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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN T. NELSON
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200233
SPECIAL COURT-MARTIAL

Sentence Adjudged: 6 February 2012.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding Officer, 5th Marine Regiment (Rear), 1st Marine Division (Rein), FMF, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj V.G. Laratta, USMC.
For Appellant: CAPT Randy C. Bryan, JAGC, USN.
For Appellee: CDR Kevin L. Flynn, JAGC, USN; Maj David Roberts, USMC.

21 March 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.

PRICE, Judge:

A military judge, sitting as a special court-martial, convicted the appellant in accordance with his pleas of three specifications of unauthorized absence in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The military judge sentenced the appellant to confinement for 140 days, forfeiture of $900.00 pay per month for four months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to

a pretrial agreement, suspended all confinement in excess of 60 days.[1]

The appellant raises three assignments of error including: (1) that his pleas of guilty were improvident because he was not informed that a punitive discharge would result in the loss of health benefits; (2) that he received ineffective assistance of counsel; and (3) that his sentence was inappropriately severe.

After careful consideration of the record and the briefs of 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.

I. Background

The appellant pled guilty to three separate periods of unauthorized absence from May 2011 through January 2012 for a period totaling more than six-months. During the military judge's inquiry into the appellant's pleas, the appellant indicated that he had long-term kidney problems. He also stated that he suffered permanent brain damage when his fever spiked as a result of acute renal failure.

The military judge then thoroughly addressed the potential necessity for an inquiry into the appellant's mental capacity or responsibility, ultimately concluding that such an examination was not warranted. RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); Record at 17-19, 30, 39, 71-73. The military judge also solicited the views of counsel on the necessity of such an exam, discussed the potential benefit of such an examination in the development of evidence in extenuation and mitigation, and later ordered a recess after directing the trial defense counsel to discuss the matter with his superiors and the appellant. Record at 30, 70-71. Following a 51-minute recess, trial defense counsel informed the military judge that he and his client "believe" that the appellant's mental responsibility at the times of the misconduct was not an issue and that the appellant was "able to participate meaningfully in his own defense." *Id*. at 71.

[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

Additional facts necessary to resolve the assigned errors are included herein.

II. Providence of Pleas

The appellant asserts that his pleas of guilty were improvident "because he was not advised by his trial defense counsel or the court of the potential loss of [Veterans Administration] (VA) health care benefits resulting from [a] punitive discharge." Appellant's Brief of 9 Oct 2012 at 6. The parties agree that the "loss of VA health benefits" could constitute a collateral consequence of a court-martial conviction and sentence. *Id*.; Government Answer at 7-8.

We review a military judge's decision to accept a plea of guilty "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 guilty plea will be set aside on appeal only if an appellant can show a substantial basis in law or fact to question the plea. *Id*. (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)):

> [W]hen collateral consequences of a court-martial conviction . . . are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.

United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982).

The pretrial agreement states that "[m]y defense attorney has advised me that any punitive discharge that is adjudged and ultimately approved . . . may adversely affect my ability to receive retirement pay and any and all other benefits accrued as a result of my military service." Appellate Exhibit I at 4, ¶ 15(a). Prior to accepting the appellant's pleas, the military judge essentially repeated that pretrial agreement provision and

asked the appellant if he understood it; he responded, “Yes, sir.” Record at 36.

We need not determine whether the alleged “collateral consequences are major,” as the appellant has failed to establish that his misunderstanding of collateral consequences was attributable to any of the three bases specified in *Bedania* to successfully challenge a plea. 12 M.J. at 376. The record reflects that any misunderstanding that the appellant may have had regarding the effect of a punitive discharge on VA health benefits “was not the result of the language of the pretrial agreement, was not induced by the military judge's comments, nor was it made readily apparent to the military judge.” *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006). Since the appellant's alleged “lack of knowledge is not the result of any of the above, the military judge did not err in his responsibility to ensure that [the appellant] understood all the consequences of his guilty plea.” *Id*.

