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

Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY J. RAMIREZ
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800055
SPECIAL COURT-MARTIAL

Sentence Adjudged: 3 August 2007.
Military Judge: CDR M.H. DeOliveira, JAGC, USN.
Convening Authority: Commanding Officer, Marine Aviation Training Support Squadron One, Marine Aviation Training Support Group 21, Naval Air Station, Meridian, MS.
Staff Judge Advocate's Recommendation: LtCol J.R. Woodworth, USMC.
For Appellant: LT Sarah E. Harris, JAGC, USN; Capt K.R. Kilian, USMC.
For Appellee: LCDR Sergio F. Sarkany, JAGC, USN.

17 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of five specifications of wrongful appropriation, three specifications of larceny, and one specification of housebreaking in violation of Articles 121 and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 930. He was sentenced to confinement for 11 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged but, pursuant to a pretrial agreement (PTA), suspended all confinement

in excess of six months for a period of twelve months from the date of trial.

The appellant alleges six errors before us: first, that the CA violated a material term the PTA; second, that his trial defense counsel's post-trial representation was ineffective; third, that the military judge admitted improper evidence in aggravation; fourth, that the military judge erred in accepting one of his guilty pleas; fifth, that the appellant's right to a fair trial was materially prejudiced by these and other supposed errors; and sixth, that the CA's action did not properly reflect the results of his court martial.

Following initial review of this matter, we returned this case to the Judge Advocate General for remand to the CA for the purpose of ordering a *DuBay*[1] Hearing. The hearing was to focus on whether the appellant and the CA engaged in the actual performance of the terms set forth in the pretrial agreement concerning automatic forfeitures and the appellant's allegations of ineffective assistance of counsel during the post-trial stage.

Having considered the parties' pleadings, the record of trial, and the results of a *DuBay* hearing, we are satisfied that the findings and 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.

I. Automatic Forfeitures

The appellant contends that the CA violated a material term of the PTA when he failed to defer and then waive the automatic forfeitures of pay imposed during the appellant's time in confinement. In light of the facts uncovered in the *DuBay* hearing, we disagree. The appellant has not met his burden in establishing governmental noncompliance with any material term of the PTA. *See United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009)(citing *United States v. Lundy,* 63 M.J. 299, 302 (C.A.A.F. 2006)).

On 2 August 2007, the appellant signed a pretrial agreement with the CA. In exchange for the appellant giving up certain constitutional rights, including the privilege against compulsory self-incrimination and the right to trial by members, the CA agreed, *inter alia*, to defer and waive automatic forfeitures. Appellate Exhibit II; *see also United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). In fact, the agreement itself approved the deferral and waiver provided the appellant complied with the other terms of the agreement and established and maintained a dependent's allotment in the amount of the deferred and waived automatic forfeitures. AE II. Looking to the basic principles of contract law, *Acevedo*, 50 M.J. at 172, we conclude that there was a condition precedent to the execution of the approved

[1] *See United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967).

deferral and waiver. Unfortunately, the appellant failed to meet that condition throughout the entire period of his confinement or even after his release from confinement, despite being afforded myriad opportunities. AE XXII at ¶ 13, *DuBay* Record. The condition precedent not having been met by the appellant, there was no requirement to execute the deferral or waiver provisions with respect to automatic forfeitures. Additionally, since the appellant was released from confinement prior to the CA taking his action, there were no automatic forfeitures for the CA to waive.

II. Ineffective Assistance of Counsel

Next, we turn to whether the appellant was deprived of his right to effective assistance of counsel during post-trial processing.

In his brief, the appellant complains that the trial defense counsel failed him "in two facets: by not contacting Appellant and determining whether or not Appellant wished to submit matters in clemency after she received the SJAR and by not commenting on the SJAR's legal error where the staff judge advocate failed to comment on the automatic forfeiture provision in the pretrial agreement." Appellant's Brief of 26 Mar 2008 at 16. At the subsequent *DuBay* hearing, the appellant also argued that his trial defense counsel had been ineffective when she failed "in following through with aiding her client and having the allotment set up." *DuBay* Record at 9.

Strickland v. Washington, 466 U.S. 668, 687 (1984), established a two-part test for ineffective assistance of counsel: an appellant must show deficient performance and prejudice from that deficiency. There is a "strong presumption" that counsel are competent. *Id.* at 689.

Having reviewed the record of the *DuBay* hearing and determined that the military judge's findings of fact were not clearly erroneous, *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001), we conclude *de novo* that the trial defense counsel was not ineffective during post-trial processing when she decided, with her client's consent, not to seek clemency from the CA. The trial defense counsel spoke with the appellant about his right to clemency twice before trial and once immediately afterwards. AE XX at ¶¶ 2, 3, *DuBay* Record. She explained that she did not intend to submit clemency because she believed the command was unlikely to grant it. AE XX at ¶ 4, *DuBay* Record. She based this belief on the inflexibility shown by the Government during pretrial negotiations, the relative generosity of the protections offered by the PTA, and most notably, upon indications that the command had discovered additional evidence of misconduct in the appellant's barracks room. AE XX at ¶ 4, *DuBay* Record. The appellant did not object to his counsel's decision at the time. He was told to contact his counsel if he changed his mind and did not deign to do so. AE XX at ¶ 5, *DuBay*

Record. Regardless, even if the appellant had requested clemency, the CA would almost certainly not have granted it. AE XX at ¶ 7, *DuBay* Record. Under the circumstances, it is clear that the defense counsel's decision not to seek clemency, was tactical in nature and did not constitute ineffective assistance of counsel.

