

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

**Before  
M.D. MODZELEWSKI, C.K. JOYCE, G.G. GERDING  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BRANDON P. EVERSON  
AVIATION BOATSWAIN'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201300111  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 17 December 2012.

**Military Judge:** CAPT Kevin R. O'Neil, JAGC, USN.

**Convening Authority:** Commanding Officer, USS CARL VINSON  
(CVN 70).

**Staff Judge Advocate's Recommendation:** LCDR M.V. Rosen,  
JAGC, USN.

**For Appellant:** Maj S. Babu Kaza, USMCR.

**For Appellee:** LCDR Brian C. Burgtorf, JAGC, USN; LT Philip  
S. Reutlinger, JAGC, USN.

**29 August 2013**

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**OPINION OF THE COURT**  
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**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 plea, of one specification of wrongful distribution of a controlled substance in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 265 days, reduction to pay grade E-1, and a bad-conduct

discharge. The convening authority (CA) approved the sentence, which was not affected by the pretrial agreement.

The appellant raises two errors: first, that his civilian counsel was ineffective in failing to argue specifically against a punitive discharge; and, second, that a bad-conduct discharge is inappropriately severe.<sup>1</sup> After careful consideration of the record and the pleadings of counsel, 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 occurred. Arts. 59(a) and 66(c), UCMJ.

### **Factual Background**

The appellant's cousin, who lived in Illinois, asked the appellant to send him \$1,500.00 worth of marijuana, with the understanding that he would sell it to a distributor. The appellant agreed, and his cousin transferred \$1500.00 to him. The appellant bought approximately 1.5 lbs of marijuana from a civilian in San Diego who he knew to be a drug dealer. The dealer also gave him instructions on how best to package and ship the marijuana to avoid detection. Following those instructions, the appellant divided the marijuana into smaller units, vacuum-sealed the bags, wrapped and packaged them securely, and mailed them via express mail. Despite the appellant's precautions, postal employees noted a strong odor emanating from the package and alerted a postal inspector, who obtained a search warrant and found the marijuana. Upon interrogation by a Naval Criminal Investigative Service agent, the appellant confessed, and subsequently pled guilty to one specification of wrongful distribution of the marijuana.

During his sentencing hearing, the appellant made a detailed and lengthy unsworn statement. In part, he explained that he was simply trying to help his cousin, who was in financial distress. He expressed regret and told the military judge that "I'm sure whatever decision you make regarding my punishment will be the right one, sir." Record at 53. His civilian counsel also introduced evaluations documenting his performance.

During his sentencing argument, the trial counsel argued for a sentence of 12 months confinement and a bad-conduct discharge. In response, the civilian defense counsel opened his sentencing argument by noting that "a sentence less than the

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<sup>1</sup> Both assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

maximum is certainly within the realm of reason. Just what that sentence is, I'll leave to the court." *Id.* at 59-60. He then highlighted several mitigating factors, including the appellant's immediate acceptance of responsibility, and the fact the appellant did not profit from this transaction, but was simply attempting to help a family member. The civilian counsel closed by stating: "So, based on these factors and the testimony - the unsworn statement of Petty Officer Everson, who seems like a very contrite sailor, who clearly did have a good career going and had excellent evals, some of the best we've seen in our practice, it seems like he's earned a little compensation, less than the maximum. We'll submit on that basis, sir." *Id.* at 61.

### **Ineffective Assistance of Counsel**

The appellant now claims he received ineffective assistance of counsel during sentencing because his trial defense counsel failed to expressly argue against a punitive discharge. We conclude that the appellant's claim of ineffective assistance of counsel is without merit.

In reviewing claims of ineffective assistance of counsel *de novo*, we begin our analysis with *Strickland v. Washington*, 466 U.S. 668 (1984), which established a two-prong test: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. There is a strong presumption of competence for counsel, and an appellant must meet this two-part test to overcome that presumption. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). The *Strickland* test applies to all phases of the court-martial, including guilty plea and sentencing proceedings. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). As a general matter, we will not second-guess the strategic or tactical decisions made at trial by defense counsel absent a showing by the appellant of specific defects in his counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (internal quotation marks and citation omitted.)

Testing civilian counsel's performance and argument by asking the three questions posed in *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991), we conclude that the appellant has failed to overcome the presumption of his counsel's competence and has failed to demonstrate that counsel's advocacy was deficient under prevailing professional norms. *See United*

*States v. Cronin*, 466 U.S. 648 (1984); *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

"Effective advocacy requires an astute, reflective evaluation of a set of circumstances with rational, tactical trial choices flowing therefrom." *United States v. Burt*, 56 M.J. 261, 265 (C.A.A.F. 2002). In the context of this case, in which the appellant pled guilty to purchasing a large quantity of marijuana from a known dealer to ship across state lines for further distribution, the defense counsel made a reasonable decision to counter trial counsel's argument for the jurisdictional maximum by arguing for something less than the maximum. We note that the military judge then imposed a sentence 100 days less than the maximum confinement of one year, and less than the cap established by the pretrial agreement.

We find that the appellant has not met his burden to show ineffective assistance of counsel.

#### **Sentence Appropriateness**

Under Article 66(c), UCMJ, we may only approve a sentence that 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 accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant mailed 1.5 lbs of marijuana worth \$1,5000.00, acting as a conduit between two distributors. We have carefully considered the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service. We find the sentence to be appropriate for this offender and the offense 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