

**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.

**SAN K. SEZGINALP
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200800871
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 10 July 2008.

Military Judge: LtCol David Oliver, USMC.

Convening Authority: Commanding Officer, Marine Wing
Support Group 17, 1st MAW, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col J.R. Woodworth,
USMC.

For Appellant: Mr. Neal Puckett, Esq.; LT Brian Korn, JAGC,
USN; LT K.L. Kadlec, JAGC, USN.

For Appellee: Capt Robert E. Eckert, Jr., USMC

2 March 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 being disrespectful to and striking a superior noncommissioned officer, in violation of Article 91, Uniform Code of Military Justice, 10 U.S.C. § 991. The approved sentence consisted of confinement for five months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises three assignments of error on appeal. First, the appellant asserts that his guilty pleas were "involuntary" as he was suffering from a severe mental disease at

the time of his pleas. Second, the appellant avers that his trial defense counsel was ineffective in that she failed to present evidence of the appellant's mental health issues during sentencing. Finally, the appellant argues that his sentence was inappropriately severe in light of his schizophrenia.

After considering the record of trial, the parties' pleadings, the results of a post-trial RULE FOR COURTS-MARTIAL 706 EVALUATION, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) evaluation and the various post-trial affidavits, we conclude that the appellant's guilty pleas were involuntary and that the findings and sentence must be set aside. We will take appropriate action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

On 10 July 2008, the appellant pled guilty to violating Article 91, UCMJ by being disrespectful to and striking a superior noncommissioned officer. Due, in part, to the appellant's prior instances of disrespectful and assaultive conduct, he was placed into pretrial confinement.

The appellant's trial defense counsel (TDC), Captain (Capt) B, USMC, submitted two sworn affidavits concerning her representation of the appellant. In a 6 February 2009 affidavit, Capt B indicated that she was informed the appellant had undergone a mental health evaluation by Dr. P subsequent to a prior incident involving disrespectful and assaultive conduct while the appellant was deployed to Iraq. At that time, Dr. P diagnosed the appellant with an Axis II personality disorder.

Capt B initially consulted with CDR H, Medical Corps, U.S. Navy, of the mental health department on Okinawa about the previous diagnosis. CDR H reviewed the appellant's medical record and assured the TDC that Dr. P's evaluation was thorough and that reports about the appellant's more recent verbal outbursts and kicking fits in the brig did not call that diagnosis into question. Capt B further investigated the appellant's mental health issues with Dr P who assured the TDC that she did not suspect any psychosis, even in light of subsequent acting out or paranoid ideations. Based on her conversations with CDR H and Dr. P, as well as her first-hand observations, Capt B concluded that another R.C.M. 706 evaluation would not be helpful or necessary.

During post-trial confinement, the TDC was informed that the appellant's behavior had become increasingly erratic and disordered. Brig personnel reported that the appellant believed that his mother had died and that the Red Cross was withholding a message about her death until the appellant signed a document acknowledging he was homosexual. It was also reported that he was talking to himself in his cell and covering the window and vents to avoid observation by spies. He indicated to a brig

guard that he believed the Brig CO and Programs Manager were telling his family bad things about him.

Following these disclosures, the TDC visited the appellant in the brig. During her visit, she observed the appellant standing on his rack and attempting to speak to his mother through the fire detector on the ceiling. At this point, she requested a post-trial R.C.M. 706 evaluation. The convening authority concurred and issued appropriate orders. Consistent with Dr. P's earlier evaluation, the post-trial R.C.M. 706 board opined that the appellant suffered from an Axis II personality disorder. In spite of the appellant's bizarre behavior, the R.C.M. 706 report indicated that the appellant was mentally responsible and capable of participating meaningfully with his defense counsel.

On 6 October 2008, the appellant was examined by Dr. R at the Naval Hospital Charleston Psychiatry Clinic. During this evaluation, the appellant indicated that he suffered from paranoid thinking. Dr. R indicated that he had knowledge of the appellant prior to his enlistment and that the doctor believed the appellant had a "clear history of psychosis consistent with schizophrenia." The doctor went on to note that the appellant's judgment and insight were fair. Dr. R opined that the appellant suffered from an Axis I schizophrenia (chronic undifferentiated type). He deferred any judgment on Axis II matters.

The assessment offered no opinion whether the appellant was able to competently assist his defense counsel. It does, however, note that Dr. R discussed with the appellant the risks, benefits, and side effects of the ordered medications. In the doctor's opinion, the appellant is not a danger to himself or others. A follow-on 20 October examination resulted in a similar assessment.

Procedural Posture

On 26 February 2009, the appellant filed a Motion for R.C.M. 706 Evaluation and Motion to Stay Proceedings. The court denied both motions on 11 March 2009. On 16 March 2009, the appellant filed a Motion to Attach and Motion for Reconsideration of this court's ruling of 11 March 2009. The court granted the Motion to Attach and, on 25 March 2009, denied the Motion for Reconsideration. On 14 May 2009, the appellant filed a Motion to Attach and Motion to Reconsider Denial of Appellant's Motion to Stay Proceedings. The court granted the Motion to Attach and on 22 May 2009, denied the Motion to Reconsider. The parties filed their briefs and other documents ordered by the court.

Upon consideration of the pleadings of the parties and the record of trial, the court *sua sponte* reconsidered its 11 March 2009 rulings on the appellant's Motion for R.C.M. 706 Evaluation and Motion to Stay Proceedings. On 16 July 2009, this court ordered an R.C.M. 706 evaluation to assess whether the appellant suffered from a severe mental disease or defect at the time of

his offenses and whether such disease or defect rendered the appellant unable to appreciate the nature and quality or wrongfulness of his conduct. We further ordered the evaluation to assess whether at the time of trial, the appellant was able to understand the nature of the proceedings or cooperate intelligently in his defense. Finally, we ordered the evaluation to assess whether the appellant was currently able to understand the nature of the proceedings or cooperate intelligently in his defense. On 4 August 2009, this court amended its 16 July 2009 order, *inter alia*, to authorize the convening authority to order a *DuBay*¹ hearing regarding the appellant's competency.

On 6 January 2010, the ordered R.C.M. 706 evaluation report was released. The evaluation found that during all relevant time periods, the appellant suffered from Schizophrenia (paranoid type), a severe mental disease, but that at the time of his offenses, the appellant was able to appreciate the nature and quality of his actions. The report, however, concluded that at the time of his trial, the appellant's mental disease rendered him unable to understand the nature of the proceedings against him or to cooperate intelligently in his defense. Finally, the report reflects that the appellant's mental disease currently is such that he is able to understand the nature of the proceedings against him and to cooperate intelligently in his defense.

On 1 February 2010, the convening authority determined not to contest the R.C.M. 706 board's findings at a *DuBay* hearing. He requested that the case be returned to him with authorization for a rehearing.

Improvident Plea

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). We will find a military judge abused his discretion in 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).

In view of the 6 January 2010, R.C.M. 706 competency report, we find a substantial basis in law and fact to question the knowing and voluntary nature of the appellant's guilty pleas. In view of our determination above, the appellant's remaining assignments of error are moot.

Conclusion

The findings and approved sentence are set-aside and dismissed. The record of trial is returned to the Judge Advocate

¹ *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967)

General of the Navy for remand to an appropriate convening authority who may order a rehearing.

For the Court

R.H. TROIDL
Clerk of Court