

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

**Before
L.T. BOOKER, J.K. CARBERRY, D.R. LUTZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JUSTIN S. SHIRLEY
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900642
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 June 2009.

Military Judge: CAPT Dennis Bengtson, JAGC, USN.

Convening Authority: Commanding Officer, Marine Wing Support Squadron 171, Marine Corps Air Station, Iwakuni, Japan.

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

For Appellant: Maj Justin Constantine, USMCR.

For Appellee: CDR Kimberly Hinson, JAGC, USN; LT Brian Burgtorf, JAGC, USN.

22 June 2010

OPINION OF THE COURT

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

CARBERRY, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy, one specification of violating a lawful general order, one specification of disobeying an order, one specification of false official statement, one specification of assault consummated by a battery, and one specification of housebreaking, in violation of Articles 81, 92, 107, 128, and 130, Uniform Code Military Justice, 10 U.S.C. §§ 881, 892, 907,

928, and 930. The convening authority (CA) approved a sentence of confinement for 6 months and a bad-conduct discharge.

The appellant now asserts that his trial defense counsel (TDC) was ineffective by: failing to advise the CA of the requirement to enter the appellant into substance abuse treatment; failing to discuss with appellant his alcoholism as a possible defense; failing to properly explain paperwork related to the appellant's court-martial; and failing to advise the CA of the appellant's alcoholism in the appellant's request for clemency.

Although not raised as an error, this court notes that the military judge failed to establish a factual predicate for the appellant's plea of guilty to the sole specification under Charge V. We will take corrective action in our decretal paragraph. The remaining findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Ineffective Assistance of Counsel

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).

TDC Failed to Discuss with the CA his Requirements to Enter Appellant into a Substance Abuse Program

The appellant contends his TDC was ineffective because he failed to discuss with the CA his "duty to enroll Appellant in a substance abuse treatment program after being made aware of any alcohol-related misconduct." Appellants Brief of 1 Mar 2010 at 8. In support of this assignment of error, the appellant submits his own declaration under penalty of perjury in which he claims he was never ordered to attend or encouraged to attend a

substance abuse program; along with a similar document from his father in which Mr. Shirley claims to have spoken to TDC and asked that he talk to the CA about the squadron and company level leadership failures in not admitting the appellant into a substance abuse treatment program. Additionally, the appellant submits MARADMIN 316/01, Post-Alcohol-Incident Screening, arguing that the appellant's chain of command failed to follow Marine Corps regulations in not admitting the appellant into a substance abuse program and that the TDC was ineffective in not highlighting this failure to the CA.

Contrary to the appellant's averment, the MARADMIN did not require the CA to enroll the appellant into a substance abuse treatment program. Rather, the MARADMIN required the commander to conduct alcohol screening and formal counseling to document alcohol related incidents in the Marine's service record if, in the judgment of the commanding officer, the consumption of alcohol was a contributing factor to the misconduct. The commanding officer's decision not to send the appellant to screening leads this court to conclude that he determined that alcohol consumption was not a contributing factor in the appellant's absence from unit physical training and was not a factor in the appellant's decision to violate a lawful general order by consuming alcohol in the barracks while in pay grade E-1. Thus, there was no "leadership failure" for the TDC to discuss with the CA.

Moreover, assuming without deciding that the CA failed to properly screen the appellant for alcohol abuse, we conclude that the TDC's decision not to assail the CA's decision was prudent and reasonable. We fail to see how the appellant would have benefited from an attack by the TDC on the CA's decision not to have the appellant screened. In our opinion, such a tack would have worked to the detriment of the appellant. Instead, the TDC opted to highlight to the CA the alcohol issues relative to the appellant's misconduct and negotiate to resolve this matter at a lower forum or garner bad-conduct discharge protection. Although unsuccessful, such a course was reasonable and we will not second guess counsel's decision not to discuss with the CA his "leadership failures." See *United States v. Paxton*, 64 M.J. 484, 489 (C.A.A.F. 2007).

Failing to Discuss with the Appellant his Alcoholism as a Possible Defense

At the outset, we note that alcoholism is not defense. See RULE FOR COURTS-MARTIAL 916, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Moreover, after reviewing the record and the appellant's brief, we find nothing to support the contention that the appellant is an alcoholic or that the defense of voluntary or involuntary intoxication existed. When asked by the military judge whether he was intoxicated when he conspired to and ultimately assaulted another Marine, the appellant stated unequivocally that he was aware of what he was doing and was not

intoxicated. Record at 24. Additionally, when asked by the military judge if he had enough time to discuss his case with TDC and whether he believed TDC's advice had been in the appellant's best interest, the appellant answered "Yes, sir". *Id.* at 11. Based on the appellant's statement regarding his lack of intoxication, his statement of satisfaction with TDC, and the fact that alcoholism is not a defense, we find no merit to this assignment of error.

