 2006, for a total of 469 days.

We are also aware of our authority to grant relief under Article 66, UMCJ, even in the absence of a due process violation. *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We decline to do so as we do not believe that the post-trial delay affected the findings and sentence that should be approved in this case.

### **Improvident Plea**

The appellant's first supplemental assignment of error claims that his guilty pleas were improvident because: (1) the military judge failed to reopen the providence inquiry when the appellant stated that a psychiatrist diagnosed him with post-traumatic stress disorder (PTSD); and, (2) his post-trial declaration establishes both that he had PTSD and that he surrendered to military control prior to his apprehension. Appellant's Supplemental Brief and Assignment of Errors of 25 May 2007 at 2-7. We disagree.

#### 1. The law

A military judge may not accept a guilty plea without inquiring into its factual basis. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). The standard of review to determine whether a plea is provident is whether 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). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

If, during the providence inquiry or sentencing, the military judge is presented with evidence or information that presents a possible defense or creates an inconsistent fact pattern with the plea, the military judge has a duty to resolve the inconsistency or to reject the plea. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)(quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)); RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). A service court of criminal appeals will not reverse the acceptance of a guilty plea "unless it finds a *substantial conflict* between the plea and the accused's statements or other evidence of record." *Shaw*, 64 M.J. at 462 (quoting *Garcia*, 44 M.J. at 498)(emphasis added). The mere possibility of a substantial conflict "is not a sufficient basis to overturn the trial results." *Id.* (quoting *Garcia*, 44 M.J. at 498)(quoting *United States v. Prater*, 32 M.J. at 436 (internal quotation marks omitted). We must determine "whether [the] [a]ppellant's reference to his [PTSD] condition in the plea context 'set[] up matter raising a possible defense,' as in *Phillippe*, or whether it presented only a 'mere possibility' of a defense, as in

*Prater. Id.* (quoting *United States v. Phillippe*, 63 M.J. 307, 310-11 (C.A.A.F. 2006); *Prater*, 32 M.J. at 436-37).

## 2. Analysis

The record does not reveal any issues with the accused's behavior during the court-martial. His pleas and colloquy with the military judge appear crisp and logical. His unsworn statement, albeit short, was coherent and presented a logical chain of events and some mitigating circumstances for the military judge's consideration. We do not discern any indication from the appellant's in-court discussions with the military judge that raise any indication that might have suggested to the military judge that the appellant lacked the capacity to plead. Had there been any in-court indication, it may have prompted the military judge to inquire into the appellant's mental responsibility at the time of the guilty plea and the offenses.

Even now on appeal, the appellant does not claim that he was unable to appreciate the nature and quality or wrongfulness of his acts as a result of a mental disease or defect. Unlike in *Phillippe* where the appellant's unsworn statement raised the possibility of the complete defense of early termination to the charged unauthorized absence, the appellant's unsworn statement, without more, did not raise an apparent inconsistency with his guilty plea. Here, it was reasonable for the military judge to rely on "both a presumption that the accused is sane [footnote omitted] and the long-standing principle that counsel is presumed to be competent." *Shaw*, 64 M.J. at 463 (citing *United States v. Cronin*, 466 U.S. 648, 658 (1984)). Therefore, when a matter is raised during an unsworn statement but does not present an apparent or possible defense in and of itself, the "military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the defense." *Id.*

Accordingly, we conclude that the appellant's mention of a PTSD diagnosis in his unsworn statement, without further evidence, only raised the mere possibility of a defense. Therefore, the record does not reveal a substantial basis in law and fact for questioning the appellant's guilty plea, and the military judge did not abuse his discretion by accepting that plea. That however, does not end our analysis, because the appellant has submitted post-trial evidence concerning his diagnosis.

The appellant's post-trial evidence presented to this court<sup>4</sup> consists of a two-page medical record and his own declaration, showing that he received mental health care at Warner Robins Air Force Base on 16 May 2005<sup>5</sup> resulting in an Axis I diagnosis of "Anxiety Disorder NOS (R/O PTSD vs. Adjustment Disorder with Mixed Anxiety and Depressed Mood)." Consent Motion to Attach Documents of 25 May 2007, enclosure 2 at 2. The Government submitted an affidavit from the appellant's detailed trial defense counsel (TDC) addressing the same issues raised by the appellant. Government Response to Court Order of 9 Aug 2007 filed 20 Aug 2007.

