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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **E.B. HEALEY**

UNITED STATES

v.

Richard C. VELDMAN
Private First Class (E-2), U.S. Marine Corps

NMCCA 200202093 Decided 16 March 2005

Sentence adjudged 2 April 2002. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st Marine Division (Rein), Camp Pendleton, CA.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

Pursuant to his pleas, the appellant was convicted of conspiracy (four specifications), wrongful use of controlled substances (five specifications), wrongful possession of controlled substances (two specifications), and wrongful distribution of Ecstasy. His offenses violated Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C §§ 881 and 912a. A military judge sitting as a general court-martial sentenced the appellant to confinement for six years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The pretrial agreement required the convening authority to suspend confinement in excess of 60 months. The convening authority approved the sentence, and in an act of clemency, suspended confinement in excess of 42 months for the period of confinement served plus 12 months thereafter.

The appellant now contends that: (1) charging both use and possession of psilocybin was unreasonable; (2) the trial defense counsel was ineffective for failing to investigate possible unlawful command influence; and (3) the sentence was inappropriately severe. We disagree.

We have carefully considered the assignments of error, the Government's response, the appellant's reply, the oral arguments,

and the record of trial. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Articles 59(a) and 66(c), UCMJ.

Background

Following an extensive investigation, the appellant and several other Marines in 1st Battalion, 4th Marines (1/4) were identified as being involved in the use, possession, and distribution of several different controlled substances. The appellant was placed in pretrial confinement on 26 November 2001. Since 1/4 was preparing for deployment, the appellant was administratively transferred to 2d Battalion, 1st Marines (2/1) on about 30 November 2001. The charges were preferred on 3 December 2001 and referred to a general court-martial on 4 February 2002. Also, on 4 February, the convening authority signed the pretrial agreement (PTA). On 5 February the PTA was amended by adding the following provision: "As an inducement for the acceptance of this Agreement, I agree not to raise a motion for unlawful command influence, to include any motion pursuant to R.C.M. 104 or Article 37 UCMJ." Appellate Exhibit I, ¶ 17 at 4.

On 14 February 2002, the military judge questioned the trial defense counsel, Captain (Capt) B, USMCR, about the terms of the PTA, including the handwritten provision foregoing any motion for unlawful command influence. Capt B explained that he gave up such a motion to induce the convening authority to sign the PTA. The military judge did not specifically question the appellant about this provision. However, the appellant later told the military judge that he understood each provision and had no questions about any provision of the PTA.

In a declaration of 31 March 2004, the appellant makes the following assertions: (1) While he was in pretrial confinement, two prisoners told him that during a 2/1-battalion formation, a chart was displayed showing the names of several Marines and their respective involvement in drug abuse; (2) Those present were also warned not to associate or talk with the named Marines; (3) The appellant was one of those named; (4) The appellant relayed this information to Capt B, who told him that nothing could be done since he was already in the brig; (5) Capt B also told the appellant that, since he had a pretrial agreement, character witnesses from the battalion would not be necessary; and (6) If the appellant had had the opportunity, he would have tried to have his 1/4 platoon commander, 1st Lieutenant Martin, testify to his good military character and rehabilitation potential.

In a declaration of 18 January 2005, Capt B responded to the appellant's assertions. He states that he investigated the allegations of unlawful command influence and monitored the unsuccessful efforts of other defense counsel to raise that issue stemming from the 2/1 formation. Prior to the date of the

formation, he had spoken to 1st Lieutenant Martin and Gunnery Sergeant Crawl but concluded that their testimony would not be beneficial to the appellant. He explained to the appellant why a claim of unlawful command influence would be unsuccessful, then recommended cooperation with the Government, particularly in light of his full confession.

Ineffective Assistance of Counsel

The appellant asserts that Capt B was ineffective because he failed to investigate the circumstances surrounding the battalion formation. We conclude that Capt B was not deficient in his duties. However, even assuming the truth of the appellant's allegations, we hold that the appellant suffered no prejudice.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for reviewing claims of ineffective assistance of counsel on appeal. The court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. This same standard has been adopted by the Court of Appeals for the Armed Forces in reviewing military appellate claims of ineffective assistance of counsel. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). Our superior court's most recent opinion on this issue summarizes the substantial burdens the appellant carries in challenging his trial defense counsel's performance:

> First, an appellant must show that counsel's performance fell below an objective standard of reasonableness -- that counsel was not functioning as counsel within the meaning of the Sixth Amendment. *United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). Our review of counsel's performance is highly deferential and is buttressed by a strong presumption that counsel provided adequate professional service. *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). Thus, an appellant's burden is especially heavy on this deficiency prong of the *Strickland* test. *United States*

> *v. Adams*, 59 M.J. 367 (C.A.A.F. 2004). An appellant must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice. *See United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002); *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000); *United States v. Gray*, 51 M.J. 1, 19 (C.A.A.F. 1999). The presumption of competence is rebutted by a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms. *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).
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> The second prong of an appellant's burden requires a showing of prejudice flowing from counsel's deficient performance. The appellant must demonstrate such prejudice as to indicate a denial of a fair trial or a trial whose result is unreliable. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004).
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> Ineffective assistance of counsel involves a mixed question of law and fact. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Factual findings are reviewed under a clearly erroneous standard. But the ultimate determinations of whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are reviewed de novo. *Id.*; *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004); *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999).

