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

**BEFORE**

**J.W. ROLPH** **C.L. SCOVEL** **J.D. HARTY**

**UNITED STATES**

**v.**

**Jesse C. SCOTT**
**Corporal (E-4), U. S. Marine Corps**

NMCCA 200300976 Decided 19 April 2006

Sentence adjudged 27 July 2001. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel



HARTY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of conspiracy to distribute a controlled substance, violating a lawful general regulation, five specifications of distributing a controlled substance, four specifications of using a controlled substance, possession of a controlled substance with intent to distribute, and possession of a controlled substance, in violation of Articles 81, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 912a.

The appellant was sentenced to confinement for 14 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the punishment as adjudged. Pursuant to the pretrial agreement, the CA was obligated to suspend confinement in excess of 90 months for a period of 90 months from the date of his action. However, in an act of clemency, the CA suspended all confinement in excess of 78 months for a period of 90 months from the date of his action.

After considering the record of trial, the appellant's three 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.

**Background**

Four sets of charges were preferred against the appellant on four different dates. We are only concerned with the second and third sets of charges preferred on 12 April 2001 and 19 April 2001, respectively.[2] The appellant waived his Article 32, UCMJ, investigation into the second set of charges on 19 April 2001, and into the third set of charges on 25 April 2001. Both waivers were in writing. Appellate Exhibit II and III.

On 21 June 2001, civilian defense counsel submitted a letter to the trial counsel withdrawing the appellant's prior waivers and demanded an Article 32, UCMJ, investigation into those charges. However, on 27 June 2001, the appellant was arraigned on the charges preferred on 12 April 2001 and 19 April 2001, without objection. Record at 14.

The fourth set of charges, stemming from the appellant's 11 May 2001 civilian arrest on drug-related offenses, was preferred on 25 May 2001. Charge Sheet dated 25 May 2001. The appellant signed a pretrial agreement on 11 July 2001, expressly agreeing to plead guilty to some of the charges preferred in the second and third sets of charges. Appellate Exhibit V. The appellant was arraigned on the fourth set of charges on 27 July 2001. Record at 27-28. The appellant complied with the pretrial agreement by pleading guilty and was found guilty in accordance with those pleas on 27 July 2001. Record at 28, 124-25.

**Article 32, UCMJ, Investigation Waiver**

In his first assignment of error, the appellant asserts that his Article 32, UCMJ, waivers were part of pretrial negotiations that did not result in a pretrial agreement, and were submitted without knowing the Government was planning to prefer additional

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[1] I. THE FAILURE TO COMPLY WITH APPELLANT'S DEMAND FOR AN ARTICLE 32 [UCMJ] INVESTIGATION INTO HIS ALLEGED MISCONDUCT REQUIRES REVERSAL.

II. APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

III. THE RECORD OF TRIAL IS MISSING THE ARTICLE 32 [UCMJ] INVESTIGATION FOR ADDITIONAL CHARGES III AND IV AND AN ARTICLE 34 [UCMJ] LETTER ON THESE CHARGES. THE RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE.

[2] The first set of charges was preferred on 16 January 2001 and dismissed on 25 April 2001. The fourth set of charges was preferred on 25 May 2001.

charges. Once the appellant learned of the additional charges, his civilian counsel withdrew the waivers and demanded an Article 32, UCMJ, investigation.[3] Because that demand was not honored, the appellant believes the findings, based on his guilty pleas, should be reversed. In his second assignment of error, the appellant asserts that if the above issue was waived by not being raised prior to trial, then he was denied effective assistance of counsel. We will discuss both assignments of error together.

1. Right to waive an Article 32, UCMJ, investigation

An accused may waive his or her right to an Article 32, UCMJ, investigation. RULE FOR COURTS-MARTIAL 405(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The manner or form of such waiver is not specified. However, the right to an Article 32, UCMJ, investigation is personal to the accused, and therefore any waiver, regardless of form, must be an informed and voluntary waiver personally made by the accused. *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004). The appellant did personally waive his right to an Article 32, UCMJ, investigation into the charges preferred on 12 April 2001 and 19 April 2001. Appellate Exhibits II and III. Therefore, the waivers were effective until withdrawn with permission for good cause shown. R.C.M. 405(k).[4]

2. Waiver of his right to object on appeal

The appellant's defense team did not file a motion to withdraw the prior waivers, nor did they object to proceeding on the charges when given the opportunity. Record at 1-5. The appellant was arraigned on the charges preferred on 12 April 2001 and 19 April 2001 without objection. *Id*. at 14. On 11 July 2001, the appellant entered into a written pretrial agreement in which he agreed to plead guilty to some of the charges preferred on 12 April 2001 and 19 April 2001. Appellate Exhibit V.