The appellant asserts that his post-trial filings establish two bases for challenging the providence of his guilty plea to the unauthorized absence. First, he claims that these documents support his position that the military judge should have reopened the providence inquiry, and invites this court to set precedent, based on public policy grounds, requiring military judges to fully explore PTSD issues on the record before accepting a guilty plea. Appellant's Supplemental Brief at 6. Second, the appellant claims that the medical record raises the defense of early termination to the unauthorized absence based on the appellant's surrender to military control when he met with the Air Force health care provider. The appellant speculates that if the military judge had questioned him about his PTSD diagnosis, the military judge would have learned about his earlier contact with the military community. *Id.*

As to the appellant's first position, we decline to create a *per se* rule that requires military judges to fully explore a PTSD issue based on public policy grounds. While we agree that military judges should be alert at all times to the possibility of potential defenses, current military justice precedent already covers the military judge's obligation in this circumstance. We have already concluded that the military judge did not abuse his discretion in accepting the appellant's plea based on the evidence before him, and for reasons stated later, we do not believe that the medical record or a more in depth providence inquiry into the appellant's claim of PTSD would have resulted in a different result. As to the appellant's second assertion, that further providence inquiry would have revealed his

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<sup>4</sup> The appellant's clemency request of 27 June 2006 did not contain any reference to PTSD.

<sup>5</sup> The medical record refers to a three-page document. The appellant has provided the first two pages. The initial medical appointment of 16 May 2005 was more than two months prior to the appellant's court-martial of 20 July 2005, and occurred during his period of unauthorized absence - 20 April 2005 through 18 June 2005. That same medical record states that the appellant began taking Zoloft two weeks prior to his appointment at the Air Force medical facility.

early surrender to military control, we conclude that the record as a whole provides a basis to reject the appellant's claim. Because this issue is raised by a post-trial declaration, we will resolve the issue based on our limited fact-finding authority and our superior court's precedent concerning competing post-trial affidavits.

Our Article 66(c), UCMJ, mandate, provides this court with fact-finding powers which are not unlimited. They are expressly couched in terms of our review of a trial court's findings of guilty and that court's prior consideration of the evidence. *United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997). Therefore, Article 66(c), UCMJ, does not authorize this court to determine innocence on the basis of evidence not presented at trial or to use our fact-finding powers to resolve factual disputes based on post-trial affidavits. *Id.* at 242-43. We can, however, weigh post-trial affidavits for the purpose of determining whether a post-trial fact-finding hearing is required or whether we can resolve an appellate issue without that hearing. *Id.* at 242. Under the principles announced in *Ginn*, we conclude that: (1) the record compellingly demonstrates that the appellant was not diagnosed with PTSD;<sup>6</sup> and, (2) it is purely speculative that the appellant would have revealed the date of the evaluation or his contact with military authorities to the military judge even if asked.

First, the appellant's declaration and his detailed trial defense counsel's (TDC) affidavit<sup>7</sup> are not at material odds on what the appellant wanted out of his court-martial - he wanted out of the Marine Corps even if it meant with a punitive discharge. As to the medical information, the appellant made his TDC aware of his medical assessment but chose to proceed against his counsel's advice concerning the use of that information. Even if the medical record presented to this court was presented to the military judge, it compellingly demonstrates that the appellant was not diagnosed with PTSD.

Second, as to the issue of an early surrender to military authorities, the appellant speculates that he would have told the military judge about that surrender if asked. When he was asked about military contact, the appellant disclosed that there was telephone contact with his platoon

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<sup>6</sup> The medical record compellingly demonstrates that the appellant was diagnosed with an anxiety disorder with symptoms that are consistent with either PTSD or an adjustment disorder. The appellant has conveniently chosen the PTSD possibility as the final Axis I diagnosis.