Although a “military judge may appropriately ask during the providence hearing whether appellant and his counsel have discussed any possible collateral results of a conviction on the charges to which a guilty plea is being entered, the judge need not undertake on his own motion to ascertain and explain what those results may be.” *Bedania*, 12 M.J. at 376.

As the appellant has shown no substantial basis in law or fact to question his pleas of guilty, we conclude that the military judge did not abuse his discretion in accepting those pleas. *See Inabinette*, 66 M.J. at 322. In addition, we find that the military judge properly defined the offenses and that the appellant provided a sufficient factual basis to establish his guilt for each period of unauthorized absence. Accordingly, the appellant's pleas were provident.

III. Ineffective Assistance of Counsel

The appellant also alleges that his trial defense counsel provided ineffective assistance. He argues four separate deficiencies including that trial defense counsel: (1) failed to advise him of the potential loss of VA health benefits; (2) failed to pursue a psychiatric examination under R.C.M. 706 and forfeited an opportunity to develop evidence in extenuation and mitigation; (3) suffered an apparent conflict of interest; and (4) failed to present available evidence in extenuation and mitigation.

As a preliminary matter, we find the appellant's claim that trial defense counsel suffered an apparent conflict of interest without merit. The appellant argues that the military judge's direction to trial defense counsel that he talk to his superiors and client about whether to request an R.C.M. 706 examination called "[trial defense counsel's] professional competence into question, and . . . that it was counsel's self-interest that moved him to waive the Rule 706 inquiry." Appellant's Brief at 16. We discern no conflict of interest arising from these facts, either actual or apparent. After stating that he saw no reason to order an R.C.M. 706 inquiry, *sua sponte*, the military judge's direction to trial defense counsel was apparently provided to ensure that trial defense counsel and the appellant were both properly advised and in agreement as to whether an R.C.M. 706 inquiry was required or desired. On these facts, the appellant has failed to demonstrate "that defense counsel faced an actual conflict of interest which affected the adequacy of [the attorney's] representation." *United States v. Thompson*, 51 M.J. 431, 434-35 (C.A.A.F. 1999) (internal quotation marks and citation omitted). Moreover, the appellant's argument is speculative and fails to demonstrate an apparent conflict of interest.

We analyze the appellant's three remaining claims of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). 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). 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) (citations 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. 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." *Id*. (citing *Ginn*, 47 M.J. at 248).

To demonstrate prejudice, the appellant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gutierrez*, 66 M.J. at 331 (quoting *Strickland*, 466 U.S. at 694). In a guilty plea case, the defense must also "show specifically that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Tippit*, 65 M.J. at 76 (internal quotation marks and citation omitted). "'[W]e need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of *Strickland* . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*.'" *Id*. (quoting ***United States v. Saintaude***, 61 M.J. 175, 183 (C.A.A.F. 2005)).

After careful consideration of the record of trial, the parties' pleadings, the appellant's declaration under penalty of perjury, and the trial defense counsel's declaration under penalty of perjury, we conclude that the appellant's remaining claims of ineffective assistance of counsel are also without merit.

A. Failure to Advise - Potential Loss of VA Health Benefits

The appellant's claims that trial defense counsel assured him of his continued eligibility for medical benefits, "never informed [him] that a Bad Conduct Discharge could result in the loss of medical benefits through the VA," and that had he known that a BCD "could result in the loss of medical benefits through the VA, [he] would not have agreed to plead guilty" are unsupported by the record. Appellant's Declaration of 8 Oct 2012.

The pretrial agreement explicitly acknowledged that trial defense counsel "advised [the appellant] that any punitive discharge that is adjudged and ultimately approved . . . may adversely affect [his] ability to receive retirement pay and any and all other benefits accrued as a result of [his] military service." AE I at 4, ¶ 15(a). The appellant also acknowledged his understanding of that provision in response to a question from the military judge. Record at 36.

Further fact-finding is not required under the fourth *Ginn* factor. Based upon the aforementioned, we conclude that the record, as a whole "compellingly demonstrate[s]" the improbability

of the facts asserted in the appellant's declaration.[2] *Ginn*, 47 M.J. at 248.

