

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

**Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J. R. MCFARLANE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DMENICO D. HUDSON
HOSPITALMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201100560
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 June 2011.

Military Judge: LtCol Charles Hale, USMC.

Convening Authority: Commander, National Naval Medical
Center, Bethesda, MD.

Staff Judge Advocate's Recommendation: LCDR K.J. Ian, JAGC,
USN.

For Appellant: LT Toren Mushovic, JAGC, USN.

For Appellee: LT Joseph Moyer, JAGC, USN.

31 August 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PAYTON-O'BRIEN, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of aggravated sexual assault, abusive sexual contact, and wrongful sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The military judge sentenced the appellant to confinement for 84 months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA)

Corrected Opinion

approved the sentence as adjudged and pursuant to a pretrial agreement (PTA), suspended confinement in excess of 30 months.

The appellant raises five assignments of error.¹ In three of the assignments of error, the appellant claims that his trial defense counsel were ineffective as follows: by not explaining the defenses of consent and mistake of fact as to consent before the appellant pled guilty; by advising the appellant that he would not have to register as a sex offender if he pled guilty; and by telling the appellant that he would receive a bad-conduct discharge if he pled guilty. In his other two assignments of error, the appellant claims his plea was not provident because he did not intelligently understand the defenses of consent and mistake of fact as to consent, and that the evidence is neither factually nor legally sufficient.

On 28 December 2011, we granted the appellant's Non-Consent Motion to Attach Documents.² These documents consisted of a handwritten declaration under penalty of perjury from the appellant, a Government Disclosure Pursuant to *Brady vs. Maryland*, a voluntary statement by Mr. JP, and a Memorandum for Evidence Custodian. The appellant outlined his complaints in his declaration and believes the assertions made establish ineffective assistance of counsel, improvident pleas, and factual and legal insufficiency. We disagree.

We have examined the record of trial, the appellant's assignments of error and the pleadings from the parties. 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.

Factual Background

The sexual assault charges in this case arise from the appellant's interaction with Hospitalman Recruit (HR) KJ while stationed at the National Naval Medical Center (NNMC) in Bethesda, Maryland. HR KJ and the appellant were acquaintances, having gone to hospital corpsman school at the same time, working together in the Plastic Surgery Clinic at NNMC, residing

¹ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

² The Government filed a written opposition to the motion to attach, citing Rule 23.4 of this court's Rules of Practice and Procedure and *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

in the same building onboard Naval Support Activity Bethesda, and socializing together.

The relevant facts concerning the charged offenses are as follows. The night of the incident, the appellant sent a text message to HR KJ asking if she wanted to go out in town with him and a fellow corpsman, but she declined. Thereafter, the appellant went to the smoke deck to have a cigarette, running into HR KJ and one of her friends on the way. The appellant noticed that HR KJ was intoxicated, because she was stumbling, slurring her words and talking quickly. The appellant further noticed that HR KJ was having trouble sitting up and staying awake. HR KJ told the appellant that she thought she had left her barracks key in her purse in another service member's barracks room, so the appellant accompanied HR KJ to the room to retrieve her key. While in the room, the appellant stopped other service members from trying to take advantage of HR KJ because of her inebriated state.

After returning to the smoke deck with HR KJ, the appellant's roommate, Hospitalman Apprentice (HA) CP, decided that the victim should be taken back to her room because of her intoxication. HA CP, the appellant, and an unknown third man helped HR KJ to her room. After arriving at HR KJ's barracks room, the appellant witnessed several individuals arguing outside her door, including HR KJ's roommate, HR JB, who refused to let HR KJ into the room because HR KJ was so intoxicated. The appellant and his roommate decided to take HR KJ to their own barracks room so she could sleep.

Upon reaching their barracks room, the appellant and HA CP laid HR KJ down on the bed and she immediately turned onto her side and appeared to fall asleep. Meanwhile, HA CP went back to HR KJ's room to try and convince her roommate to allow her back into her room, leaving the victim alone with the appellant in his room. While HR KJ was still passed out, the appellant pulled her jeans down slightly and put his hand down her pants, digitally penetrating her vagina with his fingers. Eventually, the appellant removed his hand and pulled HR KJ's pants down past her hips and rubbed his penis along her vagina, ultimately penetrating her vagina. Throughout this entire series of events, HR KJ was very intoxicated and was generally nonresponsive. The appellant stopped his actions after HR KJ called him somebody else's name.