<sup>7</sup> The TDC's affidavit incorporates the attached Bad-Conduct Discharge Advisement letter, often called a *Blunk* letter, signed by the appellant. See *United States v. Blunk*, 37 C.M.R. 422 (C.M.A. 1967).

sergeant a couple of days into the period of unauthorized absence. Record at 18. When specifically asked if he took any action during the unauthorized absence period that was an attempt to surrender himself to military control, the appellant stated "No, sir." *Id.* When asked if he could think of any reason why he would not be guilty of the unauthorized absence, the appellant again stated "No, sir." *Id.* at 19. Even if the military judge reopened providence to inquire about PTSD, under the circumstances here, we have no reason to believe that the appellant would have disclosed any information that was contrary to his goal - separation from military service - including evidence that he surrendered to military control at the time of his medical appointment. We, therefore, do not find a substantial basis in law and fact to question the appellant's guilty pleas.

### **Ineffective Assistance of Counsel**

For his second supplemental assignment of error, the appellant claims that his defense representation was constitutionally ineffective. Appellant's Supplemental Brief at 7-9. Specifically, the appellant claims his TDC was defective in not presenting any evidence of the appellant's PTSD diagnosis, not requesting an R.C.M. 706 board, and not asserting an early termination defense to the unauthorized absence offense. *Id.* at 8. We disagree.

#### 1. The law

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). Even if defense counsel's performance was deficient, the appellant is not entitled to relief unless he was prejudiced by that deficiency. *United States v. Quick*, 59 M.J. 383, 385 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 687). Applying the principles adopted in *Ginn*, we conclude that even if the facts in the appellant's declaration are true, he has not carried his burden to overcome the presumption of competence or to show prejudice if his TDC's performance was deficient.

To meet the deficiency prong the appellant must show that his defense counsel made errors so serious that his counsel was not functioning as "counsel" guaranteed 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. *Id.* In other words, in order to satisfy the "prejudice" requirement,

the defendant must show that there is a reasonable probability that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial. *Ginn*, 47 M.J. at 246-47.

The appellant's declaration and the trial defense counsel's affidavit state that trial defense counsel was aware of the appellant's basic underlining facts: (1) that he was in an unauthorized absence status; (2) that the appellant went to a military hospital during his absence; (3) that the appellant met with military authorities at the hospital; and, (4) that the appellant claimed to be diagnosed with PTSD. The TDC's interactions with the appellant gave him no reason to believe that he lacked mental capacity to stand trial or that he lacked mental responsibility for his actions. Knowing that the accused had some interaction with military authority during his unauthorized absence period, it is presumed that the trial defense counsel investigated these facts and came to a determination that they did not present a viable defense.<sup>8</sup> *See Shaw*, 64 M.J. at 463.

Alternatively, even if the TDC believed the appellant may have had a defense, raising that defense is a tactical decision to be made taking into consideration the appellant's desires. The post-trial pleadings make clear that the appellant did not want certain defenses raised and proceeded contrary to his counsel's advice on this issue. "As a general matter, [t]his Court will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Paxton*, 64 M.J. 484, 489 (C.A.A.F. 2007)(quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)(internal quotation marks omitted).

Additionally, the appellant has not shown that, but for the claimed deficiencies, he would have insisted on going to trial. Nowhere in his post-trial pleadings does the appellant state that he would have pled not guilty and demanded a trial on the merits. To the contrary, he professes that "I know I went UA and I deserved to be punished." As the appellant himself foreclosed the possibility of altering his plea in his post-trial affidavit, there is no reasonable probability that his plea would

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<sup>8</sup> 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. Terlap*, 57 M.J. 344, 349 (C.A.A.F. 2002). The underlining facts of the case, as sworn to by the appellant during his guilty plea combined with his declaration, do not provide him with a meritorious claim or defense to his charges. *See United States v. Rogers*, 59 M.J. 584, 587 (Army Ct.Crim.App. 2003)(accused must *physically* present himself to someone with authority to apprehend him and with the intent to return to military duty).

change. Under these circumstances, we do not find that the TDC's performance was deficient or that the appellant suffered prejudice.<sup>9</sup>

### Conclusion

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

Senior Judge FELTHAM and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>9</sup> We have considered the appellant's third supplemental assignment of error claiming that a bad-conduct discharge is inappropriately severe. After careful consideration of the entire record, the seriousness of the appellant's offenses, and his military service, we independently conclude that the sentence is appropriate for this offender and his offenses. See *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 (C.M.A. 1982).