Failure to Properly Explain Relevant Paperwork to Appellant

The appellant alleges that his TDC merely told him to sign the pretrial agreement in the appropriate place and not worry about the sentence. Additionally, the appellant avers that he did not understand the contents or consequences of many of the papers he discussed with his TDC. Appellant's Motion to Attach of 1 Mar 2010, Appellant's Declaration at 1.

In contrast to the appellant's declaration, the TDC submitted an affidavit in which he states that he never forced the appellant to sign any document and that he thoroughly reviewed all documents with the appellant and ensured that the appellant understood the meaning and effect of the documents he was about to sign.

Having reviewed the record and the documents filed with the court, we conclude that we can resolve the appellant's claim without requiring a post-trial evidentiary hearing by using one of six principles set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Under the fifth principle, "when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id.* at 248.

In this instance, the record is replete with evidence that the appellant was fully apprised and understood the meaning and effect of his guilty pleas; had fully read, understood, and discussed with his counsel the contents of his pretrial agreement with the CA, the significance of the Stipulation of Fact, and his appellate rights prior to signing those documents; and was satisfied with his counsel's advice. See record at 9-13, 31-37, and 66-67. In light of the appellant's statements to the military judge and the affidavit of TDC, we conclude that the appellant was fully apprised of the meaning and effect of the documents and was not forced to sign them. Accordingly, we find this allegation to be without merit.

Failure to Highlight Appellant's Alcoholism in Request for Clemency

After a thorough review of the record of trial and the post-trial declarations submitted by the appellant and his father, there is no evidence to indicate that the appellant has ever been diagnosed as an alcoholic. Thus, TDC's decision not to include an unsupported statement of the appellant's alcoholism in his request for clemency was prudent and reasonable. To have asserted that the appellant was an alcoholic without any evidence of such a diagnosis would have been reckless. We have reviewed the clemency request submitted by TDC and conclude that its focus, i.e., the severity of the appellant's sentence relative to his co-conspirators and the life-long ramifications of a bad-conduct discharge, was a sound and reasonable approach in requesting clemency. We will not second guess counsel's decision not to raise the appellant's alleged alcoholism in his clemency matters, particularly in light of the fact that the appellant was not intoxicated when he assaulted a fellow Marine and made a false official statement. We conclude that the appellant was afforded effective assistance of counsel, and this assignment of error is without merit.

Deficient Providence Inquiry

Before accepting a plea of guilty, the military judge must conduct an inquiry of the accused to determine whether there is a factual basis for the plea and whether the accused understands the plea and enters it voluntarily. *United States v. McCrimmon*, 60 M.J. 145, 152 (C.A.A.F. 2004); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); R.C.M. 910(c)-(e). The accused must admit every element of the offense to which the accused is pleading guilty. See R.C.M. 910(e), Discussion. Although the stipulation of fact establishes a factual basis for the guilty plea, R.C.M. 910(e) nonetheless requires that "[t]he accused shall be questioned under oath about the offenses." See *United States v. Aleman*, 62 M.J. 281 (C.A.A.F. 2006). In this instance, the military judge failed to inform the appellant of the elements of specification of Charge V and asked no questions of the appellant to establish a factual basis for the appellant's plea of guilty to the specification.

The failure to advise the appellant of the elements of the offense of Charge V and the failure to establish a factual basis for the appellant's guilty plea constitutes error and a substantial basis in law for not accepting the appellant's guilty plea to the offense. Accordingly, we will set-aside the finding of guilty to Charge V and its specification in our decretal paragraph.

Sentence Reassessment

Having set aside Charge V and its specification, we reassess the sentence. Applying the analysis set forth in *United States*

v. Sales, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the sentencing landscape has not substantially changed and that even if the error had not occurred, the military judge would have adjudged a sentence no less than that adjudged and approved by the CA in this case.

Conclusion

The findings of guilty to Charge V and its sole specification are set aside and the Charge is dismissed. The remaining findings and the approved sentence are affirmed.

Senior Judge BOOKER and Judge LUTZ concur.

For the Court

R.H. TROIDL
Clerk of Court