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.

James D. MUHAMMAD
Sergeant (E-5), U. S. Marine Corps

NMCCA 200400030 Decided 31 May 2006

Sentence adjudged 9 April 2003. Military Judge: P.H. McConnell. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 8th Communication Battalion, II Marine Expeditionary Force, Camp Lejeune, NC.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

GEISER, Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of willful disobedience of a lawful order in violation of Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890. The appellant was sentenced to a bad-conduct discharge, confinement for sixty-days, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant asserts three assignments of error. He first alleges ineffective assistance of counsel. Second, he asserts that the order to submit to an anthrax injection was unlawful. Third, he argues that the order to submit to the anthrax injection violated his constitutionally protected liberty interest in refusing unwanted medical treatment.

We have examined the record of trial, the three assignments of error, and the Government's response, to include the affidavit from the trial defense counsel. 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.

Ineffective Assistance of Counsel (IAC)

The appellant asserts that his trial defense counsel was ineffective when he failed to investigate the defenses of lack of specific intent and mistake of law and when he failed to preserve potential error with a conditional plea of guilty.
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)).

The appellant claims that his potential "misunderstanding of Muslim doctrine" could have negated the specific intent required under Article 90, UCMJ. Appellant's Brief of 7 Jun 2005 at 13. We disagree. "It is a . . . long-standing principle of military law that" an order from a known superior is presumed to be lawful unless "palpably illegal on its face." *United States v. Trani,* 3 C.M.R. 27, 30 (C.M.A. 1952). Accordingly, personal notions or beliefs as to the legality of the order are not relevant. *See United States v. Johnson,* 38 C.M.R. 44, 45 (C.M.A. 1967). Mistake of law is only a defense to willful disobedience if it involves a misunderstanding of a law other than the one charged.[1] A mistaken belief in the tenets of a religion does not amount to a mistake of law.

The fact that the appellant might have mistakenly thought the order to submit to inoculation was illegal does not make his disobedience any less intentional. It is axiomatic that a service member disobeys a direct order at his peril. A belief that an order is illegal is only a defense to willful disobedience if, in fact, the order is illegal. In this case it was not. *United States v. Schwartz*, 61 M.J. 567 (N.M.Ct.Crim.

[1] *United States v. New*, 55 M.J. 95 (C.A.A.F 2001)(Appellant believed that an order to wear UN accoutrements conflicted with Army Regulation (AR) 670-1, Wear and Appearance of Army Uniforms and Insignia (1 September 1992)).

App. 2005), r*ev. granted,* 62 M.J. 226 (C.A.A.F. 2005). The specific intent involved in the offense of willful disobedience is a specific intent to defy authority. *United States v. Oisten*, 33 C.M.R. 188, 193 (C.M.A. 1963).

The trial defense counsel submitted an affidavit[2] in which he detailed his investigations and decision-making process. Based upon his analysis of the law, he was convinced that the appellant would not prevail on a defense of mistake of law or lack of specific intent. We concur with his analysis. The appellant acknowledged during his unsworn statement that he made a conscious decision to disobey a superior officer based on his personal religious convictions. Record at 128-29. There is no requirement for a trial defense attorney to raise motions his research indicates are specious. We find that the trial defense counsel did not err when he determined not to raise these two defenses or to preserve his motions on appeal. We conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice.

Conclusion

The remaining assignments of error are without merit. *Schwartz*, 61 M.J. at 567. We affirm the findings and the sentence approved by the convening authority.

Senior Judge CARVER and Judge VOLLENWEIDER concur

For the Court

R.H. TROIDL
Clerk of Court

[2] Affidavit of Captain Jason K. Pulliam, USMC, of 17 May 2006.