

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MACK E. MCSPERITT, JR.
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201000369
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 19 April 2010.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol K.J. Keith, USMC.

For Appellant: CAPT Patricia Leonard, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

19 April 2011

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, consistent with his pleas, of unauthorized absence terminated by apprehension and escape from apprehension, in violation of Articles 86 and 95, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 895. The appellant was sentenced to confinement for 90 days, forfeiture of \$90.00 pay per month for 3 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in accordance with the pretrial agreement, suspended all confinement in excess of time served in pretrial confinement.

The appellant assigns four errors, three alleging his trial defense counsel provided ineffective assistance of counsel, the fourth alleging an inappropriately severe sentence. After a thorough review of the record of trial and the submissions of the parties, we conclude that the findings and 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.

INEFFECTIVE ASSISTANCE OF COUNSEL

The appellant alleges his trial defense counsel provided ineffective assistance by (1) failing to file a motion to compel production of an expert consultant, (2) failing to present evidence during his presentencing case of his possible diagnosis for Post-Traumatic Stress Disorder (PTSD), and (3) failing to present medical evidence of PTSD in his clemency petition. In support of his assertions, the appellant presents his mental health treatment records along with the declaration of Dr. Robert N. Rashidi. Dr. Rashidi is a contract psychiatrist who met with the appellant six times before his guilty plea, once immediately following his guilty plea, and once after the convening authority's action. While Dr. Rashidi has not made a definitive diagnosis of PTSD, he opined that it is "possible that [the appellant] suffers from Post Traumatic Stress Disorder." Appellant's Motion to Attach Documents, Declaration of Robert N. Rashidi at ¶6.

1. Principles of Law

We review claims of ineffective assistance of counsel under a *de novo* standard. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citations omitted). 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) (citations 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).

Furthermore, ineffectiveness at the sentencing phase may occur if the trial defense counsel "fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation" *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citation and internal quotation marks omitted). In particular, the failure of trial defense counsel to present evidence of PTSD has previously been addressed by this court. *United States v. Green*, No. 200600843, 2007 CCA LEXIS 413, unpublished op. (N.M.Ct.Crim.App. 27 Sep 2007) (finding no ineffective assistance of counsel when the appellant could neither demonstrate PTSD actually existed nor explain how the

failure to present evidence was the basis of a sound decision); *United States v. Smith*, No. 200501482, 2007 CCA LEXIS 191, unpublished op. (N.M.Ct.Crim.App. 6 Jun 2007) (finding no ineffective assistance of counsel when the trial defense counsel made the tactical decision to present evidence of a PTSD diagnosis through the accused's wife instead of an expert).

2. Discussion

We find the trial defense counsel's performance was reasonable at all phases of representation.

(a) Pretrial

The defense counsel's affidavit adequately addresses why an expert consultant was not pursued after the convening authority's denial of a witness request. Affidavit of Defense Counsel of 4 Nov 2010 at 6-7. We agree with the Government that a swift disposition was a priority for the appellant. This is evidenced not only by the trial defense counsel's affidavit, but the demand for speedy trial. *Id.* at 2-9; Record at 7. Therefore, it was an entirely reasonable approach to forgo pursuit of an expert consultant or witness in exchange for the prompt acceptance of a pretrial agreement and ensuing guilty plea. This is particularly true in light of the fact there were other means to present evidence of the appellant's symptoms. See *Smith*, 2007 CCA LEXIS 191.

(b) Presentencing

The defense counsel was similarly not deficient during the presentencing phase, because the mitigating evidence of the appellant's mental health was alternatively presented through his unsworn statement and letters written by his mother and girlfriend. Defense Exhibits A and C; Record at 71-73; see *Smith*, 2007 CCA LEXIS 191. In addition, the defense counsel made the fact that the appellant had not received any treatment for likely PTSD as a centerpiece of his sentencing argument and specifically argued that the convening authority's denial of the expert consultant should guard against a bad-conduct discharge, because the command did not give the appellant the mental help he deserved. Affidavit of Defense Counsel at 9; Record at 78-81. While this strategy might not have worked, our scrutiny of counsel's performance "should not be colored by . . . hindsight." *Alves*, 53 M.J. at 289 (citation omitted).

(3) Clemency

Finally, while the trial defense counsel did not present the appellant's medical records or any information from Dr. Rashidi during clemency, the convening authority was still aware of the mental health symptoms experienced by the appellant. The defense counsel enclosed the letters of the appellant's mother and girlfriend and also noted his combat related stress in the

clemency petition. Furthermore, defense counsel's affidavit explains why the medical records were unavailable and describes the post-trial difficulty in contacting the appellant. Affidavit of Defense Counsel at 8-10, Enclosure 2. Most importantly, perhaps, and relevant to all phases of representation, there was never a definitive diagnosis of PTSD. See *Green*, 2007 CCA LEXIS 413. Yet the defense counsel sufficiently garnered mitigating evidence of the effects of the appellant's combat experience to present to the military judge and convening authority.

Based on our review of the entire record and the submissions of the parties, we find the defense counsel adequately investigated and presented the available mitigating evidence and performed reasonably at all times. Finding no deficiency in the defense counsel's performance, we need not assess possible prejudice to the appellant. See *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993).

SENTENCE APPROPRIATENESS

A court-martial is free to impose any lawful sentence that it determines to be appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Sentence appropriateness under Article 66(c), UCMJ, requires the court to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In this case, the appellant argues his military character, balanced against the nature of his offenses, makes a bad-conduct discharge inappropriately severe. Appellant's Brief of 9 Sep 2010 at 11-12. On one hand, the appellant underwent great personal sacrifice during combat for which he received two Purple Hearts. He also suffered the loss of a close personal friend during combat and exhibited signs of mental anguish, anxiety, and difficulty adjusting to being home. On the other hand, the appellant was convicted of both an unauthorized absence terminated by apprehension and an ensuing escape. Furthermore, the Government introduced evidence of Article 15, UCMJ, punishment and a summary court-martial conviction involving multiple unauthorized absences. Prosecution Exhibit 1 at 9-10; PE 3. In total, the appellant was absent from his unit without authority for nearly a year and a half. PE 1 and 3; Record at 28-29, 75-76. The military judge and the convening authority were aware of all of these factors. Notwithstanding the appellant's honorable combat service, a bad-conduct discharge is appropriate when balanced against the offenses for which he was convicted and the overall character of his enlistment. *Snelling*, 14 M.J. at 268. After reviewing the entire record, we conclude

that the sentence is appropriate for these offenses and this offender.

CONCLUSION

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court