

**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.

**STEVEN M. SHUMAN
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200900649
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 7 August 2009.

Military Judge: CDR T.F. Fichter, JAGC, USN.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol K.M. McDonald, USMC.

For Appellant: CAPT Norman Aranda, JAGC, USN.

For Appellee: LCDR Sergio F. Sarkany, JAGC, USN.

19 October 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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, pursuant to his pleas, of eight specifications of failing to go to his appointed place of duty, one specification of unauthorized absence for over three but less than thirty days; two specifications of breaking arrest, one specification of fleeing apprehension, one specification of resisting apprehension, one specification of breaking restriction, and one specification of wrongful use of marijuana, in violation of Articles 86, 95, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 895, and 912a. The appellant was sentenced to 150 days confinement, reduction to pay grade

E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, all confinement in excess of 120 days was suspended for time served plus six months thereafter.

The appellant asserts that his guilty pleas to the eight failure to go offenses are improvident, and that his trial defense counsel provided ineffective assistance. We have examined the record of trial, the appellant's brief and assignments of error, the Government's answer, the affidavit of the trial defense counsel. 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.

Providence Inquiry

The appellant asserts that his guilty pleas to each specification of failure to go to his appointed place of duty (specifications one through eight of Charge I) should be set aside because he was physically unable to report to assigned musters during the December 2008 time frame as a result of the sedative effect of prescribed medication. Appellant's Brief of 16 Feb 2010 at 5. This claim raises the potential of an affirmative defense recognized in RULE FOR COURTS-MARTIAL 916(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). A decision to accept a guilty plea will be set aside if there is a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Should an accused establish facts raising a possible defense, the military judge has a duty to inquire further and resolve those matters inconsistent with the plea or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006); see Art. 45(a), UCMJ. A failure to do so constitutes a substantial basis in law and fact for questioning the guilty plea. See *Phillippe*, 63 M.J. at 311. However, "[a] mere possibility of such a conflict is not a sufficient basis to overturn the trial results." *Shaw*, 64 M.J. at 462 (internal quotation marks and citation omitted). When a guilty plea is first attacked on appeal, we must construe the evidence in a light most favorable to the Government. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989) (Cox, J., concurring)).

During sentencing, the appellant offered Defense Exhibit A, the written results of an inquiry into his mental condition.¹ The document was offered by the appellant for extenuation

¹ R.C.M. 706 inquiry into the mental capacity or responsibility of the accused.

purposes and not as a legal justification, excuse or defense to the failure to go specifications. Record at 95. On 13 July 2009, the 706 Board convened and determined that the appellant did not lack the capacity to appreciate the wrongfulness of his conduct, did have sufficient mental capacity to cooperate intelligently in his defense, and was able to conform his conduct to the requirements of the law. However, the 706 board also determined that the sedating effect of the medication he was taking during the December 2008 time frame made it "significantly more difficult" for him to comply with the requirements of the law regarding the infractions in Charge I. Defense Exhibit A at 2, 3. After reviewing the conclusions of the 706 Board, the military judge reopened the providence inquiry. Record at 96.

Following supplemental inquiry by the military judge, the appellant testified he was prescribed Seroquil, an antipsychotic, antidepressant which is also used as a sleeping aid. *Id.* at 97. He further indicated that he had no problem waking up in the morning, and that he did not oversleep because of his use of the medication. *Id.* at 98. He testified that he heard his alarm, but chose not to get up and was not incapacitated to the point that he could not get up. *Id.* at 99.

Applying the *de novo* standard, we are convinced that there is not a substantial basis in law or fact to question the appellant's pleas for failing to report to his assigned place of duty on eight occasions during the December 2008 time frame. The appellant's testimony does not establish that he was physically unable to report to his assigned place of duty. In fact, the appellant testified he could have reported to his assigned musters, but choose not to. Accordingly, the military judge did not abuse his discretion in accepting the factual predicate for the plea. Nor do we view the opinion from the 706 Board regarding the sedating effects of the medication as constituting a defense to the eight failure to go specifications of Charge I. Although, the 706 Board determined that the sedating effects of the medication made it significantly more difficult for the appellant to conform his conduct, the appellant's testimony clearly indicated it did not prevent him from reporting as required. This assigned error is without merit.

Ineffective Assistance of Counsel

The appellant asserts his trial defense counsel was ineffective by failing to conduct an adequate pretrial investigation, by allowing the appellant to plead to a defensible charge, and by failing to present significant and available mitigating evidence during sentencing. Appellant's Brief at 7. We have for consideration the record of trial, the appellant's brief, the Government's answer and the affidavit filed by the trial defense counsel.²

² The appellant did not file an affidavit in support of his ineffective assistance claim.

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 counsel are competent in the performance of their professional duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). The *Strickland* test governs ineffective assistance of counsel claims in cases involving guilty pleas. *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006) (citing *Alves*, 53 M.J. at 289).

The appellant indicates that his trial defense counsel failed to investigate the type of medication, number of prescribed drugs and the synergistic effect the medications had on him, specifically in regard to the failure to go offenses. He further avers that an inability defense to the failure to go specifications of Charge I would have been apparent to a reasonable trial defense counsel if an investigation was completed. Appellant's Brief at 8. We note that a trial defense counsel "must perform a reasonable investigation, or make a reasonable decision that an avenue of investigation is unnecessary." *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999).

Here, the trial defense counsel's affidavit makes it clear that he requested an R.C.M. 706 examination precisely because he suspected the various medications the appellant was ingesting contributed to the failure to go offenses. He further indicates he sought a psychiatric opinion to assist him in determining if ingestion of the medications might provide a valid defense to the charges. The examination revealed that the medications were an extenuating factor for the appellant's conduct, but not a legal justification or excuse. Affidavit of Capt. J.R. Thomas, Jr. of 12 May 2010 at ¶¶ 4 and 5. Clearly, the pretrial investigation conducted by the trial defense counsel was more than adequate and, quite properly, helped shape the advice he gave to the appellant. We find no deficiency in this course of action.

The appellant also claims his trial defense counsel failed to present significant and available mitigating evidence during

sentencing. In his affidavit, the trial defense counsel details the strategic and tactical reasons he did not seek to admit the appellant's medical records during sentencing. He was primarily concerned because the medical records detailed the appellant's multiple substance abuse problems, prior bad acts and prior suicide attempts. Providing this information would have undercut any argument that the appellant possessed rehabilitative potential and was not deserving of a bad-conduct discharge; redacting the information might have made it appear that they were hiding information. *Id.* at ¶¶ 6-12.

The strategic and tactical decisions made by a defense counsel will not be second guessed on appeal. *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977). Generally, we will not disturb the tactical decisions of a trial defense counsel unless there was no reasonable or plausible basis for the defense counsel's actions. *Id.* The reasonableness of tactical decisions made by a defense counsel is determined by determining the facts at trial and the circumstances under which counsel's decision was made. *United States v. Mansfield*, 24 M.J. 611, 617 (A.F.C.M.R. 1987).

Here, we find that the trial defense counsel's un rebutted affidavit detailing and explaining the reasons for the tactics and strategy he and the appellant chose is reasonable under prevailing professional norms. It is clear that the trial defense counsel's stated purpose during sentencing was to minimize forfeitures and avoid a bad-conduct discharge. He then proceeded on this course by attempting to characterize the appellant as a good Marine and good person who had suffered significant personal setbacks.

We find that the trial defense counsel was not deficient in his representation, and even assuming *arguendo* that he was, we further find there was no prejudice to the appellant.

Accordingly, the findings of guilty, and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court