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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.O. VOLLENWEIDER**

UNITED STATES

v.

Andre E. K. LOWE
Airman (E-3), U. S. Navy

NMCCA 200000956 Decided 7 February 2006

Sentence adjudged 3 January 2000. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS ABRAHAM LINCOLN (CVN 72).

LT J.L. WEISSMAN, JAGC, USNR, Appellate Defense Counsel
Maj ERIC P. GIFFORD, USMC, Appellate Defense Counsel
Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
LT KATHLEEN A HELMANN, JAGC, USNR, Appellate Government Counsel
Maj ROBERT M. FUHRER, USMC, Appellate Government Counsel

DORMAN, Chief Judge[1]

A military judge, sitting as a special court-martial, convicted the appellant of unauthorized absence and four specifications of missing movement of his ship thorough neglect. The appellant's crimes violated Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 90 days, forfeiture of $650.00 pay per month for 3 months, and a reduction to pay grade E-1. In taking action on the sentence the convening authority (CA) suspended confinement in excess of 80 days for a period of 6 months for the date of trial. This suspension complied with the terms of the appellant's pretrial agreement.

[1] The Chief Judge participated in the initial panel decision of this court affirming the findings and sentence in this case. That decision was issued on 30 August 2001, after it was submitted to the court for decision without assignments of error being raised. The Chief Judge did not participate in the decision to deny the motion for reconsideration. That motion was filed after the Chief Judge was reassigned to nonjudicial duties as the Assistant Judge Advocate General of the Navy for Military Justice.

The appellant has currently assigned four errors for our consideration. He first argues that he was denied effective assistance of counsel because his trial defense counsel did not request a mental competence exam or the assistance of a mental health expert. The appellant's second argument is that the military judge erred in allowing him to plead guilty to multiplicious specifications. His third assignment of error alleges that the CA did not properly act on his case and that a new action is necessary. His last assignment of error is that the sentence was inappropriately severe.

We have carefully considered the record of trial and the appellant's assignments of error. We have also considered the Government's response. Upon completion of review and consideration of these materials, 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.

Procedural History

Although not required in deciding this case, to put the case in perspective we will provide a brief procedural history. The record of trial is only 71 pages in length, and the case was tried in January 2000. The initial CA's action was issued--prematurely--on 16 May 2000. After the case was docketed with this court, on 20 February 2001, the appellant filed a motion to return the case to the convening authority due to post-trial processing errors, to include the premature action. That motion was denied on 22 February 2001. The case was then submitted to the court for decision without an assignment of error on 21 August 2001 and 9 days later, on 30 August 2001, we affirmed the findings and the sentence.

The appellant then petitioned this court to reconsider our original decision, citing the premature action by the CA and ineffective assistance of counsel during the initial review by the CA. After this court denied the motion for reconsideration, the appellant petitioned the Court of Appeals for the Armed Forces, raising the same issues. That court granted the petition, and eventually set aside both the decision of this court and the original CA's action, returning the case to the CA for a new staff judge advocate's recommendation (SJAR) and CA's action. *United States v. Lowe*, 58 M.J. 261, 264 (C.A.A.F. 2003).

Consistent with the mandate of our superior court, the case was returned to the CA, the Commanding Officer, USS ABRAHAM LINCOLN (CVN 72), on 8 July 2003, for compliance with the mandate. On 21 July 2003, the appellate defense counsel forwarded extensive materials to the CA for his consideration prior to taking a new action. A new SJAR was completed on 4 September 2003 and served on substitute trial defense counsel the following day. On 2 October 2003 that counsel submitted a

clemency request to the CA, requesting either disapproval of the bad-conduct discharge, or disapproval of the reduction and forfeiture of pay. The clemency package contained a 21 February 2003 letter from the appellant addressed to the Naval Clemency and Parole Board, the appellant's post-trial medical records concerning a gun shot wound suffered on 21 January 2000 and injuries sustained in an auto accident on 23 February 2002, as well as the appellant's psychiatric records. Additionally, the clemency package was supplemented on 3 October 2003 by the substitute trial defense counsel by submitting a 1 October 2003 letter from the appellant's mother. The CA took action on 3 October 2003, approving the sentence as adjudged, but ordering suspension of confinement in excess of 80 days in accordance with the terms of the pretrial agreement.

The case was then returned to this court and on 16 January 2004 the case was returned to appellate counsel for the opportunity to file additional briefs. Less than a month later, the appellate defense counsel filed motions to compel a RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), psychiatric evaluation and to abate the proceedings until such time as the evaluation had been conducted. This court granted those motions on 17 February 2004, and ordered inquiry into the appellant's mental competency at the time he committed the charged offenses as well as his ability to assist with his appeal. That inquiry was conducted and a report issued on 19 April 2004, finding the appellant to have been competent at the time of the offenses and able to assist in his appeal. On 28 April 2004 this court vacated our previous order abating the proceedings.

