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

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

UNITED STATES OF AMERICA

v.

DERRICK A. SANDERS
MASTER AT ARMS SEAMAN (E-3), U.S. NAVY

NMCCA 201200519
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 August 2012.
Military Judge: Maj Yong Lee, USMC.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: LCDR S.J. Gawronski, JAGC, USN.
For Appellant: Capt David Peters, USMC.
For Appellee: Capt Franklin J. Foil, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

27 June 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 various offenses related to controlled substances: one specification of attempted possession, two specifications of introduction, four specifications of distribution, two specifications of use, and one specification of solicitation, in violation of Articles 80, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§

880, 912a, and 934. The military judge sentenced the appellant to confinement for five years, reduction to pay-grade E-1, a fine of $5,000.00, and a bad-conduct discharge. In accordance with the pretrial agreement, the convening authority disapproved the fine, and suspended all confinement in excess of 36 months.

In his sole assigned error, the appellant claims ineffective representation by his trial defense counsel.[1] He asserts he was not adequately informed of the consequences of waiving his ability to bring motions for relief from pretrial confinement and to suppress his confession to law enforcement.

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.

Background

For over 18 months, the appellant, a master-at-arms, purchased, used, introduced and distributed ecstasy, methylone pills, and marijuana. He was involved in a number of these illegal drug transactions with fellow master-at-arms and civilians. The appellant's illegal drug use included instances when he was an on-duty sentinel on Naval Submarine Base New London, Groton, Connecticut. His drug activity only ceased when a fellow master-at-arms was arrested in a police sting. The appellant ultimately confessed his activities to law enforcement.

In addition to a confinement cap and disapproval of any fine, the pretrial agreement contained an explicit waiver of motions related to pretrial confinement. The appellant also expressly agreed to the admissibility of a Stipulation of Fact and certain evidence, including his signed confession. Prosecution Exhibit 1. The Stipulation of Fact and the various exhibits were admitted as prosecution exhibits prior to the military judge's providence inquiry. Record at 48-51. Prosecution Exhibits 2-6.

Discussion

We review ineffective assistance of counsel claims *de novo*. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005).

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

United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008) (internal citations omitted). The appellant bears the heavy burden of demonstrating "(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)). 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). In the guilty plea context, the first prong 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). The second prong is modified, however, to focus on whether the "ineffective performance affected the outcome of the plea process. In this regard, the appellant must also show 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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *United States v. Tippit*, 65 M.J. 59, 76 (C.A.A.F. 2007) (internal quotation marks and citations omitted). The appellant fails to establish that his counsel was deficient and also fails to demonstrate a probability that he would have chosen to go to trial.

A simple examination of record of trial demonstrably debunks the claims made by the appellant that he was "not adequately informed" of the consequences of his waivers. Appellant's Brief at 3. When entering into a pretrial agreement, an accused may waive "many rights and Constitutional protections," so long as the waiver is knowing and voluntary. *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003). Despite the appellant's claims to the contrary, the military judge engaged in a lengthy colloquy with the appellant and his defense counsel regarding his waivers, and the consequences thereof. The military judge explained each potential motion thoroughly to the appellant. The military judge also solicited comment from the trial defense counsel about the factual basis of any potential motions. On multiple occasions, the appellant affirmed that trial defense counsel explained the provisions of the pre-trial agreement, that he understood the various consequences of his waivers, and that he was entering into the agreement willingly.

Based on our careful reading of the record, the trial defense counsel competently carried out the wishes of the appellant. Further, even assuming *arguendo* trial defense

counsel was deficient, we are unconvinced that a different outcome would have occurred had the appellant opted for trial. The appellant faced overwhelming evidence including eyewitness testimony and lab results. As such, we find no prejudice.

Court-Martial Order Errors

Although not raised as error, we note that the court-martial order contains two scrivener's errors with regard to Charge IV. First, Specification 2 contains the following inapplicable language: "Providence, Rhode Island, on or about March 2010". Second, Specification 3 incorrectly shows an offense commencement date as September 2012, vice September 2011. We find the errors harmless, but in keeping with the principle that military members are entitled to records that correctly reflect the results of their court-martial proceedings, we will order corrective action in our decretal paragraph. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Conclusion

The findings and the sentence as approved by the convening authority are affirmed. The supplemental court-martial order shall be corrected to delete the language "Providence, Rhode Island, on or about March 2010" in Specification 2 of Charge IV and to properly reflect an offense commencement date of "September 2011" in Specification 3 of Charge IV.

For the Court

R.H. TROIDL
Clerk of Court