

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

**Before
J.A. MAKSYM, J.R. PERLAK, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**LINCOLN J. CRALL
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200900503
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 September 2008.

Military Judge: LtCol Jeffrey Meeks, USMC.

Convening Authority: Commanding General, 1st Marine
Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col B.D. Landrum,
USMC.

For Appellant: Patrick J. Callahan, Esq.; Maj Kirk
Sripinyo, USMC.

For Appellee: Capt Robert Eckert, USMC.

31 August 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice, 10 U.S.C. § 919. The military judge sentenced the appellant to four years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence but granted clemency and suspended confinement in excess of 2 years.

The appellant now alleges two primary errors: (1) that the military judge committed plain error when he failed to consider the affirmative defense of lack of mental responsibility; and (2) that his trial defense counsel were ineffective in (a) failing to suppress the appellant's statement to the Naval Criminal Investigative Service (NCIS), (b) failing to object to the court recognizing Special Agent Keleher as an expert witness, (c) by failing to request an appropriate remedy for trial counsel's discovery violation, and (d) by failing to object to Prosecution Exhibits 12 and 13.

We have examined the record of trial and the pleadings by all parties. 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

Following his second deployment to Iraq, the appellant, an infantry Marine, was assigned to a barracks room with Corporal (Cpl) Bergfalk. Cpl Bergfalk showed the appellant a 1911 .45 caliber pistol which he unlawfully possessed. During the early evening of 20 January 2008, the appellant and Cpl Bergfalk were in their barracks room, along with several other Marines. The appellant picked up the pistol and moments later, the weapon discharged, killing Lance Corporal Babcock. The manner in which the weapon discharged was the primary matter of dispute at trial. The Government alleged that Cpl Bergfalk told the appellant the weapon was in condition one, meaning that the weapon was loaded and ready to fire, and that the appellant, not believing him, pulled the trigger. The appellant presented evidence that he suffered from post-traumatic stress disorder (PTSD) and argued that in his hyper vigilant state, he was attempting to clear the weapon when it accidentally fired.

Affirmative Defense

The appellant's first assigned error alleges that the military judge committed plain error by failing to consider the defense of lack of mental responsibility. A military judge is presumed to know the law and apply it correctly. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). Assuming, without deciding, that the appellant reasonably raised the affirmative defense of lack of mental responsibility, a military judge, sitting alone as a court-martial, is not required *sua sponte* to make separate special findings; however, he shall do so upon request by any party. RULE FOR COURTS-MARTIAL 918(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The appellant made no such request at any time during trial; furthermore, he does not articulate how the military judge failed to consider his defense in reaching the findings.

Contrary to the appellant's assertion, there is ample evidence in the record of trial that the military judge considered the affirmative defense. The military judge requested briefs from both parties on the issue of PTSD and mental responsibility, asked questions of the defense expert on PTSD with regards to the wrongfulness of the appellant's actions, and questioned the Government's mental health expert on the testimony from the defense expert. Record at 335-37, 461-62, 464-66; Appellate Exhibit XIII. We find the appellant's assignment of error to be without merit.

Ineffective Assistance of Counsel

In his second assignment of error, the appellant alleges that his trial defense counsel were ineffective. To that end, the appellant carries the burden to show both that his counsel's performance was deficient and that the deficiencies were so serious as to deprive him of a fair trial. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). However, we must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

[We apply] a three prong test to determine if the presumption of competence has been overcome:

- (1) Are the allegations true; if so, "is there a reasonable explanation for counsel's actions?";
- (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
- (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

Id. (quoting *United States v. Grigoruk*, 56 M.J. 304, 307 (C.A.A.F. 2002)). In applying the test, we evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel. *Id.* However, we "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Maza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001)). When an appellant assails the trial strategy or tactics of the defense counsel, he carries the burden to demonstrate specific defects in his counsel's performance that were "unreasonable under prevailing professional norms." *Id.* (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (internal quotation marks omitted)).

