

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

**Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARK J. MUSACCHIO, JR.
HOSPITALMAN (E-3), U.S. NAVY**

**NMCCA 201300145
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 January 2013.

Military Judge: Maj Eric Emerich, USMC.

Convening Authority: Commanding General, 2d Marine
Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Maj J.N. Nelson,
USMC.

For Appellant: CAPT Randy Bryan, JAGC, USN.

For Appellee: CDR James E. Carsten, JAGC, USN.

26 November 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 general court-martial convicted the appellant, pursuant to his pleas, of one specification of attempted aggravated sexual assault, one specification of dereliction of duty, one specification of aggravated sexual assault and two specifications of abusive sexual contact, in violation of Articles 80, 92 and 120(c) and (h), Uniform Code of Military Justice, 10 U.S.C. § 880, 892, and 920(c) and (h) (2007). The military judge sentenced the

appellant to seven years' confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 26 months, suspended adjudged forfeitures, and waived automatic forfeitures until the appellant's End of Active Obligated Service.¹

The appellant's sole assignment of error is that trial defense counsel was ineffective during the sentencing phase of his court-martial by failing to review and present specific evidence in extenuation and mitigation.² After careful consideration of the record, the appellant's claims, and the Government's response, 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.

Background

The appellant, a 37-year-old married Navy hospitalman (E-3), was convicted, pursuant to his pleas, of offenses stemming from unauthorized, unsupervised, and undocumented "medical examinations" he performed or attempted to perform upon two junior enlisted female Marines while assigned to a Marine Battalion Aid Station (BAS). These exams were performed under the guise of a required annual "pap smear." Neither exam was conducted in accordance with the BAS standard operating procedures, even though the appellant "knew that all patient encounters, treatments, and medications were required to be appropriately and accurately documented."³ Specifically, the appellant: 1) failed to ensure that a privileged provider or Independent Duty Corpsman was present for each exam; and 2) failed to document properly the exam in each Marine's medical record.

Claim of Ineffective Assistance of Counsel

¹ To the extent that the convening authority's action purports to execute the punitive discharge it is a legal nullity. See *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

² This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

³ Prosecution Exhibit 1 at 2.

The appellant alleges in his post-trial affidavit that his trial defense counsel was ineffective in preparing his sentencing case, because trial defense counsel did not offer certain BAS medical records. The appellant argues that these medical records would have demonstrated that prior to his having performed unsupervised examinations of the two enlisted female Marines, "multiple military providers at the BAS [had] regularly acquiesced to or permitted me to perform medical examinations without their presence or direct supervision."⁴ Based on this, the appellant argues that this acquiescence would have served to mitigate his sentence. We disagree.

In reviewing for ineffectiveness, the court "looks at the questions of deficient performance and prejudice *de novo*." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008) (citation omitted).

This court analyzes the appellant's claim of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, to prevail on a claim of 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*, 466 U.S. at 687) (additional citation omitted).

When assessing *Strickland's* first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689 (citation omitted). When challenging the performance of trial defense counsel, the appellant "bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citation omitted).

"When there is a factual dispute, we determine whether further factfinding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If, however, the facts alleged by the defense would not result in relief under the high standard set by *Strickland*, we may address the claim without the necessity of resolving the factual dispute." *Tippit*, 65 M.J. at 76 (citing *Ginn*, 47 M.J. at 248).

⁴ Appellant's Motion to Attach of 19 Aug 2013, Post-Trial Declaration of Appellant dated 16 August 2013.

Here, there is no need for further fact-finding because this court is convinced that the trial defense counsel's decision not to offer the medical records into evidence at sentencing was reasonable and clearly did not amount to deficient performance under *Strickland*. The evidence in issue would have, at best, reflected that providers made conscious decisions to allow the appellant to perform authorized examinations under certain circumstances, not that they allowed him to perform unauthorized examinations without their knowledge. Such evidence does not appear to either extenuate or mitigate the offenses to which the appellant pled guilty.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court