United States v. Davis, __ M.J. __, No. 98-0497, slip op. at ___ (C.A.A.F. Mar. 4, 2005).

Although the appellant did not assert in his declaration of 31 March 2004 that his counsel failed to investigate a potential issue of unlawful command influence stemming from the 2/1-battalion formation, his appellate counsel did make that assertion during oral argument. The closest reference in the appellant's declaration is Capt B's purported statement that "there was nothing we could do about [the diagram and its use at the formation] since I was already in the brig." Appellant's Declaration of 31 Mar 2004 ¶5 at 1. Taking the appellant's assertion at face value, it is not inconsistent with Capt B's declaration that he did investigate the issue, for indeed there was nothing anybody could do to prevent the use of the diagram at that formation after the fact. Even if we interpret the statement to mean that any litigation of the issue would be useless, that is completely consistent with Capt B's declaration.

The reason for that lies in the two different units involved in this case. The appellant was placed in pretrial confinement by his original unit, 1/4, the only unit who knew him, of his performance of duty and his military record. Nothing in the record suggests that anyone at 2/1 knew the appellant or anything about him other than what the investigative report might allege. He had simply been transferred to that unit because 1/4 was in the middle of workups for deployment. Nothing in the record or allied papers suggests that the formation had any possible effect on the appellant's trial, including the referral decision, selection of members or influence on the judicial actions of the military judge or members. As to potential influence on defense witnesses, the only witness that the appellant refers to by name is 1st Lieutenant Martin, but Capt B interviewed him before the alleged unlawful command influence occurred, and concluded he would not be helpful. Thus, we think it is clear that any motion based on 2/1 unlawful command influence would have been doomed to failure.

Based upon our review of the declarations, the other allied papers, and the record of trial, we find that Capt B did investigate the unlawful command influence issue. Even if we assumed, however, that the appellant is correct that Capt B was deficient in his representation for failing to investigate or litigate unlawful command influence, we would conclude that he was not prejudiced. As stated above, the appellant has not named a single witness from 1/4 who would have testified but for the formation. Moreover, he has not identified anybody from 2/1 that even knew him, much less anybody that would be willing to testify for him. This assignment of error is without merit.

Motion to Attach

In support of his contention of ineffective assistance, the appellant moved to attach pages from the PTAs of three Marines whose names appeared on the chart apparently shown at the 2/1 formation. Each of these pages includes a waiver of a motion for unlawful command influence similar to the waiver included in the appellant's PTA. The motion also seeks to attach pages 41-45 of the record of trial of one of those three Marines. The sole supporting argument for the motion is that the documents are:

> necessary to demonstrate a pattern of defense counsel waiver of the unlawful command influence just before the trial. These documents are similar to Appellant's pretrial agreement in that they were hand written into the pretrial agreements after being signed by the defendants.

Appellanat's Motion to Attach of 1 Mar 2005 at 1.

As a general rule, we do not consider matters outside the record unless they are relevant to the issues in the case. *See* Art. 66(c), UCMJ; N.M.CT.CRIM.APP. RULE 4-8.3a. We conclude that the appellant has not borne his burden to show how these

documents from other cases are relevant to the assignments of error. Accordingly, the motion is denied.

Unreasonable Multiplication of Charges

The appellant contends that his conviction for possession of psilocybin (mushrooms) and his conviction for use of the same substance constitutes an unreasonable multiplication of charges (UMC). We disagree.

During the providence inquiry, the appellant told the military judge that he had four bags of mushrooms and ate one mushroom. Based on our review of the record, we conclude that the appellant did not consume all that he possessed. Thus, a substantial quantity of mushrooms remained in his possession after the use was complete. Accordingly, this assignment of error is without merit. *United States v. Johnson*, 26 M.J. 415, 419 (C.M.A. 1988).

Sentence Appropriateness

The appellant asserts that the adjudged sentence, including confinement for six years and a bad-conduct discharge, is inappropriate and grossly disproportionate to the appellant's offenses. We disagree.

The appellant's offenses extend to use, possession, and distribution of various controlled substances. We note that several offenses were committed on base. After reviewing the entire record, including careful consideration of the evidence in extenuation and mitigation, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

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

Chief Judge DORMAN and Judge HEALEY concur.

For the Court

R.H. TROIDL
Clerk of Court