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

Before
M.D. MODZELEWSKI, C.K. JOYCE, T.R. ZIMMERMANN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

THOMAS G. CAMPBELL II
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200466
SPECIAL COURT-MARTIAL

Sentence Adjudged: 13 July 2012.
Military Judge: Maj Eric L. Emerich, USMC.
Convening Authority: Commanding Officer, 2d Marine Regiment, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: LCDR Brandon E. Boutelle, JAGC, USN.
For Appellee: Maj Crista D. Kraics, USMC; Maj William C. Kirby, USMC.

30 April 2013

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.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy to commit the offense of unauthorized sale of military property and two specifications of the unauthorized sale of military property, in violation of Articles 81 and 108, Uniform Code of Military Justice, 10 U.S.C.

§§ 881 and 908. The military judge sentenced the appellant to a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.[1]

The appellant's sole assigned error is that a punitive discharge in this case is inappropriately severe, based on the appellant's three deployments (two in direct combat support) and subsequent diagnosis of post-traumatic stress disorder (PTSD). Having considered the parties' pleadings and the record of trial, we find the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ. We therefore affirm the findings and the approved sentence.

Factual Background

The appellant joined the Marine Corps at the age of 20 in 2006. He served a combat tour in Iraq beginning in July 2008, followed by a combat tour in Afghanistan beginning in February 2010. During the second combat tour, he survived an attack during which his vehicle was hit by an improvised explosive device. In March 2011, he deployed with the 26th Marine Expeditionary Unit and supported NATO actions in Libya. Between August 2011 and May 2012, the appellant was treated by a psychiatrist who diagnosed him with chronic PTSD and chronic major depression.

In August 2011, the appellant responded to an advertisement soliciting the sale of military equipment. Unbeknownst to the appellant, an agent with the Naval Criminal Investigative Service (NCIS) had placed the ad pursuant to an undercover operation designed to curb the theft and sale of military property from Camp Lejeune, North Carolina. The appellant and the agent exchanged several phone calls and text messages, and made arrangements to meet for the purpose of the appellant selling military property to the agent. On 24 August 2011, the appellant and a junior Marine agreed to engage in the unauthorized sale of military property. On 8 September 2011, the two Marines drove to a location in the local community and met with the NCIS agent. The agent paid the appellant $1,400.00 to purchase the following items of military property: six Small Arms Protective Insert (SAPI) plates, six front and back SAPIs, and a modular tactical vest. After this sale, the appellant and

[1] To the extent that the CA's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

the agent continued to communicate and agreed to another transaction. On 4 October 2011, the appellant and the agent met and the appellant sold an M50 gas mask to the agent for $150.00. All of the items the appellant sold contained serial numbers and were controlled items of military issued gear belonging to the United States. The appellant had no authority to sell these items.

At trial, the appellant stated during the providence inquiry that he was pleading guilty freely and voluntarily after consultation with counsel, and established a factual basis for each element of each offense. During the sentencing portion of the court-martial, the appellant presented several character witnesses and offered letters documenting his family history of military service and general good character. He did not offer any medical testimony or evidence beyond a one page letter from his doctor that documented the diagnoses of chronic PTSD and chronic major depression and the medications prescribed. The letter also stated that the treatment plan was to see the appellant once every six weeks for twenty minutes "for medication monitoring and cognitive behavioral psychotherapy."

Through counsel, the appellant submitted a clemency request to the CA and attached the same documentary evidence he had presented at trial, including the doctor's letter. In the clemency letter, the defense counsel noted that the appellant was "suffering from PTSD, with diagnosed depressive tendencies that may have impacted his ability to fully appreciate the nature of his conduct." We conclude that he did not assert this as an issue of legal error that would invalidate the appellant's pleas, but rather as a matter in mitigation. Neither at trial nor in clemency did the appellant present any evidence that his PTSD affected his ability to appreciate the nature of his conduct. Any connection between the diagnosis and the strictly pecuniary crimes of the appellant is at best attenuated and on the record before us, does not rise to the level of either a legal defense or allegation of legal error. We therefore find no error, and certainly no harmful error, in the staff judge advocate's failure to address the assertion in his recommendation, nor in the military judge's acceptance of the appellant's guilty pleas. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).

Discussion

Under Article 66(c), UCMJ, we may only approve a sentence which we find appropriate after we have independently reviewed

the case and considered the nature and seriousness of the offenses and the character of the offender. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's offenses are serious. Over a period of several weeks, he had multiple conversations via telephone or text messages with an undercover NCIS agent the appellant believed to be a civilian seeking to purchase serialized military property. The appellant initiated some of these contacts, including calling the agent after the appellant returned from a two-week period of leave. On two separate occasions, the appellant sold items vital to combat Marines to this agent and pocketed over $1,500.00. He involved a Marine junior to him in this unlawful activity.

On appeal, the appellant asks this court to disapprove the only punishment adjudged – the punitive discharge – based on the PTSD diagnosis. However, while the appellant did offer the evidence of the diagnosis itself – the doctor's letter – in sentencing and included it in his clemency matters, he did not present any evidence at trial, during clemency, or on appeal as to how his medical diagnosis influenced the conduct underlying the offenses of conviction. It is telling that the appellant's civilian defense counsel at trial argued against imposition of a punitive discharge, but did not even reference the medical issue in this portion of his argument. In short, there is no evidence in the record to establish that the appellant's medical condition is linked to the misconduct of which he was convicted, and, if so, how. There is an insufficient basis to support granting the requested relief.

We have carefully considered the entire record of trial, the nature and seriousness of these offenses, the matters the appellant presented in extenuation and mitigation, and the appellant's military service to include his combat tours. We find the sentence to be appropriate for this offender and the offenses committed. Granting additional sentence relief at this point would be engaging in clemency, a prerogative reserved for the CA, and we decline to do so. *See Healy*, 26 M.J. at 395-96.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court