

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

**Before  
E.E. GEISER, R.G. KELLY, V.S. COUCH  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MANASSES A. PAIGE  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200600587  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 17 June 2005.

**Military Judge:** Col Daniel J. Daugherty, USMC.

**Convening Authority:** Commander, 3d Marine Division (-)  
(Rein), Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol D.J. Bligh,  
USMC.

**For Appellant:** Glenn Gerding, Civilian Defense Counsel; LT  
D.W. MacKinnon, JAGC, USN.

**For Appellee:** LT M.H. Herrington, JAGC, USN.

**1 July 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

**GEISER, Senior Judge:**

A military judge, sitting as a general court martial, convicted the appellant, consistent with his pleas, of disrespect to a noncommissioned officer, violation of a lawful general order, dereliction of duty, assault and battery, and breaking restriction, in violation of Articles 91, 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 928, and 934. Additionally, a panel of officer and enlisted members found the appellant guilty, contrary to his pleas, of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The appellant was sentenced to confinement for four years, forfeiture of all pay (but not allowances) for a period of four years, reduction to

pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On 13 December 2006, the appellant submitted an appellate brief raising ten assignments of error.<sup>1</sup> The pleadings included the appellant's 9 November 2006 declaration asserting specific instances of ineffective assistance of counsel (IAC). On 24 July 2007, this court returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority authorized to order a *DuBay*<sup>2</sup> hearing and make findings respecting the appellant's IAC allegations. On 20 November 2007, the ordered *Dubay* hearing was held. The military judge took evidence and made the requested findings.<sup>3</sup> The record was returned to this court on 6 March 2008 and counsel was provided an opportunity to submit additional matters for consideration. The appellant filed a supplemental brief on 7 April 2008 raising an eleventh assignment of error which, in essence, took issue with some of the *DuBay* hearing military judge's findings.<sup>4</sup> The Government responded on 7 May 2008.

We have carefully examined the record of trial to include the record of the court-ordered *Dubay* hearing, the appellant's various pleadings and assignments of error, and the Government's responses. 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.

### **Improvident Pleas**

The appellant asserts that the military judge erred when he accepted the appellant's guilty plea to Specification 2 of Charge

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<sup>1</sup> I - The appellant's plea to Specification 2 of Charge I (dereliction of duty for failing to prevent underage drinking) was improvident; II - The military judge erred when he accepted two stipulations of fact without fully explaining their effect to the appellant; III - The military judge erred when he admitted evidence of Lance Corporal (LCpl) Richardson's character for truthfulness and specific instances of her truthfulness; IV - Trial counsel committed plain error during his closing argument on the merits when he vouched for the credibility of Government witnesses; V - Trial counsel committed plain error during his closing argument on the merits when he commented that the Government's evidence was uncontradicted; VI - Cumulative error; VII - The military judge erred when he failed to sua sponte instruct the members that they could consider the appellant's entry into stipulations as a mitigating factor; VIII - Ineffective assistance of counsel; IX - Legal and factual sufficiency of the guilty finding to Charge II (rape); X - Court-martial order failed to indicate that certain charges were withdrawn and dismissed with prejudice as required by the pretrial agreement.

<sup>2</sup> *United States v. Dubay*, 27 C.M.R. 411 (C.M.A. 1967).

<sup>3</sup> Appellate Exhibit LXX.

<sup>4</sup> XI - The *Dubay* hearing military judge erred when he held that the trial defense counsel had a legitimate tactical reason not to object during the Government's closing argument and when he held that trial defense counsel's performance was constitutionally sufficient.

I (dereliction of duty) in that the appellant did not have a duty to prevent an offense in which he was participating. The appellant contends that he knowingly obtained and provided alcohol to CC, an underage Marine, which CC used to violate a lawful general order prohibiting underage drinking. This, the appellant asserts, made him an "accessory" to the offense and a participant who cannot be guilty of failing to prevent misconduct in which he participated. Appellant's Brief and Assignment of Errors of 13 Dec 2006 at 10.

A military judge's acceptance of a guilty plea will not be set aside absent an abuse of discretion. See *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). In order to reject a guilty plea on appellate review, the record must show a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F. 2004) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). The appellant must overcome the generally applied waiver of the factual issue of guilt inherent in a voluntary guilty plea. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

We note that the appellant does not dispute that more senior Marines generally have a duty to prevent an underage subordinate from consuming alcohol. See *United States v. Risner*, No. 200501643, 2006 CCA LEXIS 226, unpublished op. (N.M.Ct.Crim.App. 9 Aug 2006). His argument is more in the nature of an exception to this general duty. Paradoxically, the appellant seems to be contending that his own willful facilitation and promotion of CC's offense somehow relieves him of responsibility for failing to comply with his duty to ensure that subordinates do not engage in such conduct.

We agree with the appellant that Article 77(2)(b), UCMJ, provides that one who is not a perpetrator may also be guilty of an offense if he assists the perpetrator in the commission of the offense while sharing in the perpetrator's criminal design. The appellant urges and we agree that when the appellant purchased alcohol for a Marine he knew to be under age and facilitated her consumption of that alcohol by playing drinking games with her, that his conduct and intent made him a principal equally guilty of violating the lawful general regulation prohibiting underage drinking.

