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

Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILLIE A. BRADLEY
SEAMAN (E-3), U.S. NAVY

NMCCA 200501089
GENERAL COURT-MARTIAL

Sentence Adjudged: 17 August 2004.
Military Judge: LCDR Christopher Connor, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT E.S. White, JAGC, USN.
For Appellant: Capt Jeffrey Liebenguth, USMC.
For Appellee: Maj Jonathan Nelson, USMC; LT Timothy Delgado, JAGC, USN.

15 February 2011

OPINION OF THE COURT

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

BEAL, Judge:

A military judge, sitting as a general court-martial, convicted the appellant pursuant to his pleas of aggravated assault and reckless endangerment in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The appellant was sentenced to confinement for 48 months and a dishonorable discharge; the convening authority approved the sentence as adjudged. This case is before us a second time on remand from the United States Court of Appeals for the Armed Forces (CAAF).

Background

The appellant fired three rounds from his Ruger 9mm pistol towards the vicinity of another group of Sailors during a show-down occurring on the streets of Norfolk, Virginia in the early morning hours of 2-3 October 2003. Within three weeks of the incident being investigated, charges were preferred against the appellant alleging attempted murder, conspiracy to commit murder, and reckless endangerment. Shortly after his charges were referred to a general court-martial the appellant entered into a pretrial agreement. The agreement required the appellant to testify under a grant of immunity in the companion case, *United States v. Townsend*. Following his testimony in that case, the appellant withdrew from the pretrial agreement and pled not guilty to all charges. The appellant litigated several motions, one of which was a motion under RULE FOR COURTS-MARTIAL 907(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) to dismiss all charges as a result of the Government's improper use of the appellant's immunized statements and testimony. Alternatively, the appellant sought to disqualify the trial counsel from further participation in his prosecution. The military judge denied the motion in its entirety and the appellant changed his forum selection to military judge alone and entered guilty pleas to aggravated assault and reckless endangerment pursuant to a second pretrial agreement. During the military judge's colloquy with the appellant regarding the meaning and effect of his pleas, the appellant, through counsel, indicated that he was knowingly waiving appellate review of the military judge's ruling on the motion to dismiss charges, but believed that he was preserving appellate review of the judge's ruling on the motion to disqualify trial counsel.

In our initial review, we set aside the findings and sentence having found the military judge abused his discretion by denying a defense motion to disqualify trial counsel due to the improper use of the appellant's immunized statements and testimony. *United States v. Bradley*, No. 200501089, 2008 CCA LEXIS 398, unpublished op. (N.M.Ct.Crim.App. 25 Nov 2008). The Government appealed this court's opinion pursuant to Article 67(a)(2), UCMJ, and certified the following questions: 1) Did the NMCCA err by finding the military judge abused his discretion in ruling on the motion, or 2) Did the NMCCA err by setting aside the findings and sentence without determining whether the appellant was prejudiced by the error?

The CAAF resolved the appeal on a specified issue of their own and in a three-judge majority opinion remanded the case for further review holding that the appellant waived review of the disqualification issue because he pled guilty unconditionally. *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010). The CAAF majority further opined that application of the waiver doctrine would not render the appellant's pleas improvident. Consequently, the court remanded the case "for further review pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c)(2006)."

On remand, the appellant has assigned two additional errors: 1) the appellant's pleas were not knowing or voluntary because he reasonably, but mistakenly, believed he had preserved the disqualification motion for appellate review, and 2) the appellant received ineffective assistance of counsel when his attorney erroneously advised him that his motion to disqualify trial counsel was preserved for appellate review. Appellant's Brief of 22 Apr 2010. The Government contends that the CAAF has already conclusively ruled on the first issue and that the performance of the appellant's counsel was not deficient because their misinterpretation of the law was reasonable at the time. Appellee's Brief of 21 Jun 2010. We have once again reviewed the record and considered the pleadings of the parties. Based upon our review of the entire record, we find no error that materially prejudiced a substantial right of the appellant and we affirm the findings and sentence.