Similarly, we conclude that the trial defense counsel was not deficient in failing to set up an allotment for the appellant's wife. Counsel clearly informed him of his responsibility to set up the allotment and did not fail to fulfill any of her duties. AE XX at ¶ 9, 10, *DuBay* Record.

Finally, we find that there was no ineffective assistance of counsel when the trial defense counsel failed to comment on the omission in the staff judge advocate's recommendation of any instructions regarding the waiver of automatic forfeitures because "there was no colorable showing of possible prejudice." *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997). As noted above, there were no automatic forfeitures to waive on the date the CA took his action.

III. Admission of Improper Evidence in Aggravation

In his third assignment of error, the appellant claims that it was plain error for the military judge to admit as sentencing evidence a drug-abuse screening form filled out by the appellant prior to his enlistment.

Because the appellant did not object at trial, we review the military judge's decision to admit the evidence for plain error. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to a substantial right. *Id.* at 463-65. The appellant has the burden of persuading this court that the three prongs of the plain error test are satisfied. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

The appellant is correct that evidence of pre-service drug-use by the appellant should not have been admitted as evidence in aggravation because it was not "directly relating to or resulting from" the offenses to which the appellant was found guilty. RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The fact that the appellant used marijuana one time before he enlisted was not sufficiently related in time, type, or outcome to the convicted crime to qualify as proper evidence in aggravation. *United States v. Hardison*, 64 M.J. 279, 281-82 (C.A.A.F. 2007).

However, the admission does not rise to the level of plain error. When the issue of plain error involves a judge-alone trial, as it does here, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible

evidence, and is presumed not to have relied on such evidence. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). We are confident that the admission of this evidence did not alter the appellant's sentence or result in any other material prejudice to the appellant.

IV. Acceptance of Guilty Plea

The appellant next claims that the military judge erred in accepting his plea of guilty to the crime of housebreaking.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). An abuse of discretion occurs when there is a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

During the providence inquiry, the military judge correctly explained to the appellant that the offense of housebreaking requires proof that he (1) unlawfully entered a building or structure; and (2) entered with the concurrent intent to commit a crime within the building or structure. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 56(b); *see also United States v. Davis*, 56 M.J. 299, 300 (C.A.A.F. 2002)(citation omitted).

The appellant now argues that he did not have the requisite intent to commit larceny at the time he entered the barracks rooms because he did not know precisely which items he intended to steal when he was inside. However, the appellant's own statements during the providence inquiry evidence an intent to steal personal items once he had entered the barracks rooms: "[u]pon entering the rooms I had the intent of looking for my items and obtaining items for my own personal interest." Record at 71. When the military judge asked him whether he intended to steal when entering the rooms, the appellant replied, "[p]ossibly, if there was something ... I had interest in." Record at 77. And finally, when asked by the military judge whether he had testified to having an intent to commit larceny when he entered the barracks rooms, he replied, "[y]es, sir." Record at 80.

We find that there was no basis in law or fact for questioning this guilty plea and that the military judge did not abuse his discretion in accepting it.

V. Cumulative Errors

The appellant also alleges that through a combination of supposed errors -- the erroneous acceptance of the appellant's guilty plea, the admission of improper evidence in aggravation, and the failure to advise the appellant of a term of his pretrial agreement -- the appellant was deprived of a fair trial.

We review the question of whether cumulative errors denied the appellant a fair trial by determining whether we can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error ...." *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992)(citation and internal quotation marks omitted). The doctrine is understood to operate when there are errors, "'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence." *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999)(quoting *Banks*, 36 M.J. at 170-71).

We have already found that the military judge did not err in accepting the appellant's plea to the charge of housebreaking. Assertions of error without merit are not sufficient to invoke this doctrine. *Id*. Similarly, we found that the improper admission of the appellant's pre-service drug screening as evidence in aggravation did not prejudice the appellant.

We now turn to the last of the assigned cumulative errors. After sentencing appellant to 11 months confinement and a bad-conduct discharge, the military judge failed to explain the fact that the pretrial agreement entitled him to the deferral of automatic forfeitures if he set up an allotment in favor of his family. We find that this error was harmless because the trial defense counsel clearly informed the appellant of this provision of the pretrial agreement. AE XX at ¶ 9, *DuBay* Record. Furthermore, the military judge discussed automatic forfeitures with the appellant and he was fully aware of his rights and obligations under this section of the agreement. AE XX at ¶ 9, *DuBay* Record.

Looking at the extent of these assigned errors and the prejudice they caused, we are confident that they did not "substantially sway" the judgment and do not think that a rehearing is appropriate.

VI. Error in the Promulgating Order

The court-martial promulgating order (CMO) incorrectly states that the appellant was found guilty of the language "one Playstation portable 2 gigabyte memory card' in Specification 7 of Charge I. The CMO also incorrectly fails to state that the appellant pled and was found guilty of the name "Private [S.T.} Adams, U.S. Marine Corps, Room 233" in the sole specification under Charge II, which name was excepted out of the plea and finding as to that specification. Special Court-Martial Order No. 4-2007 of 14 Jan 2008. Although there was no prejudice to the appellant, he is entitled to have his official records correctly reflect the results of his court-marital. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

VII. Conclusion

The findings and approved sentence are affirmed. The supplemental court-martial order shall correctly reflect the appellant's plea as to the specification under Charge II, and the findings as to Specification 7 of Charge I and the specification under Charge II.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court