We note that violation of a lawful general regulation is punishable, *inter alia*, by confinement for up to two years and a dishonorable discharge. We also observe that the maximum punishment for the dereliction offense the appellant pled guilty to is, *inter alia*, no more than 6 months confinement and a bad-conduct discharge. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 16(e)(1)&(3).

The appellant was not charged with any other offense relating to his facilitation and encouragement of CC's underage

drinking. The facts underlying the case law cited by the appellant involve situations where an accused was found guilty both of illegal drug use and of failing to prevent or failing to report others involved in the offense.<sup>5</sup> We agree that in such cases, an appellant cannot be held criminally liable for failing to prevent or report illegal conduct he participated in and was otherwise being held accountable for.

In the instant case, rather than overcharging the appellant or otherwise increasing his punitive exposure, it appears the Government elected to charge the appellant with a lesser offense than might otherwise have been warranted by the facts. In view of this, we do not find a substantial basis in law or fact to question the appellant's guilty plea to dereliction of duty. He received a single conviction for conduct that he acknowledges constituted a violation of the lawful general regulation. That his conviction was of a lesser offense than might otherwise have been supported by the facts is to the appellant's benefit. We find, therefore, that the military judge did not abuse his discretion in accepting this plea.

#### **Stipulations of Fact**

Prosecution Exhibit 2 was a stipulation of fact entered into by the appellant and both counsel that an analysis of the victim's blood alcohol revealed a blood-alcohol level of 292 mg/DL. This equates to a blood alcohol content (BAC) of .292. Prosecution Exhibit 5 was a stipulation of fact entered into by the appellant and both counsel that the appellant and victim had sexual intercourse on the night in question.

The appellant acknowledges that the military judge reviewed each stipulation with him prior to accepting them into evidence. Specifically, the appellant was asked if he read and understood the contents of each stipulation; if he had discussed each stipulation with his attorney; if he understood the contents of the stipulations; whether the stipulations were true; whether the appellant understood the contents of the stipulations would be considered uncontradicted facts that the members would use to determine his guilt or innocence and a sentence; and whether anyone forced the appellant to enter into the stipulations. Appellant's Brief at 17; Record at 110-12, 124-25. The military judge expressly informed the appellant that he had a right not to enter into the stipulations and that, if contradicted at trial, the stipulations would have to be withdrawn. Record at 125.

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<sup>5</sup> In *United States v. Thompson*, 22 M.J. 40, 41 (C.M.A. 1986), the appellant was convicted of dereliction of duty for failing to prevent an airman from wrongfully using marijuana. He was also convicted of using marijuana at the same time and place as the airman. In *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986), the appellant was convicted of failing to report another service member's use of marijuana. He was also convicted of multiple instances of marihuana use at the same time and place as the other service member.

On appeal, the appellant contends that the military judge did not explain that the stipulations relieved the Government of its burden to prove both elements of rape. Appellant's Brief at 19. We are unpersuaded by this argument as it is contrary to the clear record in this case. The appellant was unequivocally informed that the stipulations would, if admitted, be used "by the members to determine your guilt or innocence" and that it would be used by appellate authorities to determine the factual sufficiency of the evidence. Record at 124-25. Notwithstanding his assertions on appeal, we are confident the appellant clearly understood that the members would use the stipulations as uncontradicted evidence that the facts stated in the stipulations were true and that the Government could use the stipulations to satisfy its burden of proof on those matters.

The appellant further contends that the two stipulations of fact, taken together, constituted a "de facto admission of guilt to the elements of rape." Appellant's Brief at 19. This is a mischaracterization of the record. While we agree that Prosecution Exhibit 5 admitted the first element of rape, Prosecution Exhibit 2 did not admit that the sexual intercourse was achieved by force and without the consent of the victim.

While the prosecution strenuously argued that the victim's agreed-upon BAC level was strong evidence that she was physically unable to consent to sexual intercourse, the defense just as vigorously argued a contrary conclusion. In support of their version of events, the defense offered an expert witness who discussed the victim's alcohol tolerance level based on her admission that she first consumed alcohol at age 4 and drank regularly during high school.

The defense also offered the testimony of various service members whose recollections of the victim's words and actions supported the defense position that, notwithstanding her high blood alcohol content, it was entirely possible that the victim could have legally consented to sexual intercourse. The defense didn't need to prove consent but only raise it as a reasonable possibility. Considering the record as a whole, we find no evidence that the defense in any way perceived that admitting that the victim had a particular BAC on the night in question was somehow the equivalent of admitting that the victim did not consent to sexual intercourse.

Having carefully reviewed the record, we find that the appellant was clearly informed of the various uses the stipulations would be put to and agreed with those uses. We further find that, taken together, Prosecution Exhibits 2 and 5 did not constitute a *de facto* guilty plea to rape. We find, therefore, that the military judge did not err when he accepted the stipulations into evidence. The alleged *sub rosa* agreement between the prosecutor and detailed defense counsel at trial will be addressed in the section below dealing with ineffective assistance of counsel.