Appellant's NCIS Statement

The appellant alleges that his trial defense counsel were ineffective in failing to move the court to suppress his statement to NCIS. Whether or not his counsel would have succeeded in suppressing the appellant's statement to NCIS is not the question before this court. Instead, we are asked to examine whether or not his trial defense counsel's decision to not object to the admission of the statement was ineffective. We find that it was not; the appellant's defense counsel made a tactical decision to not object for several reasons. First, the appellant and his trial defense counsel decided that the appellant would testify at trial to explain the circumstances of the shooting, and his trial defense counsel reasoned at that point, the appellant statement would be used against him during cross examination. Second, the trial defense counsel realized that the appellant's statement to NCIS was, in the main, consistent with the defense strategy at trial -- that the appellant was not mentally responsible for the shooting. The portions of the statement that were inconsistent with the defense would be corroborated by Government witnesses. We find the appellant's trial defense counsel were not ineffective in not objecting to the appellant's statement to NCIS.

Expert Testimony

The appellant next alleges that his trial defense counsel were ineffective in failing to object to the trial court's recognition of Special Agent Keleher as an expert in the functionality of the 1911, .45 caliber firearm. Similarly, the trial defense counsel had reasonable grounds to not object. A witness may be qualified as an expert by knowledge, skill, experience, training, or education. MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Special Agent Keleher testified as to the extensive experience he had in owning and operating 1911s. There is no evidence that the particular model of firearm at issue in this case was so unique that Special Agent Keleher's knowledge and experience with 1911's were inadequate to allow him to render an opinion as to the functionality of this particular firearm. To the contrary, both the Special Agent and the defense's own expert testified that the firearm was not modified and is typical of the 1911 model. Additionally, both Special Agent Keleher and the defense's firearm expert testified that the weapon was functioning properly. The appellant could not have been prejudiced by testimony consistent with his own expert. We find no merit in this assigned error.

Remedy for Discovery Violation

The appellant also asks this court to further find his trial defense counsel ineffective in failing to ask for a sufficient remedy in light of the trial counsel's discovery violation. The trial defense counsel requested all statements from Government

witnesses be turned over as part of discovery. During the redirect examination of Private (Pvt) Bergfalk, it was revealed that the trial defense counsel were never provided the transcript of Pvt Bergfalk's testimony at the private's own court-martial.

To begin, the appellant's civilian trial defense counsel, in her affidavit, is mistaken in her belief that the basis for a mistrial or dismissal of charges requires bad faith or intentionality on the part of the trial counsel -- there is no such requirement. See *Brady v. Maryland*, 373 U.S. 83 (1963). The aim of the remedy sought is not to punish the Government for any misdeeds, but rather to avoid an unfair trial to the accused. *Id.* In this case, the discovery violation became evident during trial, at which point the military judge ordered the Government to produce and to turn over to the defense the transcript of Pvt Bergfalk's testimony. The military judge further gave the defense an opportunity to recall Pvt Bergfalk if they found anything substantive in the transcript. Upon review of the transcript, the appellant's trial defense counsel concluded that they were satisfied with the cross examination of Pvt Bergfalk and chose not to recall him to the stand. Based upon these circumstances, the appellant did not receive ineffective assistance of counsel.

Prosecution Exhibit

Finally, the appellant avers that his trial defense counsel were ineffective in failing to object to the Government's introduction of Prosecution Exhibits 12 and 13 during sentencing. Again, we are asked to review the trial defense counsel's decision to not object to photographs and video footage of the victim during sentencing. In this case, both of the trial defense counsel considered the evidence beforehand and consciously made a decision not to object. They further noted their familiarity with the particular military judge in this case and did not feel that he would be overly prejudiced by the footage. Finally, the trial counsel is permitted to present evidence as to any aggravating circumstances "resulting from the offenses of which the accused has been found guilty." RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We therefore find no merit in this assigned error.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court