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

BEFORE

W.L. RITTER **J.F. FELTHAM** **E.S. WHITE**

UNITED STATES

v.

Thomas H. KING
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200401338 Decided 14 November 2006

Sentence adjudged 18 April 2004. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Combat Service Support Battalion 7, Combat Service Support Group 11, 1st FSSG, MarForPac, Camp Pendleton, CA.

CDR LISA MACPHEE, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

RITTER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of disrespect towards a commissioned officer, willful disobedience of a commissioned officer, willful disobedience of a noncommissioned officer, disrespect towards a noncommissioned officer, and misbehavior before the enemy, in violation of Articles 89, 90, 91, and 99, Uniform Code of Military Justice, 10 U.S.C. §§ 889, 890, 891, and 899. The military judge sentenced the appellant to confinement for one year, forfeiture of $795.00 pay per month for twelve months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, pursuant to the pretrial agreement, suspended all confinement in excess of 180 days.

The appellant contends: (1) his guilty pleas were improvident because he was mentally incompetent at the time of

the offenses and at the time of trial; (2) his guilty plea to the Article 99, UCMJ, offense of misbehavior before the enemy was improvident because the military judge failed to elicit a factual basis that the appellant's conduct occurred "before the enemy;" (3) his trial defense counsel was ineffective for failing to request a mental capacity examination pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); and (4) a sentence including a bad-conduct discharge is inappropriately severe.

After carefully considering the record of trial, the appellant's five assignments of error[1] 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.

Facts

In early 2004, the appellant's unit deployed to Iraq to assume duties as a Marine Corps security battalion, providing security for convoys that delivered supplies and ammunition to various other units in the theater of operations. On 4 March 2004, the appellant mishandled a tank-mounted machine gun, resulting in an accidental weapons discharge. On 7 March 2004, the appellant refused orders to provide security for a convoy about to leave the base. Specifically, the appellant refused to accept ammunition for his rifle, refused to carry a loaded weapon as a member of the convoy, and refused the option of not carrying a rifle but serving as driver for the convoy. The appellant's refusals were motivated by the fear of dying. Although the appellant engaged in this conduct while on board a coalition air base, both organized and unorganized enemy forces operated in the immediate area around the base.

The appellant was sent to the staff psychiatrist for evaluation. The appellant was pronounced mentally fit and returned to his unit. On 8 March 2004, the appellant was disrespectful towards, and disobeyed the orders of, both a commissioned officer and a noncommissioned officer.

[1] The appellant's second and third assignments of error both contend the military judge's providence inquiry failed to establish a factual basis that the misconduct alleged under Article 99, UCMJ, occurred "before the enemy." Both argue that it was not enough that enemy guerillas were within close proximity of the base at which the appellant's misconduct occurred, but that the base itself had to be under the imminent threat of an attack. We therefore treat the second and third assignments of error as one.

The appellant was returned to the care of the staff psychiatrist. Over the next few days, the appellant was closely monitored and evaluated. The appellant was found to be experiencing an operational stress reaction, a transient condition. Although the psychiatrist had some concerns about the appellant's fitness for duty, he found that the appellant was not suffering from any sort of mental disease or defect and that he was competent to face the legal consequences of his actions.

During the presentencing hearing of the appellant's special court-martial, the staff psychiatrist testified concerning his treatment and diagnosis of the appellant. The military judge did not reopen the providence inquiry and inquire further into the appellant's mental capacity during or after the defense evidentiary presentation. On appeal, the appellant has provided the court with a declaration of Dr. Ioana Sandu, a staff psychiatrist of the North Chicago Veteran's Affairs (VA) Medical Center, who treated the appellant in February 2005. Dr. Sandu diagnosed the appellant with bipolar disorder, acute manic episode, but offered no opinion as to whether the appellant lacked mental responsibility for his offenses, or lacked the mental competency to stand trial or to assist in his appeal.

Mental Competency

The appellant contends that his guilty pleas are improvident because the military judge failed to rule out the possibility that the appellant lacked mental responsibility at the time of the offenses and the mental capacity to stand trial. He argues that the evidence of post-traumatic stress syndrome offered during the presentencing hearing raised these two issues and imposed a duty on the military judge to inquire further into the appellant's mental capacity. We disagree.

After entering unconditional pleas of guilty, the appellant offered evidence that he had suffered an operational stress reaction through the testimony of LCDR Jason Bennett, Medical Corps, U.S. Navy, the staff psychiatrist who treated him. LCDR Bennett testified that after treating the appellant over a period of several days, including a two-day inpatient period, he found the appellant experienced a "combat or operational stress reaction," a unique diagnosis used to describe a temporary reaction to intense emotions that occur in the operational environment. Record at 80. LCDR Bennett further testified that during the appellant's 48-hour inpatient treatment, his symptoms

disappeared, his behavior returned to normal, and "it became more clear that this was a transient operational stress reaction as opposed to a more serious psychiatric disorder that would persist." *Id*. Finally, LCDR Bennett opined that a person suffering an operational stress disorder typically understands right and wrong even though they are experiencing very strong emotions that may motivate their behavior.

Before accepting a guilty plea, the military judge must find that there is a sufficient factual basis to satisfy each and every element of the pled offense. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). If the accused discloses matters inconsistent with his plea, the military judge must either resolve the apparent inconsistency or reject the plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). Once the guilty plea is accepted, we will not disturb it, unless the record reveals "a substantial conflict between the plea and the accused's statements or other evidence of record." *Id*.; *accord United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

An accused is presumed to have been mentally responsible at the time of the alleged offenses, and to have the mental capacity to stand trial. R.C.M. 909(b) and 916(k)(3). The accused has the burden of proving lack of mental responsibility by clear and convincing evidence. R.C.M. 916(b).

