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

Before
R.E. VINCENT, J.F. FELTHAM, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DAVID J. MONTOYA
PERSONNEL SERVICEMAN SEAMAN (E-3), U.S. NAVY

NMCCA 200700933
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 August 2007.
Military Judge: Col Steven Day, USMC.
Convening Authority: Commandant, Naval District Washington, Washington Navy Yard, DC.
Staff Judge Advocate's Recommendation: LCDR E.J. Osterhues, JAGC, USN.
For Appellant: LCDR K.B. Reeves, JAGC, USN; Capt Sridhar Kaza, USMC.
For Appellee: LT Duke Kim, JAGC, USN.

24 February 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, consisting of a military judge sitting alone, convicted the appellant, pursuant to his pleas, of indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for three years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the portion of the sentence pertaining to confinement and reduction in pay grade as adjudged, but, in accordance with

the pretrial agreement, suspended all confinement in excess of 24 months for six months from the date of the CA's action. Additionally, in accordance with the pretrial agreement, the CA approved a bad-conduct discharge rather than the adjudged dishonorable discharge.

In his sole assignment of error, the appellant asserts that his guilty plea was involuntary. He contends that his plea was induced by his trial defense counsels' misrepresentation that a defense expert had determined that the appellant did not suffer from sexomnia, a sleep disorder in which people engage in sexual intercourse while asleep, when, in actuality, the defense expert had not made such a determination.

We have carefully reviewed the record of trial, the appellant's sole assignment of error, and the Government's response. We conclude that the findings and 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.

A. Procedural History

In support of his allegation, the appellant submitted a declaration to the court and two affidavits from Commander (CDR) Mark Miller, MC, USN, the appellant's sleep disorder expert witness and confidential consultant. On 8 April 2008, this court ordered the Government to secure an affidavit from the appellant's two trial defense counsel, LT R and LT L, in response to the appellant's allegations. Their responses, when considered in light of the record of trial, were insufficient for this court to adequately address the involuntary plea issue. Therefore, on 22 May 2008, we returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority to order a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968). [1]

A *DuBay* hearing was conducted on 2 July 2008. The military judge who presided over the hearing issued written essential findings of fact and conclusions of law concluding that the appellant's trial defense counsel did not misrepresent CDR Miller's advice as to the sleep disorder sexomnia.[2]

[1] The appellant did not allege ineffective assistance of counsel. Therefore, the Sixth Amendment analysis set forth *Strickland v. Washington*, 466 U.S. 668, 689 (1984), was not part of this Court's *DuBay* hearing order.

[2] The Findings of Fact/Conclusions of Law document signed by the military judge is undated and was not marked as an appellate exhibit, but is attached to the *DuBay* hearing record immediately before the "Record of Proceedings."

B. Applicable Law

"[A] guilty plea must be both voluntary and intelligent if it is to represent a constitutionally valid predicate for a conviction." *Ferrara v. United States,* 456 F.3d 278, 290 (1st Cir. 2006)(citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). The voluntariness of a guilty plea is a question of law, *Marshall v. Lonberger,* 459 U.S. 422, 431 (1983), and is reviewed de novo on appeal.

The standard as to the voluntariness of a guilty plea is a "plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." *Brady*, 397 U.S. at 755. (citation and internal quotation marks omitted). Following the *Brady* standard*,* the United States Court of Appeals for the First Circuit set forth a two-part Fifth Amendment due process test for evaluating assertions of involuntary pleas. *Ferrara*, 456 F.3d at 290. Initially, an appellant "must show that some egregiously impermissible conduct . . . antedated the entry of his plea. Second he must show that the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice." *Id.* (citations omitted).

In the instant case, the post-trial declarations and affidavits filed by both parties and the extensive factual findings from the *DuBay* hearing provide ample insight concerning the appellant's reliance on his trial defense counsel's representations in his ultimate decision to plead guilty. Reviewing the military judge's essential findings of fact under a clearly erroneous standard, we conclude that they are supported by the record and we adopt them as our own. We must now consider *de novo* whether these facts support a finding that the appellant's guilty plea was voluntary.