We find the appellant's declaration insufficient to "establish[] the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76. We therefore conclude that the appellant's claims on appeal that his trial defense counsel failed to advise him of the potential loss of VA health benefits both unsupported by the record and insufficient to establish that his "counsel's performance was deficient." *Strickland*, 466 U.S. at 687.

B. Failure to Develop and Present Available Evidence in Extenuation and Mitigation.

The appellant contends that trial defense counsel "knew that [he] suffered substantial and permanent brain damage as a result of his kidney disease and even if a 706 was not warranted for purposes of determining mental responsibility, such a medical review would likely have provided medical testimony that would have been critical during the sentencing phase of the trial." Appellant's Brief at 13. The appellant also asserts that trial defense counsel was deficient by failing to present "favorable evidence of [his] deployment to Afghanistan" and other deficiencies including testimony regarding the consequences of renal failure, his continued need for medical treatment and his "record of treatment" following the periods of unauthorized absence." *Id*. at 17. We disagree.

We find the appellant's allegations insufficient to establish that his "counsel's performance was deficient." *Strickland*, 466 U.S. at 687. The appellant has not sustained his "burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76.

Assuming, without deciding, that trial defense counsel's performance was deficient, we conclude that the appellant has not satisfied the second *Strickland* prong. The appellant asserts that counsel should have requested an R.C.M. 706 examination and submitted other evidence in extenuation and mitigation. Review of the record leads us to conclude that the appellant has failed to

[2] Trial defense counsel's assertion that he and the appellant discussed future medical benefits, that he informed the appellant that a punitive discharge would likely result in loss of medical benefits, and that he included the "notice paragraph" in the pretrial agreement are also supported by the record. Declaration of Captain C.J. Fuller, USMC of 31 Oct 2012 at 1-2.

demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gutierrez*, 66 M.J. at 331 (citation and internal quotation marks omitted).

Trial defense counsel presented a case in extenuation and mitigation, including 35 pages from the appellant's medical record. This defense exhibit detailed his medical history, including his recurrent battle with kidney stones, instance of renal failure, and migraine headaches, and website excerpts from the National Institutes of Health regarding acute renal failure and kidney stones including causes, symptoms, treatment, prognosis, and complications. Defense Exhibits A-C. The record also reflects that the appellant deployed to Afghanistan. Record at 3-4, 74; Prosecution Exhibit 3 at 1. In addition, and unrebutted in the record, are the appellant's statements during the providence inquiry and presentencing that, while experiencing renal failure, he had a fever that spiked and caused permanent brain damage. Record at 17-18, 73. Noticeably absent from the appellant's declaration and appellate brief is any specific evidence in extenuation or mitigation that was neither investigated nor submitted.

Though some discrepancies exist between the appellant's allegations and trial defense counsel's declaration, there are sufficient uncontroverted facts to decide the legal issue without additional fact-finding.[3] *See Ginn*, 47 M.J. at 243.

IV. Sentence Severity

In addition, the appellant asserts that the approved sentence is inappropriately severe given that his misconduct resulted from his attempts to cope with his health issues incurred in the line of duty. We disagree.

[3] Trial defense counsel states that he attempted to contact the four Marines identified by the appellant as potential presentencing witnesses, but that of the two he could locate, only one responded. He also states that potential witness Captain R responded after the trial date that he "kn[e]w the Marine and can speak a little about his work ethic, although I don't recall much." Declaration of Capt C.J. Fuller, USMC, of 31 Oct 2012 at 2. Trial defense counsel further stated that he discussed his concerns regarding his inability "to secure direct evidence of brain damage" or witness testimony regarding the appellant's military character or service with the appellant and that the appellant decided not to seek a continuance. He indicates that the appellant wanted to "complete his guilty plea so that he would only have to serve an additional 14 days with good time credit" under the terms of the pretrial agreement. *Id.* at 3.

A court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964). 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). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy on the accused and is the prerogative of the convening authority. *Healy,* 26 M.J. at 395.

After carefully considering 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 his offenses. *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395; *Snelling* 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

V. Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the CA.

Senior Judge MODZELEWSKI and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court