On 27 July 2001, at an Article 39(a), UCMJ, session, the trial counsel announced the jurisdictional basis for the fourth set of charges, Additional Charges III and IV. The following discussion occurred between the military judge and counsel:

MJ: Thank you, Major Williams.

> When you were talking about the charges and specifications before this court just a minute ago you were referring to Additional Charges III and IV only; is that correct?

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[3] The appellant was informed of the second and third sets of charges on 25 April 2001. Charge Sheets. His civilian defense counsel, who did not represent him at the time of the waivers, submitted a request to withdraw the waivers and demanded an Article 32, UCMJ, investigation on 21 June 2001.

[4] We will address the issue of withdrawal for good cause under our analysis of the appellant's second assignment of error.

TC: That's correct, Your Honor.

MJ: Mr. Hilton,[5] do you have any concerns about the jurisdictional basis *for the other charges* before this court?

CC: No, Your Honor.

Record at 20 (Emphasis added). The appellant entered his pleas in accordance with his pretrial agreement and was found guilty. By acknowledging the jurisdictional basis for all charges, and by entering his guilty pleas to some of the charges preferred on 12 April 2001 and 19 April 2001, the appellant showed his clear intent to waive the issue he now raises before this court.

"If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused's right at the trial, there is no good reason in law or logic to set aside [the appellant's] conviction." *United States v. Chuculate*, 5 M.J. 143, 145 (C.M.A. 1978)(citing *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958). This issue is waived, and even if not waived, there is no indication that the failure to raise the issue below materially prejudiced the accused's substantial rights at his trial, as will be discussed below. *See* Art. 59(a), UCMJ.

3. Ineffective assistance of counsel by not moving to withdraw the appellant's prior waivers.

For his second assignment of error, the appellant asserts that if we find waiver as to the first assignment of error, then he was denied effective assistance of counsel by his civilian defense counsel. We disagree.

We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)(citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)).

This court applies a three-prong test to determine if the presumption of competence has been overcome. *Garcia*, 59 M.J. at 450 (citing *United States v. Grigoruk*, 56 M.J. 304, 307 (C.A.A.F. 2002)). If the issue can be resolved by addressing the third prong of this test, we need not determine whether counsel's performance was deficient. *United States v. Quick*, 59 M.J. 383,

[5] Colonel Robert E. Hilton, USMC (Ret). Colonel Hilton served on active duty in the U.S. Marine Corps as a judge advocate and retired in 1998. Record at 6, Appellate Exhibit V at 4.

386 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 697). That third prong states:

> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

*Garcia*, 59 M.J. at 450. We find this issue can be resolved under the third prong, because even if the issue was timely raised, there is no reasonable probability that there would have been a different result because there was no good cause for withdrawing the waivers.

An accused may request to withdraw a prior Article 32, UCMJ, investigation waiver for good cause shown. R.C.M. 405(k). That request can be granted by "the commander who directed the investigation, the convening authority, or the military judge, as appropriate." *Id*. Whether there is "good cause" is a question of law. *United States v. Nickerson*, 27 M.J. 30, 32 (C.M.A. 1988). If the appellant's Article 32, UCMJ, investigation waivers were part of a written pretrial agreement that later fell through, that may be good cause for allowing the appellant to withdraw that waiver. The burden, however, is on the appellant to show good cause. *Id.*