On 25 May 2004 the appellant filed a motion, seeking the return of the record to the CA for a new SJAR and action. In the motion, the appellant raised concerns that the CA had not considered the materials forwarded to him by the appellate defense counsel on 21 July 2003, and that there were errors in both the SJAR and action. Following issuance of a show cause order to the Government, and the Government's response, the motion was denied on 22 June 2004. Following the appellant's 8th enlargement of time, the appellant filed his brief on 7 January 2005, in which he raised the four assignments of error, summarized above. Following five enlargements of time, the Government filed its brief on 30 August 2005.

Assistance of Counsel

The appellant asserts that his trial defense counsel was ineffective because he did not request an R.C.M. 706 evaluation. In support of his argument the appellant cites his affidavit of 21 December 2004 and the 19 April 2004 R.C.M. 706 evaluation. Appellant's Brief at 5-6. He also asserts that by asking the appellant to waive the reading of the elements with respect to Specifications 2-4 of Charge II his counsel provided ineffective assistance, and cites counsel's waiver of a valid motion

concerning the unreasonable multiplication of charges with respect to those same specifications as further evidence of ineffective representation. Lastly, the appellant complains that his counsel failed to object to Prosecution Exhibit 2 on the basis of foundation or authenticity.

In its recent decision in *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court provided a comprehensive explanation of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint of deprivation of the effective assistance of counsel, an appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

To determine whether the presumption of competence is overcome, we apply a three-part test:

> 1. Are the appellant's allegations true, and if so, is there a reasonable explanation for the lawyer's actions?
>
> 2. If the allegations are true, without a reasonable explanation, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers?
>
> 3. If so, we test for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Id. at 474. With respect to the first question, are the appellant's allegations true, the answer is yes, for the most part. His counsel did not ask for an R.C.M. 706 Board, did not raise a motion concerning whether the specifications under Charge II constituted an unreasonable multiplication of charges, and did not object to Prosecution Exhibit 2 on the basis of foundation and authenticity. But, we find no evidence that his counsel either waived or asked the appellant to waive the reading of the elements of Specifications 2-4 of Charge II. With respect to the second part to the first *Davis* question, however, there does appear to be good reasons for his counsel's actions or lack thereof.

RULE FOR COURTS-MARTIAL 706(a) provides in part, "If it appears to . . . defense counsel . . . that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief of observation shall be transmitted . . . to the

officer authorized to order an inquiry into the mental condition of the accused." In raising the allegation that his counsel was ineffective, the appellant has the burden of demonstrating facts that support his argument. In this case, the appellant has presented insufficient evidence to demonstrate that at the time of his initial trial his defense counsel had any reason to believe that his client lacked mental responsibility at the time of the offenses or at the time of trial. The appellant's own affidavit disclaims the existence of any such indications that the appellant was suffering from any mental diseases or defects.

For a complex offense such as conspiracy, robbery, or murder, a failure to discuss and explain the elements of the offense during the providence inquiry has been held to be fatal to the guilty plea on appeal. *United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982); *United States v. Nystrom*, 39 M.J. 698, 701-02 (N.M.C.M.R. 1993). A different result occurs for less complex cases, such as simple military offenses where the elements are commonly known by most servicemembers, and where the record makes clear that the accused understood the elements. *Nystrom*, 39 M.J. at 701. In the case before us, we find no evidence that the appellant's counsel either waived the reading of the elements of Specifications 2-4 of Charge II, or asked the appellant to do so. But, even if he did, under the facts of this case there would be no ineffective assistance. The elements were read. Record at 19-21. And the record demonstrates that the appellant understood the elements.

In *United States v. Joyce*, 50 M.J. 567, 569 (N.M.Ct.Crim. App. 1999), this court determined that it was not an unreasonable multiplication of charges to charge Airman Recruit Joyce with two separate missing movements when his ship sailed from Everett, Washington, to Victoria, British Columbia, and then when it left Victoria and sailed back to Everett 7 days later. Thus, appellant's counsel was on sound legal grounds when he declined to raise an unreasonable multiplication of charges motion in this case. Counsel did, however, attempt to have the military judge consider the four missing movement offenses to be a single offense for sentencing purposes, but the military judge declined to do so. Again, the military judge's reasoning was sound. During the providence inquiry, the appellant admitted that he could have made each movement of his ship.

Prosecution Exhibit 2 is the record of the appellant's summary court-martial held on 4 June 1998. While true that the trial defense counsel did not object on grounds of "foundation" or "authenticity," our experience teaches us those objections are seldom made where the record of the prior proceeding originated in the accused's current unit. The summary court-martial was convened by the same convening authority as convened the present special court-martial. Without question, the trial defense counsel was aware that such an objection was pointless.

With respect to this assignment of error, we also find no prejudice, and thus the assignment of error fails. The 19 April

2004 R.C.M. 706 evaluation concludes that the appellant was mentally competent at the time he committed the charged offenses. We have also considered *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005) with regard to the issue of prejudice, and conclude it does not apply because we are convinced that the results of the R.C.M. 706 Board, even if known at the time of the appellant's trial, would not have produced a substantially more favorable result for the appellant. *Id*. at 397. Furthermore, in *Harris* the accused discovered evidence, post-trial, that directly called into question his mental competence at the time of the charged offenses. *Id*. at 393. The appellant has presented no such evidence.

