

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

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

**UNITED STATES OF AMERICA**

**v.**

**MARIO L. SAGONA  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200800847  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 8 May 2008.

**Military Judge:** LtCol Eugene Robinson, USMC.

**Convening Authority:** Commanding Officer, Combat Logistics  
Regiment 1, 1st Marine Logistics Group, MarForPac, Camp  
Pendleton, CA.

**Staff Judge Advocate's Recommendation:** LtCol A.M. Ray,  
USMC.

**For Appellant:** CDR Kathleen A. Atkisson, JAGC, USN; Maj  
C.J. Broadston, USMC; LT Michael Maffei, JAGC, USN.

**For Appellee:** Capt Robert Eckert, USMC.

**30 September 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 special court-martial convicted the appellant, pursuant to his pleas, of two specifications of wrongful use of marijuana and one specification of larceny in violation of Articles 112a and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 921. The appellant was sentenced to confinement for 180 days, forfeiture of \$898.00 pay per month for six months, a reprimand, and a bad-conduct

discharge. The convening authority (CA) approved the sentence as adjudged. Pursuant to the terms of a pretrial agreement, all confinement in excess of time served (36 days) was suspended for 12 months from the date of the CA's action.

### **Procedural Background and DuBay Hearing**

The appellant filed his original brief assigning as error that the trial defense counsel was ineffective because she failed to fully investigate and properly advise the appellant of an apparent immunity defense. This court returned the record of trial to the Judge Advocate General for remand to the CA, authorizing him to conduct a *DuBay* hearing in order to develop additional facts relative to the appellant's allegations of ineffective assistance of counsel.<sup>1</sup> Appellate Exhibit D-I.<sup>2</sup> A *DuBay* hearing, ordered by Commanding Officer, Combat Logistics Regiment 1, 1st Marine Logistics Group, Marine Force Pacific, Camp Pendleton, California was conducted. AE D-III. The *DuBay* military judge (hereafter "military judge"), submitted written findings of fact and conclusions of law addressing the appellant's claims. AE D-X.

The military judge found that a promise of immunity was made to the appellant by a person the appellant reasonably believed had the authority to make such a promise. AE D-X at 13-15. Nonetheless, the military judge also ruled that the trial defense counsel's representation was not so deficient as to overcome the presumption of her competency. AE D-X at 18, 19.

The appellant's post-*DuBay* brief challenges the military judge's written findings of fact and conclusions of law. Specifically, the appellant asserts that the military judge erred when he found that the appellant did not detrimentally rely upon his sergeant major's offer of apparent immunity. The appellant also asserts that the military judge erred when he found that the trial defense counsel was not ineffective by failing to investigate, research, analyze or advise the appellant regarding the prospective defense of apparent immunity. Appellant's Brief of 8 Sep 2009 at 10. The Government argues that the appellant's guilty pleas and his pretrial agreement constituted waiver of any apparent immunity defense. Alternatively, if the court does not find waiver, the Government argues that the appellant did not detrimentally rely on any promises made and that his counsel provided effective assistance. Government's Answer of 23 Oct 2009 at 10.

---

<sup>1</sup> *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1986); see also *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

<sup>2</sup> Appellate Exhibits D-I through D-X appear in the *DuBay* Record.

This court subsequently specified an issue regarding burdens of proof as to the prospective apparent immunity defense<sup>3</sup> and heard oral argument. After careful consideration of the parties' briefs, the record of trial, the record of the *DuBay* hearing, and oral argument, we find a substantial basis to question the voluntariness of the appellant's pleas and therefore we do not reach the assigned errors or specified issue. Arts. 59(a) and 66(c), UCMJ.

### **Factual Background**

The appellant used marijuana repeatedly throughout his time in the Marine Corps. *DuBay* Record at 94. On four separate occasions - from October 2007 to March 2008 - he tested positive for marijuana via urinalysis. Prosecution Exhibit 1 at 10; Record at 18-20; AE D-V at 2. During his current enlistment, he received nonjudicial punishment three times, including for his first positive urinalysis. PE 1 at 6-10.