Providence of the Appellant's Plea

In our initial review we concluded, as a matter of law, that application of the waiver doctrine would render the appellant's pleas improvident. In their review under Article 67(a)(2), UCMJ, the CAAF majority held that we erred as a matter of law in reaching that conclusion. *Bradley*, 68 M.J. at 283. Accordingly, we are substantively bound by the majority's holding that application of waiver in this case does not render the appellant's pleas improvident. Art. 67(e), UCMJ. Accordingly, we decline to grant relief for the appellant's first assigned error.

Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, the appellant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(citation omitted). Specifically, the appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In regard to the appellant's claim that he received ineffective assistance of counsel, we agree with the Government's position that under the facts of this record, we cannot find the civilian defense counsel's advice, i.e., that the appellant's plea would preserve appellate review of the motion to disqualify trial counsel, to rise to the level of deficient performance, because even if the trial defense counsel's advice was erroneous, the error was not so serious that counsel was not functioning as the counsel guaranteed an accused by the Sixth Amendment.

While we acknowledge the defense counsel's advice to the appellant regarding preservation of the disqualification issue was erroneous due to his characterization of the pleas as

"unconditional," we also find that his mistaken belief that he had preserved the issue for appeal to be reasonable. A plain reading of R.C.M. 910(a)(2) allows an accused, with the approval of the military judge and the consent of the Government, to condition his pleas and reserve the right of appellate review over adverse rulings on specified pretrial motions. Even though the civilian defense counsel characterized the appellant's pleas as being "unconditional," he also expressly articulated on the record that the appellant's pleas were entered with the understanding that appellate courts would review the military judge's ruling on the motion to disqualify trial counsel. The military judge expressed his approval by accepting the plea, the trial counsel, who had zealously advocated the Government's case throughout and who had initially questioned the defense's interpretation of the effect of their pleas, manifested the Government's tacit consent by standing mute and by not otherwise objecting to the appellant's so-called unconditional plea. Accordingly, while we find the defense counsel's advice was erroneous, the error did not rise to the standard of "deficient performance" under *Strickland.*

Article 66(c) Review

A Court of Criminal Appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. We have reviewed the *entire* record and we are satisfied that regardless of any asserted error (waived or otherwise), the appellant did not suffer any material prejudice to a substantial right. *See United States v. Nerad*, 69 M.J. 138, 146-147 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 669 (2010)(noting the "should be approved language" of Article 66(c), UCMJ overrides any doctrinal constraint, including waiver, upon the CCA's authority to review a record).

The day following the military judge's ruling on the motion to disqualify trial counsel, the appellant entered his pleas. As noted above, the appellant mistakenly believed that he preserved for appellate review the military judge's ruling regarding the trial counsel's qualifications to continue in the appellant's prosecution. In reviewing the entire record, we conclude that even if the military judge erred in his ruling, the appellant was not materially prejudiced as to a substantial right.

The only evidence on findings that was offered by the Government was a stipulation of fact signed by the appellant, the civilian defense counsel, and the lead trial counsel (who was subject to the disqualification motion). Proescution Exhibit 13. After the stipulation was offered, the appellant affirmed for the military judge that he understood the purpose and uses of the stipulation of fact, and that he was entering into the stipulation freely and voluntarily and that he agreed to it being admitted as evidence. As to the findings, the trial counsel

played no other role in the appellant's prosecution and under these circumstances we can find no prejudice as to findings.

Prior to the presentencing hearing, the appellant moved for additional pretrial confinement credit under Article 13, UCMJ. The appellant testified in support of the motion but at the end of his direct testimony, the military judge disqualified either trial counsel from cross-examining the appellant because he did not want either counsel to be able to make use of any immunized statements or testimony previously given by the accused. The military judge denied the motion for extra administrative credit, however he took appropriate action to ensure none of the appellant's immunized statements came to play in rebutting the assertions constituting the appellant's Article 13 claim.

The Government's sentencing case amounted to PE 13 (the stipulation of fact) and PE 15 (three evaluation reports), which were admitted without objection from the defense. Furthermore, the defense did not object to any aspect of the trial counsel's argument on sentence. Consequently, we see no prejudice as to the sentence.

Accordingly, we affirm the findings and sentence as approved by the convening authority. Arts. 59(a) and 66(c), UCMJ.

Senior Judge MITCHELL and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court