

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES K. SAGER
INFORMATION SYSTEMS TECHNICIAN SEAMAN APPRENTICE (E-2)
U.S. NAVY**

**NMCCA 201000213
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 December 2009.

Military Judge: CDR Mario H. De Oliveira, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: LCDR F.J. Yuzon,
JAGC, USN.

For Appellant: LT Michael R. Torrissi, JAGC, USN.

For Appellee: CDR James B. Melton, JAGC, USN; Maj Elizabeth
A. Harvey, USMC.

9 November 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was tried by general court-martial with enlisted representation. Pursuant to his pleas, the military judge found the appellant guilty of one specification each of unauthorized absence and wrongful use of cocaine, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant pleaded not guilty to one specification of wrongful introduction of cocaine onto a naval installation and one specification of wrongful distribution of cocaine, in violation of Article 112a, UCMJ. At the conclusion of the Government's case in chief, the military judge dismissed

the contested charges pursuant to RULE FOR COURTS-MARTIAL 907, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The adjudged sentence included confinement for fifty-three days, reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the sentence.

The appellant raises two errors on appeal: (1) that the military judge's ruling on the admissibility of the drug lab report and expert testimony deprived him of his sixth amendment right to confrontation; and, (2) that his Trial Defense Counsel was ineffective by failing advise him that his guilty plea would waive his sixth amendment issue on appeal.

Statement of Facts

On 18 August 2009, the appellant submitted to a voluntary urinalysis and his urine sample was sent to the Navy Drug Screening Laboratory, Jacksonville, Florida for testing. Prior to its testing, the appellant's urine sample was assigned laboratory accession number J09H0620083 and placed in a batch of 100 other urine samples, 3 of which were quality control samples. Approximately 15-20 laboratory technicians tested the urine sample and or made clerical annotations on the laboratory report for the appellant's urine sample. On 26 August 2009, the sample tested positive for the cocaine metabolite.

The appellant was charged with the illegal use of cocaine, distributing cocaine, introducing cocaine onto a military installation and unauthorized absence. Prior to trial, the appellant filed a motion *in limine* to bar the admission of the drug laboratory report documenting the results of his drug test unless each analyst who participated in the testing testified at trial. The appellant argued that admitting the laboratory report without the testimony of the persons who conducted the testing would violate the Confrontation Clause of the Sixth Amendment. The military judge ruled that the laboratory report, less the cover letter, was non-testimonial hearsay, and thus admissible.

Immediately following the military judge's ruling, the appellant entered pleas of guilty to using cocaine and unauthorized absence, and not guilty to distribution and introduction of cocaine.

Analysis

The appellant's first assignment of error need not detain us as the appellant's unconditional guilty plea waived appellate review of the military judge's ruling on the admissibility of the laboratory report. See R.C.M. 910(j). See also *United States v. Rehorn*, 26 C.M.R. 267, 268-69 (C.M.A. 1958) (an unconditional guilty plea generally "waives all defects which are neither jurisdictional nor a deprivation of due process of law").

We note that the lab report which is the subject of this assigned error was neither offered nor entered into evidence. We also note that before accepting the appellant's guilty plea the military judge properly advised him that he was giving up important rights including the presumption of innocence, his rights against self-incrimination, to trial on the facts and to confront witnesses against him. The appellant acknowledged his understanding of those rights, that he discussed those rights with his counsel, and that he believed his counsel's advice to be in his best interest. Record at 297-300; Trial Defense Counsel's Affidavit of 2 Aug 2010 at ¶ 6. Based upon the foregoing, we find this error to be without merit.

In his second assigned error, the appellant argues that his trial defense counsel was ineffective by failing to advise him that his unconditional guilty plea would waive appellate review of the confrontation issue relative to the laboratory report.¹

We review ineffective assistance of counsel claims *de novo*. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We analyze claims of ineffective assistance of counsel under the framework established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show 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 there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis*, 60 M.J. at 473 (citing *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004)). In doing so, 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)). This is because it is presumed that counsel are competent in the performance of their representational duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). Because this is a guilty plea case, the appellant must show not only that his counsel was deficient, but also 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." *Id.* at 289 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Assuming without deciding that trial defense counsel failed to inform the appellant that his guilty plea waived appellate

¹ The appellant and, in response to a court order, his trial defense counsel filed affidavits concerning the alleged ineffective assistance of counsel. Applying the fourth and fifth *Ginn* principles, we have determined that we can resolve the alleged errors without a *DuBay* hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

review of the confrontation issue relative to the laboratory report, we conclude that the appellant has failed to establish either that his counsel was deficient, or 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. *Id.*

The record and trial defense counsel's affidavit make clear that the defense strategy was to portray the appellant as a drug user who had taken responsibility for his actions by pleading guilty, and who had been wrongfully accused of distributing cocaine by Government witnesses trying to protect themselves. Trial defense counsel's request that the military judge advise the members of the appellant's guilty plea and his repeated description of the appellant as a "drug user" wrongly accused of being the "big fish" by Government's witnesses were consistent with this strategy. Record at 333, 398, and 399. Furthermore, the appellant pleaded guilty to drug use immediately following the military judge's adverse ruling on the admissibility of the drug laboratory report. *Id.* at 288. The aforementioned, the appellant's colloquy with the military judge regarding his understanding of the meaning and effect of his pleas of guilty, and trial defense counsel's affidavit in which he states that the appellant was fully apprised and concurred with this strategy, also support the conclusion this was the defense strategy at trial. Trial Defense Counsel's Affidavit at ¶¶ 23-25. Finally, we note that such a strategy was sound in light of the overwhelming evidence of the appellant's cocaine use which, in addition to the positive urinalysis report, included the appellant's admission to an investigator and the testimony of two persons who witnessed the appellant snorting cocaine.

After review of the entire record and the affidavits of the appellant and his trial defense counsel, we conclude the appellant has failed to establish that his counsel's performance was deficient, or that "there is a reasonable probability that, but for counsel's [presumed failure to advise him that his guilty plea waived appellate review of the Sixth Amendment Confrontation Clause issue], he would not have pleaded guilty and would have insisted on going to trial.'" *Alves*, 53 M.J. at 289 (citation omitted). Accordingly, we find this assignment of error to be without merit.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court