In mid-January 2008, the appellant's friend, Private B, assaulted and robbed a fellow Marine living in their barracks. AE D-IX at 2. Immediately following the incident, while the victim was being questioned by Criminal Investigation Division investigators, the appellant stole the victim's laptop computer and later shipped it to his home of record in Michigan. Record at 24-25. The day after the robbery, the appellant smoked marijuana while at the beach. *Id.* at 15-16. The alleged larceny of the computer was charged under the sole specification of the additional charge and the marijuana use was the basis for Specification 1 of the original charge.

About two weeks later, on Friday, 1 February 2008, the appellant and several of his friends were questioned by the barracks duty noncommissioned officer (DNCO) for suspected use of marijuana. During this interview, the DNCO also discovered the appellant's possession of a falsified military identification card. *Id.* The following Monday, 4 February 2008, the battalion sergeant major questioned the appellant and his friends about the DNCO's report of the Friday night incident. *DuBay* Record at 124. The appellant offered to provide the sergeant major information in return for immunity from prosecution. The sergeant major agreed, and entered into an immunity agreement with the appellant in exchange for information provided by the appellant. It is this agreement that gives rise to a number of troubling issues surrounding this case. The exact terms of the immunity agreement are disputed and the only physical evidence of the agreement was destroyed by the sergeant major prior to deployment to a combat zone. Additionally, there is no record of what information the appellant provided the sergeant major. Coincidentally, however,

---

<sup>3</sup> WHETHER THE GOVERNMENT OR THE APPELLANT BEARS THE BURDEN OF PRODUCING THE AGREEMENT CENTRAL TO THE APPELLANT'S DE FACTO IMMUNITY CLAIM, AND, IF THE GOVERNMENT BEARS THIS BURDEN, WHETHER THE LOSS OF THIS DOCUMENT CONSTITUTES A DUE PROCESS VIOLATION?

the Naval Criminal Investigative Service developed their first lead on the computer larceny seven days following the appellant's conversation with the sergeant major. *DuBay Record* at 174.

A few weeks later, on or about 4 March 2008, the appellant was administered a urinalysis and his specimen tested positive for the presence of marijuana in his system. *Record* at 20. This suspected use of marijuana is reflected in Specification 3 of the original charge. On 2 April 2008, following the return of the positive urinalysis report, the appellant was placed in pretrial confinement and charges were thereafter preferred for this alleged wrongful use of marijuana. A few days later he was also charged with the larceny of the laptop computer.

Sometime after the preferral of charges, Captain (Capt) D was detailed as the appellant's trial defense counsel.<sup>4</sup> At their second meeting, the appellant told his attorney about the February agreement with the sergeant major which, according to the appellant, immunized him from prosecution for the computer larceny and the March marijuana offense. *Dubay Record* at 161, 164. According to Capt D's interview notes, one of the terms of the agreement was "if [the appellant] told [the sergeant major] everything, and answered his questions, immunity about the info (sic), [the appellant would] be taken off the SACO list."<sup>5</sup> *DuBay Record* at 172. Capt D acknowledged during her *DuBay* testimony that her client told her that one of the terms of the immunity agreement was that the appellant would be removed from the SACO's list if he answered the sergeant major's questions, "but [she] did not believe it applied to his offenses." *Id.* at 166.

Following that meeting, Capt D investigated the issue and confirmed the existence of an agreement from both the sergeant major and the battalion legal officer, but she could not ascertain the actual terms of the agreement. The sergeant major told Capt D the appellant was only provided immunity for the 1 February 2008 suspected marijuana use and possession of the false ID; the legal officer had no recollection of the terms of the agreement.<sup>6</sup> Capt D also learned from the sergeant major that he shredded the agreement before he deployed to Iraq.

At their next meeting, Capt D informed the appellant of what she had learned regarding the immunity agreement and advised him it would be difficult to prove its actual terms. *Id.* at 165. During this meeting, Capt D also presented the appellant with the pretrial agreement upon which he ultimately entered his pleas. AE I. Paragraph 2 of the agreement stipulates "This agreement

---

<sup>4</sup> At the time of her detailing, she was a first lieutenant.

<sup>5</sup> "SACO" stands for Substance Abuse Control Officer, a unit member whose assigned duties include the administration of the urinalysis-program.

<sup>6</sup> Charges were not preferred against the appellant for the 1 February 2008 marijuana use or the possession of a false ID.

(Parts I and II) constitutes all the conditions and understandings of both the government and myself regarding the pleas in this case. There are no other agreements, written or otherwise." *Id.* at 1.