## Ineffective Assistance of Counsel

The appellant provided a statement to investigators indicating, *inter alia*, that the victim consented to having sexual intercourse with him; that she was "awake and kissing him;" that she unzipped his pants; told him to "hurry up;" and hoped he would "last more than 5 minutes." Appellate Exhibit VII at 7. However, the statement also contained the appellant's assertion that he had used a condom and thrown the condom and package into the dumpster near the barracks. An immediate search of the dumpster by investigators did not reveal the condom or wrapper. The statement also reflected actions by the appellant which his trial defense counsel believed could be interpreted by the members as predatory or at least put the appellant in a bad light. Specifically, the appellant told investigators that he understood the victim was on liberty risk for underage drinking and that he purposefully went out to get a bottle of rum for her. AE VII.

The appellant asserts that his counsel provided ineffective assistance (IAC) at trial. Specifically, the appellant avers that his trial defense counsel's advice, offered pursuant to a *sub rosa* agreement with the prosecutor, to enter into the stipulation of fact affirming that intercourse took place in return for the Government not offering the appellant's statement to investigators, was deficient in that it prevented the members from considering the only direct evidence that the appellant honestly and reasonably believed that the victim consented to intercourse. Appellant's Brief at 41-42. The appellant also asserts that his counsel was deficient when he failed to object to the prosecution's improper comments during closing argument and request a mistrial. Appellant's Brief at 43.

In order to prevail on a claim of IAC, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

As noted above, on 20 November 2007 and 15 January 2008, a *Dubay* hearing requested by this court was held to gather additional facts relating to the appellant's IAC claims. The

military judge conducting the hearing heard testimony by both the prosecutor and the detailed defense counsel and considered other evidence offered by the parties. The military judge entered extensive findings of fact. He specifically found that "there simply is no evidence" beyond the appellant's own claims to support the allegation that there was a *sub rosa* agreement between counsel. AE LXX at 6. The military judge found that the prosecution's rationale for not offering the appellant's statement was to "place more pressure" on the appellant to testify at trial to establish his mistake of fact defense.

A military judge's findings of fact will not be overturned on appeal unless they are clearly erroneous or unsupported by the record. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). The appellant does not challenge any of the military judge's findings of fact relative to the alleged *sub rosa* agreement between counsel. Having carefully reviewed the record, we find the military judge's findings of fact relative to the alleged *sub rosa* agreement are not clearly erroneous and are supported by the record. We adopt them as our own.

Regarding the allegation of a *sub rosa* agreement and improper advice regarding the stipulation of fact admitting that sexual intercourse took place, we conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice.

The appellant's second allegation of IAC involves the trial defense counsel's failure to object to allegedly improper comments by the prosecution during argument. The military judge found that the trial defense counsel made a tactical decision not to object to alleged improper statements made by the Government counsel during closing based on a belief that the arguments were "not effective" and that the defense, during argument, would be able to effectively counter such claims by pointing to specific evidence. AE LXX at 5.

The appellant contests these findings of fact, asserting that the trial defense counsel testified that he did not specifically remember the contents of the prosecution's argument after the passage of two years. In response to the military judge's questions regarding his trial tactics, the trial defense counsel engaged in what the appellant characterizes as "post hoc speculation as to why he might have objected." Appellant's Brief and Assignments of Error After *Dubay* Hearing of 7 Apr 2008 at 6.

Having carefully reviewed the trial defense counsel's testimony, we find that the appellant's argument takes the testimony a bit out of context. While the trial defense counsel reasonably did not recall the specifics of the Government's argument delivered some two years previously, his thoughtful analysis of what he believed occurred was far from the kind of random speculation intimated by the appellant. The trial defense counsel based his testimony on a recollection of his general

practice and philosophy regarding objections in front of the members. Specifically, he indicated that he would have objected if he thought that the arguments were effective in any way. He recalled going through the witnesses during his own argument highlighting the contradictions. He further stated that objecting in front of members is a tactical decision and that it was not his practice to simply object for the sake of objecting if he perceived no real benefit to be gained. Finally, the trial defense counsel showed a reasonable knowledge of the applicable objections to such statements and was therefore able to speak up if he perceived it was in his client's best interest to do so. Record at 542-43.

Having carefully reviewed the record, we find the military judge's findings of fact relative to the trial defense counsel's failure to object to improper argument are not clearly erroneous and are supported by the record. We adopt them as our own. Considering the military judge's legal conclusions, *de novo*, we agree that the trial defense counsel had facially reasonable tactical reasons not to object to the prosecutor's improper argument. We will not second-guess counsel's tactical decision-making. Considering the record as a whole, we find the trial defense counsel's tactical decision was reasonable given the facts known to him at the time. We conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice.

### **Conclusion**

The appellant's remaining assignments of error are without merit.<sup>6</sup> The findings and the approved sentence are affirmed.

Judge KELLY and Judge COUCH concur

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>6</sup> Even assuming trial counsel's argument was improper, we conclude that the error was harmless beyond a reasonable doubt.