Trial Proceedings

At trial, the appellant elected to be represented by his two trial defense counsel (TDC) and declined to be represented by any other attorney. The appellant pleaded guilty pursuant to a PTA, which required that the appellant enter into a stipulation of fact. After an appropriate inquiry with the appellant, the military judge admitted the stipulation of fact into evidence. The appellant was notified of the possible charges by the military judge, including that the maximum punishment included a dishonorable discharge. The appellant informed the military judge that he had discussed the charges with his TDC and understood the ramifications of pleading guilty. Pursuant to the defense request, the military judge took judicial notice of the Adam Walsh Act³ and the State of Georgia's sex offender registration law, and attached the relevant statutes to the record as appellate exhibits.⁴ The appellant acknowledged he understood the potential effects of sex offender registration. TDC also informed the military judge at trial that they advised the appellant of the potential impact of sex offender registration laws.

During the providence inquiry, the military judge listed the elements of each offense. The military judge defined consent and mistake of fact as to consent and after conferring with his defense counsel, the appellant acknowledged his understanding of the defenses and indicated he had no questions for the military judge. Under oath, the appellant admitted to engaging in sexual acts with HR KJ without her consent. He told the military judge that there was nothing about HR KJ's conduct or a prior relationship that would make him believe that she consented to sexual activity with him on the night in question, nor that he had a mistaken belief that HR KJ consented to the sexual activity.

The military judge conducted an appropriate inquiry into the terms of the PTA, and the appellant acknowledged an understanding of the agreement. The appellant informed the military judge that he understood what it meant to plead guilty, that he was pleading guilty freely and voluntarily, and he was not forced or threatened into pleading guilty.

³ Adam Walsh Child Protection and Safety Act of 2006, 42 USC § 16901

⁴ Appellate Exhibits VI and VII.

Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims *de novo*. *United States v. Osheskie*, 63 M.J. 432, 434 (C.A.A.F. 2006). To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

In the guilty plea context, the first part of the *Strickland* test remains the same -- whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys. *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985)). The second prong is modified to focus on whether the "ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59.

With respect to the first prong, whether counsel's performance was deficient, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; see also *Harrington v. Richter*, 131 S. Ct. 770, 788, (2011) ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one."). With regard to the second prong, an appellant in a guilty plea case establishes prejudice by showing that, but for counsel's deficient performance, there is a "'reasonable probability'" that "he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (quoting *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)).

This case involves a post-trial declaration-based claim of ineffective assistance of counsel. The Government objected to our consideration of the post-trial declaration and did not submit an opposing affidavit. Applying the factors set forth in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we will resolve the appellant's claims based on the record before us without the need for an evidentiary hearing.⁵

⁵ In *Ginn*, the Court of Appeals for the Armed Forces delineated the authority of Courts of Criminal Appeals to decide ineffective assistance of counsel issues without further proceedings:

(1) if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected;

The first, second, fourth, and fifth *Ginn* factors are relevant here. After consideration of these factors, we conclude that TDC's performance was not deficient and the appellant has failed to meet his burden in proving ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. We find nothing in the record to suggest that TDC were deficient in their representation in any of the three ways averred by the appellant. Rather, the record compellingly demonstrates that the appellant was satisfied with counsel, fully informed of the charges to which he was pleading guilty and the possible defenses to those charges, understood the maximum punishment he faced, and was fully apprised of and understood the administrative consequence of sex offender registration.

Assuming *arguendo* that the appellant and the victim had previously engaged in sexual activity, that she touched him in a "sexual way" the night of the charged incident, or that the appellant had a contagious venereal disease, these facts do not negate the fact that the appellant, under oath, admitted to engaging in sexual acts with HR KJ without her consent. The appellant's post-trial affidavit contains his admission that he engaged in sexual touching of the victim after she had been

(2) if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected;

(3) if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts;

(4) if the affidavit is factually adequate on its face but the appellate filings and record as a whole "compellingly demonstrate" the improbability of those facts, the court may discount the factual assertions and decide the legal issue;

(5) 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; and

(6) the Court of Criminal Appeals is required to order a fact-finding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66, UCMJ, fact-finding power and decide the legal issue.