At trial, the military judge concluded his providence inquiry by asking the accused and counsel if there were any other agreements in the case aside from the pretrial agreement and received assurances from the appellant and each counsel that there were no other agreements in the case. Record at 31, 37. The military judge subsequently made a finding that the appellant's pleas were made voluntarily. *Id.* at 39. That same day, the trial defense counsel prepared the appellant's clemency request with a typed statement signed by the appellant as an enclosure. *DuBay Record* at 180.

In the request Capt D specifically referenced the immunity agreement: "As stated in the enclosure, Pvt Sagona had an understanding that he would not be charged with future misconduct for drug abuse after he agreed to give information on Marines who were smoking marijuana on restriction. He also believed that he was going to be separated with an other than honorable discharge for his cooperation." Clemency Request of 25 Jul 2008. The appellant's statement read in part:

Before I even got charged, I had a discussion with Sgt Major [S] about separating me from the Marine Corps with an OTH. I told him things with an understanding that I would be separated with an OTH no matter what I told him. I would like the opportunity to talk to you about our discussions and explain to you why I deserve to be separated with an OTH instead of receiving a bad conduct discharge.

*Id.* at Encl. (1).

At the *DuBay* hearing, the appellant explained why he told the military judge there were no other agreements. He testified that on the day of trial, he asked his trial defense counsel if he should tell the judge about the immunity agreement and she advised him not to, because doing so would most likely result in his returning to the brig for "another four month[s]" or a "really long time" while the issue was further litigated and that he probably would lose. *DuBay Record* at 89, 92-93, 101-02, 115-16. When Capt D later testified, no one asked her if the appellant's recollection of her advice was accurate, she only testified generically that she advised her client that proving the terms of the agreement would be difficult, and that ultimately he chose to accept the pretrial agreement rather than pursue any relief under the immunity agreement. *DuBay Record* at 165. She also testified that she prepared the appellant for his guilty pleas on the day of trial, but could not specifically remember what they discussed. *Id.* at 167-68.

## Voluntariness of Pleas

Appellate courts apply a substantial-basis test in reviewing a trial judge's acceptance of a plea at a court-martial, i.e., Does the record as a whole show 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). Rejection of a plea is required if there is a substantial basis to question either the legal or factual predicate for the plea. *Id.* Questions of law arising from the acceptance of the plea are reviewed *de novo* and questions of fact surrounding the guilty plea are reviewed for an abuse of discretion. *Id.* In this case, the military judge found that the appellant's pleas were made voluntarily. Record at 39. Because this finding was premised on inaccurate information provided by both the appellant and his counsel, there is a substantial basis to question both the factual and legal predicates for the plea.

A plea of guilty must be voluntarily entered in order to satisfy the requirements of due process. *United States v. Perron*, 58 M.J. 78, 81 (C.A.A.F. 2003); *United States v. Care*, 40 C.M.R. 247, 250 (C.M.A. 1969). Ever since *United States v. Green*, 1 M.J. 453 (C.M.A. 1976), part and parcel of any military judge's *Care* inquiry has been to receive assurances from counsel for both parties, "that the written agreement encompasses all of the understandings of the parties and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain." *Id.* at 456. This inquiry is considered "invaluable . . . to appellate tribunals by exposing any secret understandings between the parties" and "essential to satisfy the statutory mandate that a guilty plea not be accepted unless the trial judge first determines that it has been voluntarily and providently made." *Id.*

This judicially mandated practice is institutionalized as standard procedure through RULE FOR COURTS-MARTIAL 910(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) which states:

The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

Judicial scrutiny of plea agreements at the trial level was mandated in part to serve two public policy concerns: 1) to enhance public confidence in the plea bargaining process and 2) to minimize controversies regarding the propriety and meaning of