We find no evidence that the appellant was suffering from a severe mental disease or defect at the time of his offenses, or that he lacked the mental capacity to understand the nature of the court-martial proceedings or to assist in his own defense. First, the defense assertion on appeal that the appellant was suffering from post-traumatic stress disorder is wholly unsupported by evidence in the record. Second, the same evidence presented at the court-martial that raised issues of mental responsibility resolved them in favor of the presumptions of mental responsibility and competence. Third, the defense did not request an R.C.M. 706 board before or at trial,[2] and we find no evidence that should have caused the military judge to order one *sua sponte*. Fourth, even the post-trial diagnosis of bipolar disorder provided by the Veteran's Hospital psychiatrist offers no information or opinion relating to the appellant's mental condition at the time of the offenses or at trial. *See*

[2] The appellant requested an R.C.M. 706 board from this court in March 2005 based on the affidavit of Dr. Sandu. We denied this request because the affidavit did not provide evidence that the appellant was not mentally responsible for his offenses, or lacked mental capacity to stand trial or participate in his appeal.

United States v. Young, 43 M.J. 196, 198-99 (C.A.A.F. 1995)(noting that a post-trial diagnosis of mental suffering does not serve as evidence that the appellant was mentally incompetent when he committed his offenses or stood trial).

We are mindful of our superior court's recent guidance in *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005), wherein the Court found an appellant's guilty pleas improvident because he was later diagnosed with a bipolar disorder. But in that case, a doctor opined after trial that because of his disorder, the appellant had been unable to appreciate the wrongfulness of his conduct at the time of the offenses. In this case, the post-trial diagnosis of bipolar disorder does not include a medical opinion that the appellant was suffering from a severe mental disease or defect at the time of his offenses or at trial. Thus, the problem that *Harris* addressed -- whether an accused could make an informed guilty plea without knowledge that he suffered a severe mental disease or defect at the time of the offense -- does not exist here.

In light of all the medical evidence in the record, the appellant's mere assertions on appeal that he was suffering from post-traumatic stress disorder and may have been suffering from bipolar disorder at the time of the offenses and at his court-martial is insufficient to establish a substantial basis for questioning the guilty pleas in this case. We therefore find no merit in this assignment of error.

Misbehavior "Before the Enemy"

The appellant contends that his guilty plea to misbehavior before the enemy was improvident, because the military judge failed to elicit sufficient facts to establish that the appellant's refusal to participate in a military convoy took place "before the enemy," that is, that it occurred at a time of imminent combat conditions. We disagree.

The military judge discussed this element with the appellant during the providence inquiry. The appellant explained that, because of his fear of dying, he refused orders to accept ammunition, carry a loaded weapon while participating as security for a military convoy, or drive a vehicle in the convoy. He agreed that his refusals occurred aboard Al Asad Air Base in Iraq, that enemy forces were in close proximity to the base, and that his unit was or would become tactically engaged with enemy forces.

Describing the term "before the enemy," the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 23c(1)(c), states:

> (c) *Before the enemy*. Whether a person is "before the enemy" is a question of **tactical relation, not distance**. For example, a member of an antiaircraft gun crew charged with opposing **anticipated** attack from the air, or a member of a unit **about to move into combat** may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a **tactical operation then going on or in immediate prospect** is not "before or in the presence of the enemy" within the meaning of this article.
>
> (Emphasis added.)

In *United States v. Sperland*, 5 C.M.R. 89, 91 (C.M.A. 1952) our superior Court interpreted the phrase "before the enemy" as follows:

> It may not be possible to carve out a general rule to fit all situations, but if an organization is in position ready to participate in either an offensive or defensive battle, and, its weapons are capable of delivering fire on the enemy and in turn are so situated that they are within effective range of the enemy weapons, then that unit is before the enemy.

We are satisfied that the military judge elicited sufficient facts to establish that the appellant displayed cowardice at a time when his unit was about to embark on a tactical operation in an area teeming with both organized and unorganized forces of the Iraqi insurgency. The close proximity of the enemy to the Al Asad Air Base supports the conclusion that the enemy was, or within moments would have been, within the effective range of the convoy's weapons, and that the Marines who were preparing to move forward and meet this enemy were moments away from coming within range of the deadly weaponry employed by a guerilla force.

We reject the appellant's argument that the base itself must have been under enemy attack in order for the offense to have been committed "before the enemy." As the Manual for Courts-Martial makes clear, this offense is concerned with a tactical relationship, not the distance from the enemy. Indeed,

one of the established offenses under Article 99, UCMJ, is the refusal to advance with one's command so as to engage enemy forces. *United States v. Payne*, 40 C.M.R. 516, 519-20 (A.B.R. 1969). Such an offense, by fair implication, may occur prior to actual contact with the enemy and "miles from the enemy lines." MCM, Part IV, ¶ 23c(1)(c). We are confident that the military convoy in issue was a "tactical operation then going on or in immediate prospect" within the meaning of the Manual for Courts-Martial.

Based on the record as a whole, we find no substantial basis for questioning the appellant's guilty plea to the Article 99, UCMJ, offense. We therefore reject his second and third assignments of error.

Remaining Assignments of Error

We have carefully considered the appellant's contentions that his trial defense counsel rendered ineffective assistance by failing to seek a formal R.C.M. 706 board, and that the sentence was unduly severe. We find no merit in either contention.

It is obvious from the record that the trial defense counsel discussed this case with a qualified psychiatrist, whom he also called as a witness in the presentencing hearing. Since that expert ruled out a severe mental disease or defect, and even the post-trial declaration does not indicate a lack of mental responsibility for the offenses or mental incapacity to stand trial, we find the appellant has not overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). Likewise, considering all the facts in the record, we find the sentence appropriate to this offender and his offenses. *See United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court