

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

**Before
C.L. REISMEIER, E.E. GEISER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOE L. BATTLE, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900603
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 27 May 2009.

Military Judge: Col Daniel J. Daugherty, USMC.

Convening Authority: Commanding Officer, Marine Air Wing Support Squadron 272, Marine Wing Support Group 27, 2d Marine Aircraft Wing, Jacksonville, NC.

Staff Judge Advocate's Recommendation: Maj S.D. Schrock, USMC.

For Appellant: CDR R.D. Evans, Jr., JAGC, USN.

For Appellee: Capt Michael W. Aniton, USMC.

25 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of wrongful distribution of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The approved sentence was a letter of reprimand, confinement for 90 days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises three assignments of error. First, he asserts that the military judge erred when he failed to inquire into the potential defense of entrapment. Second, the appellant avers that a punishment including a bad-conduct discharge was

inappropriately severe. Finally, the appellant argues that his trial defense attorney was ineffective when he failed to submit the appellant's combat record during the sentencing portion of the trial or as a matter in clemency.

We have examined the record of trial, the appellant's assignments of error, and the Government's response. We find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Entrapment

The stipulation of fact and the providence inquiry reveal that the appellant was approached by Lance Corporal (LCpl) Jones, a former member of his platoon with whom he'd served in Iraq. LCpl Jones requested that the appellant provide him with Percocet for relief of pain. Unbeknownst to the appellant, the man was an informant for the Naval Criminal Investigative Service (NCIS) sent to purchase drugs.

The appellant had been prescribed Percocet for a hip injury. The appellant explained that the requestor was a "war-buddy" who was one of several Marines the appellant felt particularly close to due to their shared combat experiences in Iraq. Record at 44-45. The appellant informed the military judge that he repeatedly declined to provide the drugs but that his friend persisted. The appellant acknowledged that he eventually provided 4 Percocet pills to LCpl Jones along with a pair of shoes in return for \$80.00. In a sworn statement to NCIS, the appellant acknowledged having previously given Percocet pills away to family members.¹

Although he initially denied receiving money for the drugs, after consultation with counsel, he eventually admitted to the military judge that the money was for both the drugs and the shoes. Record at 38. In light of the fact that his friend was working for NCIS, the appellant now argues that the facts above were sufficient to require the military judge inquire into the defense of entrapment.

A military judge's decision to accept or reject an accused's guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). An abuse of discretion is more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). We will find a military judge abused his discretion in

¹ At trial, the military judge ruled that he would not consider anything in the appellant's NCIS statement after the appellant arguably invoked his right to remain silent by stating, "I got nothing to say." The portion of the statement considered by the military judge included the admission that he gave Percocet pills to family members. Prosecution Exhibit 4 and Record at 39.

accepting a guilty plea only if the record shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Rejecting a guilty plea 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 an appellant's statements or other evidence offered on his behalf appear inconsistent with his initial guilty plea, the military judge should conduct a thorough inquiry to determine the appellant's position regarding the apparent inconsistency. *United States v. Parker*, 10 M.J. 849, 851 (N.C.M.R 1981). The military judge is not, however, required to "embark on a mindless fishing expedition to ferret out or negate all possible defenses or potential inconsistencies." *United States v. Jackson*, 23 M.J. 650, 652 (N.M.C.M.R 1986). A "mere possibility" of a conflict is insufficient to render a providence inquiry inadequate. *United States v. Sanders*, 33 M.J. 1026, 1028 (N.M.C.M.R. 1991).

Entrapment is a defense if the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense. RULE FOR COURTS-MARTIAL 916(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The fact that LCpl Jones was working for NCIS and persisted in asking for drugs after the appellant's initial refusals does not, without more, constitute entrapment. R.C.M. 916(g), Discussion. The evidence also shows that the appellant took money for the drugs, which suggests other motives beyond his claim of merely helping an insistent friend. Further, we note that the appellant acknowledged having previously provided Percocet to family members. Finally, the military judge inquired into the defense of duress. In this context, the appellant assured the military judge that LCpl Jones' entreaties did not compel him to commit the offense and that he could have avoided providing the drugs if he'd wanted to. In view of this, we do not find that the military judge erred by not inquiring into the defense of entrapment. Consequently, we do not find a substantial basis in law or fact to overturn the military judge's acceptance of the appellant's guilty pleas.

Sentence Severity

The appellant argues that a bad-conduct discharge is inappropriately severe for the offense of distributing prescription pain medication to another Marine on a military installation. We have considered the appellant's record, to include his exemplary combat record in Iraq, his physical injuries, and the entire record of trial. We have also considered the seriousness of his offense. Intentionally distributing controlled pain medication to another military member onboard a military installation is a serious offense. Added to his instant offense, is the appellant's prior misconduct which resulted in an administrative discharge recommendation based on a pattern of misconduct. The maximum punishment

authorized for distributing controlled substances on a military installation includes a dishonorable discharge. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (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).

Ineffective Assistance of Counsel

The appellant's exemplary war record was amply demonstrated on the record to the extent that it resulted in a specific clemency recommendation by the military judge. Record at 55. While other documents might have highlighted specific details of the appellant's service, we find that counsel's failure to offer such additional documentation was not error. Assuming, *arguendo*, that counsel did err by not submitting additional documentation of the appellant's war record, any such error did not prejudice the appellant in view of the approved sentence. *Strickland v. Washington*, 466 U.S. 668 (1984).

Conclusion

The findings and approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court