**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**
**WASHINGTON NAVY YARD**
**WASHINGTON, D.C.**

**BEFORE**

**C.L. CARVER** **D.O. VOLLENWEIDER** **E.E. GEISER**

**UNITED STATES**

**v.**

**Andrew B. ATTERBERRY**
**Corporal (E-4), U. S. Marine Corps**

NMCCA 200501564 Decided 20 July 2006

Sentence adjudged 18 July 2005. Military Judge: J.M. Schum. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3d Marines, 3d Marine Division (-)(Rein), MCBH, Kaneohe Bay, HI.

Maj GREGORY CHANEY, USMC, Appellate Defense Counsel
LT TYQUILI BOOKER, JAGC, USNR, Appellate Government Counsel



GEISER, Judge:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a special court-martial of two specifications of wrongful use of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 4 months, forfeiture of $823.00 pay per month for a period of 6 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, and suspended confinement in excess of 45 days.

The appellant initially raised no specific assignments of error. This court ordered briefs on two specified issues. First, whether the appellant's pleas of guilty were provident when the military judge failed to reopen the providence inquiry to negate a possible defense when he received some evidence that the appellant suffered from a major depressive disorder. Second, whether the trial defense counsel's (TDC) failure to present evidence of the appellant's mental condition on the date of his offenses and thereafter, his failure to object to evidence of uncharged misconduct presented by the Government in aggravation,

and his submission of evidence in extenuation and mitigation that was inconsistent with the appellant's stated desire to remain in the Marine Corps, amounted to ineffective assistance of counsel.

The appellant, in response, answered both specified issues in the affirmative and requests that this court set aside his conviction.

We have examined the record of trial and the briefs submitted in response to the specified issues. We conclude that the findings and the sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

## Background

The appellant pled guilty pursuant to a pretrial agreement. The military judge found the pleas provident. During the appellant's unsworn statement, he informed the military judge that he had been diagnosed with Major Depressive Disorder (MDD) prior to enlisting in the Marine Corps. He also informed the military judge that he was feeling depressed at the time of the offenses. Record at 40-41. The appellant also informed the military judge that he began seeing a psychiatrist after committing the offenses and presented medical records in support of this as extenuation and mitigation evidence. Record at 42; Defense Exhibit A.

Following the revelations noted above, the military judge questioned the TDC regarding a potential affirmative defense. Specifically, he inquired whether the TDC had spoken with the appellant's treating psychiatrist. The TDC indicated that he and the doctor had exchanged messages but not spoken directly. The TDC also indicated that after reviewing the appellant's most recent medical records, he found no indication that the Major Depressive Disorder made him not responsible for his actions. Record at 44-45. The military judge then questioned the appellant regarding his mental disorder. The appellant affirmed that his depression did not affect his ability to tell right from wrong on the days the offenses were committed. The appellant specifically stated, "I knew it was wrong, sir." Record at 45.

During presentencing, the Government offered two written statements the appellant made to the Naval Criminal Investigative Service (NCIS) and one statement made by another Marine to NCIS. The statements included references to uncharged misconduct. Specifically, Prosecution Exhibits 1 and 2 reflected that the appellant had used ecstasy in the past and had distributed methamphetamine to another Marine on one of the two occasions the appellant pled guilty to using methamphetamine. The TDC did not object. Record at 27.

In extenuation and mitigation, the TDC offered written statements by three members of the appellant's chain of command that documented that he was a hard worker, proficient at his occupation, an honor graduate of his MOS school, one of the finest athletes in the entire 3d Marine Regiment, and that he is a solid Marine in terms of performance. Each of the statements went on, however, to note that the appellant's lack of discipline, fortitude and poor example to other Marines were such that they would not want to continue serving with him. DE B.

**Improvident Pleas**

A military judge's decision to accept or reject an appellant's guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). An abuse of discretion is more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). We will find a military judge abused his discretion in accepting a guilty plea only if the record shows 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)).

Rejecting a guilty plea must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999). If the appellant's statements or other evidence offered on his behalf appear inconsistent with his initial guilty plea, the military judge should conduct a thorough inquiry to determine the appellant's position regarding the apparent inconsistency. *United States v. Parker*, 10 M.J. 849, 851 (N.C.M.R. 1981).

In the instant case, the military judge, upon learning of the appellant's mental disorder, inquired both of the TDC and the appellant whether they believed the appellant's MDD in any way impacted his ability to tell right from wrong. Both affirmatively denied any impact. In addition, the appellant's mental health records covering 5 separate mental health evaluations over a period of more than two months uniformly reflect that the appellant was "responsible for all actions" and fit for "full duty from a mental health perspective." DE A t 12.

While there is evidence that the appellant suffered from a mental disorder, there is no evidence in the record that the disorder was such that it rendered the appellant unable to understand the nature and quality of his actions at the time of the offenses, at trial or during the pendency of his appeal. The "mere possibility" of such evidence is insufficient to render a providence inquiry inadequate. *United States v. Sanders*, 33 M.J.

1026, 1028 (N.M.C.M.R. 1991). The military judge is not required to "embark on a mindless fishing expedition to ferret out or negate all possible defenses or potential inconsistencies." *United States v. Jackson*, 23 M.J. 650, 652 (N.M.C.M.R. 1986). We, therefore, find no substantial basis in law or fact to question the appellant's guilty plea. We find that the military judge did not abuse his discretion.

**Ineffective Assistance of Counsel**

The appellant also asserts that his TDC was ineffective by failing to present evidence of the appellant's mental condition on the date of his offenses and thereafter; his failure to object to evidence of uncharged misconduct presented by the Government in aggravation; and his submission of evidence in extenuation and mitigation that was inconsistent with the appellant's stated desire to remain in the Marine Corps.

In order to prevail on a claim of ineffective assistance, 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)).

With regard to the appellant's mental condition, the TDC presented the military judge with ample evidence in the form of the appellant's mental health records to document the appellant's current and ongoing battle with MDD. That he did not also bring in an expert witness or try to contact doctors who treated the appellant prior to the offenses is not significant considering that there was no reason for him to believe that the appellant's MDD affected his ability to understand the nature and quality of his actions.

With respect to the appellant's assertion that his TDC erred by not objecting to improper Government aggravation evidence, we note that the trial was conducted before a military judge. Military judges are presumed to know the law and to follow it, absent clear evidence to the contrary. *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F 2006)(Baker, J., concurring in result). The appellant offers no evidence to rebut the presumption that

the military judge understood the law and considered only those appropriate aspects of the Government's case in aggravation. After a careful review of the record, we find the appellant suffered no prejudice. We need not, therefore, evaluate whether the TDC erred by not objecting to the contested aggravation evidence.

Finally, with regard to the TDC's submission of statements inconsistent with the appellant's stated desire to remain in the Marine Corps, we note that the objected to statements contained much that was beneficial to the appellant's extenuation and mitigation case including opinions by his superiors that he was a hard worker, proficient at his occupation, an honor graduate of his MOS school, one of the finest athletes in the entire 3d Marine Regiment, and that he is a solid Marine in terms of performance. In view of the mixed nature of the evidence, we do not find that the TDC erred in offering the three statements into evidence notwithstanding that they were a mixed blessing for the defense case. We conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice.

**Conclusion**

The approved findings and the sentence are affirmed.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court