Id. at 248.

drinking and expressed knowledge of the wrongfulness of his actions. Furthermore, his conclusory statement that he could not have committed the offenses without the victim contracting his disease is mere speculation. The statement of JP and the DNA report, enclosed with the appellant's declaration, even if true, do not change the legal conclusion of this case.

The appellant offers no evidence, other than his statements in this declaration, that he was forced to admit anything at trial or that he pleaded guilty without being fully apprised of the potential consequences. Although he claims now that he felt like he was forced to admit to things that he did not do, the military judge gave the appellant ample time to consider whether he desired to plead guilty. The appellant conferred with his TDC numerous times in order to clarify his facts. Although the appellant now alleges he was forced into a particular narrative, it is clear from the record that at any point during the providence inquiry the appellant could have clarified any points of confusion, yet he failed to do so. Finally, the appellant's claims as to a misunderstanding about the maximum punishment and sex offender registration requirements are wholly unsupported by the record. In fact, the appellate filings and the record as a whole "compellingly demonstrate" the improbability of the facts set forth by the appellant.

**Providence of the Appellant's Plea/
Legal and Factual Sufficiency**

Next, the appellant alleges that his guilty plea was not provident because he did not intelligently understand the defenses of consent and mistake of fact as to consent, and that the evidence was not legally and factually sufficient. As the issues are related, we will address them together.

Although the appellant alleges that the evidence is neither factually nor legally sufficient to support a guilty finding, since he did not enter a conditional plea, he waives any objection relating to factual issues of guilt of the offenses to which his pleas were made. RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). As the appellant pleaded guilty unconditionally, the issue is analyzed in terms of the providence of plea, not sufficiency of the evidence. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

To prevent the acceptance of improvident pleas, the military judge has a duty to establish, on the record, the factual bases that establish that "the acts or the omissions of

the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969) (citations omitted). If the military judge fails to establish that there is an adequate basis in law and fact to support the plea during the *Care* inquiry, the plea will be improvident. We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novo*. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference." *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009) (quoting *Inabinette*, 66 M.J. at 322). If an accused sets up a matter inconsistent with the plea at any time during a guilty plea proceeding, the military judge must resolve the conflict or reject the plea. Art. 45(a), UCMJ; see R.C.M. 910(h)(2).

R.C.M. 916(j)(1) states, "[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." It is an affirmative defense to several Article 120, UCMJ, violations that the accused held, as a result of mistake or ignorance, an incorrect belief that the other person engaging in the sexual conduct consented. R.C.M. 916(j)(3). This ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. *Id.* To be reasonable, the mistake or ignorance must have been based on information or lack of information which would indicate to a reasonable person that the other party consented. *Id.* In the event that the accused's statements or matters in the record indicate a defense might exist, the military judge must determine whether that information raises a conflict with the plea and thus the possibility of a defense or only the "mere possibility" of conflict. *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)).

In this case, the record does not support the appellant's contention that he failed to understand the defense of consent or mistake of fact as to consent. Neither does the information provided by the appellant at trial raise a possibility of a defense. The record is clear that the appellant demonstrated sufficient understanding as to the two defenses. The appellant repeatedly informed the military judge that HR KJ was

substantially intoxicated when he committed his offense against her. The military judge asked the appellant more than once if there was anything that would have led the appellant to believe that HR KJ consented to the sexual conduct. The appellant replied each time in the negative. Based on the record before us, we conclude that there was no possible defense of consent or mistake of fact as to consent and that the appellant's plea was provident. Under the circumstances of this case, a reasonable person would not have held a mistaken belief that HR KJ consented to sexual conduct. We conclude that the appellant completed a knowing, voluntary, and intelligent plea of guilty to the charged offense, including a proper Care inquiry.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Judge WARD and Judge McFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court