C. Analysis

On 4 December 2006, a rape charge was preferred against the appellant. LT L was assigned as detailed defense counsel.[3] On 8 March 2007, a charge of rape was referred for trial by general court-martial against the appellant. Shortly after being assigned as the appellant's trial defense counsel, LT L researched and obtained medical literature concerning sexomnia. On 26 June 2007, the convening authority granted the appellant's request for CDR Miller to be designated as a sleep disorder expert witness and confidential consultant. Appellate Exhibit XX. At an Article 39(a), UCMJ, session held on 28 June 2007, LT R entered his appearance as the appellant's individual military counsel (IMC).

Prior to trial, both LT R and LT L consulted with CDR Miller on numerous occasions concerning the possibility that the appellant suffered from sexomnia. After consultation, the appellant's trial defense team determined that it would need to obtain objective and subjective evidence in order to ascertain if sexomnia was a viable defense. The potential objective evidence was derived from a sleep study, which the appellant underwent in early July 2007. The sleep study results were provided to CDR Miller. The subjective evidence included a review of the appellant's past sexual behavior to ascertain if he had engaged in sexual activity while asleep. Accordingly, his trial defense team interviewed the appellant's wife and "Ms. H", a woman identified by the appellant as a prior sexual partner. "Ms. H" did not recall any instances and the appellant's wife stated that the appellant may have engaged in sexual activity with her on one occasion while asleep.

On 20 July 2007, the appellant instructed his trial defense team to begin negotiations with the convening authority concerning a possible pretrial agreement. On 23 July 2007, CDR Miller informed LT R that the sleep study results did not indicate that the appellant suffered from sexomnia, but indicated that the appellant exhibited mild sleep apnea. CDR Miller noted that clinical diagnosis of sexomnia would require sleep study results and a medical evaluation of subjective factors, including observations from previous sexual partners.

[3] LT K, a Coast Guard judge advocate, was also assigned as a detailed defense counsel, but the appellant relieved her from providing any further representation at an Article 39(a), UCMJ, session held on 28 June 2007. Record at 18-20, 164.

On 24 July 2007, the appellant signed a Memorandum for the Record prepared by his defense trial team in which the appellant acknowledged that CDR Miller had informed his defense counsel that he suffers from moderate sleep apnea and that while the appellant "may suffer from sexomnia there is no scientific data to back up your claim, thus making it difficult for it to be proven at trial." Appellate Exhibit XXX (Memorandum for the Record of 24 Jul 2007). Additionally, the appellant informed his trial defense team at this meeting that he was awake and aware of his actions during the incident. Finally, on 14 August 2007, the appellant pled guilty to indecent assault at a general court-martial.

Upon evaluation of the pertinent facts and applying the two-part test set forth in *Ferrara*, we concur with the military judge's conclusions that the appellant's trial defense team did not make any factual misrepresentations to the appellant concerning a possible sexomnia defense or CDR Miller's medical advice or information. They enrolled the appellant in a sleep study and interviewed previous sexual partners in an attempt to obtain objective and subjective evidence supporting a potential sexomnia defense. They continuously provided the appellant both verbal and written updates regarding their ongoing research and consultations with CDR Miller and interviews with witnesses. Most significantly, the trial defense team explained to the appellant that they had evaluated the objective and subjective evidence, thoroughly explained the advice and information provided by CDR Miller, and advised the appellant that the chances of successfully asserting a novel defense unsupported by evidence would be difficult. Furthermore, the appellant's trial defense counsel did not seek a medical diagnosis from CDR Miller, rather he was asked to interpret a sleep study. The trial defense team did not seek a medical diagnosis from CDR Miller because they lacked the necessary subjective evidence after interviewing the appellant's prior sexual partners.

Additionally, *assuming arguendo* that the appellant's trial defense team made a factual misrepresentation, it would not constitute egregiously impermissible conduct that would invalidate his guilty plea. Finally, even if the appellant satisfied the first prong of the *Ferrara* test, he has failed to prove that his counsel's misconduct influenced his decision to plead guilty. We note that the appellant did not provide any evidence at the *DuBay* hearing that he suffers from sexomnia. Additionally, at trial, the appellant entered into a stipulation of fact and testified during the providence inquiry that he was awake and conscious when he sexually assaulted the victim.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

Senior Judge FELTHAM and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court