Finally, we answer the third *Davis* question in the negative concerning the facts of this case. Even if the alleged deficiencies in the trial defense counsel's performance at trial fell below the minimum standard of fallible attorneys, we are convinced that the results of trial are fair and just and that there is no "reasonable probability that, but for the lawyer's error, there would have been a different result." *Davis*, 60 M.J. at 473.

Plain Error

The appellant asserts plain error. He alleges that the military judge erred when he allowed the appellant to plead guilty to Specifications 2-4 of Charge II, because they are multiplicious with Specification 1 of Charge II. We do not agree, and note that the appellant has cited no cases that support his position that missing movement of a ship on four different dates, from three different ports, are multiplicious. Our holding in *Joyce*, 50 M.J. at 569, suggests otherwise.

In the case before us, the appellant entered unconditional guilty pleas and did not challenge the specifications under Charge II as being multiplicious. Thus, unless the appellant can demonstrate that the four specifications were factually the same, he is not entitled to relief. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). He has failed to do so. Furthermore, he has failed to establish plain error. In fact, the appellant has failed to demonstrate any obvious error. *See United States v. Tyndale*, 56 M.J. 209, 217 (C.A.A.F. 2001).

Convening Authority's Action

The appellant next argues that a new CA's action is required. First he notes that the current action "is essentially a duplicate of the initial action." Appellant's Brief at 11. Next he notes that the action states that no legal issues were raised. Issues were, however, raised on appeal, and the appellant argues that the CA should have considered those issues. *Id*. at 11-12. The appellant specifically cites the allegations of legal error concerning ineffective assistance of counsel,

improper argument of Government counsel, and procedural error concerning appellate leave.

RULE FOR COURTS-MARTIAL 1106(d)(4) requires the staff judge advocate to state an opinion in the SJAR as to whether "corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 . . . ." The failure to include such an opinion, however, is tested for prejudice. *See United States v. Dodson*, 40 M.J. 634, 637 (N.M.Ct.Crim.App. 1994)(holding such issue "harmless."). Where the alleged error has no merit, the appellant is not entitled to relief simply because the staff judge advocate failed to address it. *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988).

With respect to the issues that the appellant had raised on appeal, it cannot be said that none had merit, as one of those issues resulted in the case being returned to the convening authority for a new action. That issue, however, dealt with whether the original CA's action was premature, and is not concerned with whether corrective action should be taken as to the findings or sentence. To that extent, we find no error in failing to address that legal issue in the SJAR. The issue was, in fact, already resolved.

With respect to the issue of failing to address the issue of ineffective assistance of counsel, we find that it was error not to address it in the SJAR. We find the error harmless, having thoroughly considered the substance of the issue, and having found no prejudice. In fact, we found no factual support for the allegation. Concerning the allegation of improper argument by the trial counsel, we also hold that it should have been addressed. Since a comment by the staff judge advocate that he disagreed with the allegation of the error would have been both sufficient and legally correct, we conclude that the error was harmless. Finally, matters concerning the administration of appellate leave do not impact the findings and sentence. Thus the staff judge advocate was not required to address that issue.

In reviewing the appellant's brief on the assignment of error, it is apparent that his level of consternation is directly related to the fact that the new action looks so much like the original action. We understand his confusion, particularly given the language of our superior court in its decision in this case. "We reject the Government's contention at oral argument that Appellant's presence and subsequent injury at a bar at 1:00 a.m. alone militate a conclusion that the convening authority would not have considered clemency." *Lowe*, 58 M.J. at 263. With our many years of experience advising convening authorities, we would not have been so swift in rejecting such a contention. While we are confident that the convening authority would consider those facts, we are equally confident that they were not "matters that could have altered the outcome." *Id*. at 264. Nevertheless, in reviewing what is now a two volume "record" assembled around a

71-page record of trial, we are confident that the staff judge advocate and the CA have complied with the mandate of our superior court. While we are not surprised by the outcome, we endorse the process.

Sentence Appropriateness

The appellant argues that his sentence is inappropriately severe. While acknowledging that he was an unauthorized absentee from his ship for nearly 8 months, he argues that extenuating and mitigating circumstances render his sentence unduly harsh. Appellant's Brief at 13. The appellant then cites evidence of his alcohol dependence and chronic depression, evidence that was not presented to the military judge.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

We have considered the appellant's argument on this matter, and recognize that we are the first court to view evidence of the appellant's problems with alcohol and depression. We have also considered the appellant's prior summary court-martial for unauthorized absence, and that he personally elected not to present evidence to the military judge in extenuation and mitigation. While we are sympathetic to the appellant's problems with alcohol and depression, in our collective experience we have seen too many cases concerning similar crimes in which similar extenuation and mitigation was considered, yet resulted in a sentence similar to that of the appellant's. Granting sentencing relief in this case would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96. After reviewing the entire record, and applying the appropriate standard of review, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court