The appellant claims in his post-trial affidavit that he executed three separate documents that were part of pretrial negotiations: two waivers of Article 32, UCMJ, investigations for the charges preferred on 12 April 2001 and 19 April 2001, and a pretrial agreement.[6] The waivers are attached to the record of trial as Appellate Exhibits II and III, however, the pretrial agreement is not attached to the record of trial. We will accept the appellant's claims unless the "appellate filings and record as a whole 'compellingly demonstrate' the improbability of his claim." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Without the original pretrial agreement the appellant claims to have signed, we cannot determine whether the written waivers and that pretrial agreement expressly or impliedly establish a mutually dependent relationship, as the appellant suggests. The record does, however, contain the second pretrial agreement under which the appellant eventually entered his guilty pleas. Appellate Exhibit V. That agreement contains the appellant's express waiver of an Article 32, UCMJ, investigation into Additional Charges III and IV, but is silent as to the Article 32, UCMJ, waivers previously submitted. The record does not contain, nor is there any reference to, a separate document signed by the appellant waiving an Article 32, UCMJ, investigation into Additional Charges III and IV.

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[6] Appellant's Affidavit of 3 Nov 2004 at 1, ¶ 1.

When the written waivers and the second pretrial agreement are considered together, it appears that the local practice was as follows: (1) when an Article 32, UCMJ, waiver was part of a negotiated pretrial agreement, the waiver was expressly contained within that agreement without any separate written waivers; (2) when an Article 32, UCMJ, investigation waiver was not part of a negotiated pretrial agreement (e.g., one submitted in hopes that the CA will look favorably on a subsequent offer), it was executed as a separate document. Under these circumstances, we find that the "appellate filings and record as a whole 'compellingly demonstrate' the improbability" of the appellant's claim that the two waivers were part of a pretrial agreement signed by the appellant.[7] *Ginn*, 47 M.J. at 248.

We find that the appellant has failed to establish good cause that would have allowed him to withdraw his waivers, even if raised before the proper authority.[8] There is, therefore, no reasonable probability that there would have been a different result even if this issue had been timely raised below. The appellant has failed to overcome the strong presumption of competence of his defense team. Even if that presumption was overcome, the appellant has failed to show any prejudice. This issue is without merit.

**Incomplete Record of Trial**

For his third assignment of error, the appellant claims that the record of trial is substantially incomplete, thereby making it impossible for this court to carry out its statutory review. The missing portion of the record is limited to an Article 32, UCMJ, investigation into the fourth set of charges, and the Article 34, UCMJ, staff judge advocate letter for those charges.

That portion of the assigned error relating to the Article 32, UCMJ, investigation lacks merit because, even assuming the investigation occurred, the appellant affirmatively waived his right to such an investigation as part of the inducement for the convening authority to enter into a pretrial agreement. Record at 110; Appellate Exhibit V, at 3, ¶ 10.

Concerning the absence of the Article 34, UCMJ, advice letter, no objection or motion relating to the absence of this document was raised at trial or during the post-trial review

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[7] The civilian defense counsel's letter of 21 June 2001, states that it is his understanding that the waivers were part of the pretrial negotiations. This statement appears to reflect what the civilian counsel was told but not what he had personal knowledge of, because he did not represent the appellant at the time of the waivers.

[8] Because civilian defense counsel's letter was submitted after referral of charges, the military judge was the proper person to raise this issue with. R.C.M. 405 (k).

process.[9] The appellant alleges there is no record that the staff judge advocate's advice was prepared as part of the referral process. Appellant's Brief at 8. "If no such advice was ever prepared . . . the referral of [Additional Charge III and IV] to a general court-martial was erroneous. However, the error is not a jurisdictional flaw, is not *per se* prejudicial error, and mandates reversal only if appellant suffered actual prejudice." *United States v. Madigan*, 54 M.J. 518, 520 (N.M.Ct.Crim.App. 2000)(quoting *United States v. Blaine*, 50 M.J. 854, 856 (N.M.Ct.Crim.App. 1999)(internal quotation marks omitted); *see United States v. Murray*, 25 M.J. 445, 447 (C.M.A. 1988).

The appellant has alleged no specific prejudice related to this issue, and we find none in this guilty-plea case. Although it would be error not to prepare and forward an Article 34, UCMJ, letter, or if prepared and forwarded, not to attach the document to the record of trial, we conclude that any error in this case was harmless beyond a reasonable doubt. *See* Article 59(a), UCMJ.

**Conclusion**

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

Chief Judge ROLPH and Senior Judge SCOVEL concur

For the Court

R.H. TROIDL
Clerk of Court

[9] Appellant's Clemency Request of 23 Sep 2002.