plea bargain provisions, an otherwise "fertile source of appellate litigation." *Green*, 1 M.J. at 456. Since *Green*, appellate courts will not, under normal circumstances, consider post-trial claims of *sub rosa* agreements when the appellant and counsel have made on-the-record assurances to the military judge that no other agreements exist. *United States v. Muller*, 21 M.J. 205, 207 (C.M.A. 1986). The *Muller* court's reliance upon the on-the-record assurances from the appellant and counsel is sound legal practice due to the counsel's professional responsibility to be candid with the tribunal; "A covered attorney shall not knowingly . . . make a false statement of material fact . . . to a tribunal," or "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," or "offer evidence that the covered attorney knows to be false." Judge Advocate General Instruction 5803.1C, Rule 3-3 (Ch-1, 10 May 2010); see *United States v. Baker*, 58 M.J. 380, 385 (C.A.A.F. 2003). Unlike the *Muller* case, reliance upon the assurances made by the appellant and his counsel in this trial is unfounded due to the revelations of the *DuBay* hearing that, contrary to the representations made by the appellant and his counsel at trial, there was another agreement which was intimately involved with the appellant's case. The existence of an immunity agreement in this case is undisputed; the only disputes concern the scope of immunity granted and exactly what information was obtained in exchange.

Although Capt D was not directly confronted at the *DuBay* hearing with the apparent inconsistencies between what she knew at the time of trial and what she told the military judge (and what she may have told her client to tell the military judge), she testified that her rationale for her actions was that she considered the immunity agreement with the sergeant major to be a separate, unrelated agreement because it did not relate to any of the charges that were referred to trial. *DuBay* Record at 166, 168-69, 177. We reject Capt D's characterization of the immunity agreement as being unrelated to this case for the following reasons. First, according to her own interview notes, her client maintained that one of the terms of the immunity agreement made in February 2008, was that the appellant would be removed from the SACO roster until his administrative discharge was processed. *Id.* at 166, 172, 177. At his trial, the appellant informed the military judge that the allegation identified in Specification 3 of the original charge resulted from a urinalysis test administered on 5 March 2008, indicating that he was put back on the roster before he was separated in contravention of the appellant's understanding of the agreement. Record at 22. Second, another disputed term of the immunity agreement was that the appellant would not be prosecuted for any of his conduct related to the information he disclosed to the sergeant major. *DuBay* Record at 83. While the record is devoid of any detailed account of what information the appellant actually provided the sergeant major, the appellant did testify at the *DuBay* hearing that he provided the sergeant major information about the robbery and larceny. *Id.* Third, Capt D's drafting of a clemency request

on the day of trial, which included the immunity agreement as a basis for clemency, calls into question her belief that the immunity agreement was unrelated to the appellant's case. Whereas litigation over the loose language of the disputed terms contained in the immunity agreement, or the lack of any record as to what information the appellant actually provided, might not have resulted in barring prosecution of the charges in this case, we find it unreasonable to perceive the immunity agreement as being unrelated to this case. Accepting counsel's clemency statements at face value that her client believed that there was an immunity agreement at issue, the record suggests that she stood by mute as the appellant informed the military judge that there were no other agreements in this case. Record at 38.

The existence of the immunity agreement created a potential legal basis for the appellant to seek significant relief, had the issue been litigated at trial. The record is unclear, but it leaves an impression that the appellant's attorney presented one of two options regarding the immunity agreement: 1) pretend the agreement never existed and get out of jail immediately pursuant to the pretrial agreement, or 2) endure a lengthy and undetermined period of confinement before he could litigate the issues presented by the immunity agreement. If, at the time of his pleas, the appellant had disclosed the existence of the agreement to the military judge, then the existence of the agreement would not necessarily have hindered the military judge from accepting the pleas as voluntary, so long as the military judge could ascertain that the appellant voluntarily waived any potential relief stemming from the immunity agreement in exchange for the protections offered in sentence limitation portion of the pretrial agreement. On the other hand, if the appellant's decision not to pursue potential relief was influenced by some form of coercion or duress, i.e., protracted and unnecessary imprisonment, then we cannot say that his pleas were truly voluntary.

Had this experienced trial judge received full disclosure on the record of all pertinent facts regarding the appellant's decision, we have no doubt that he would have been the singularly most qualified person to determine the voluntariness of the appellant's guilty pleas. Regrettably, the military judge was prevented from doing so due to the misleading information provided by the appellant and his trial defense counsel.<sup>7</sup> Consequently, in light of the whole record, we find a substantial basis to question the military judge's finding that the appellant's pleas were knowing and voluntary.

---

<sup>7</sup> Although somewhat vague, Capt D's testimony at the *DuBay* hearing indicated that the trial counsel was not aware of the immunity agreement struck between the appellant and the sergeant major.

**Conclusion**

The findings and sentence are set aside. A rehearing is authorized.

For the Court

R.H. TROIDL  
Clerk of Court