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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Christopher A. YARBROUGH
Seaman Recruit (E-1), U.S. Navy

NMCCA 200200720 Decided 12 January 2004

Sentence adjudged 16 August 2001. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LT JOHN J. LUKE, JAGC, USN, Appellate Defense Counsel
LT C.J. HAJEC, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge, sitting alone. Pursuant to his pleas, the appellant was convicted of an attempted burglary, conspiracy to commit burglary, a 2-month unauthorized absence terminated by apprehension, wrongfully using both cocaine and marijuana, and wrongfully possessing both Ecstasy and LSD, in violation of Articles 80, 81, 86, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 886, and 912a. The appellant was sentenced to confinement for 8 months, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the adjudged sentence. A pretrial agreement had no effect on the sentence.

We have carefully considered the record of trial, the appellant’s three assignments of error, 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.

Recusal

In the appellant's first assignment of error, he asserts that the military judge erred to the prejudice of his substantial rights by failing to recuse himself in accordance with RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The appellant requests that this court remand his case for a new hearing, or in the alternative, set aside the bad-conduct discharge. We disagree.

R.C.M. 902(a) provides that "[e]xcept as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Further, a military judge may accept a waiver by the defense of any grounds for disqualification arising under R.C.M. 902(a), provided that the acceptance of the waiver is preceded by a "full disclosure on the record of the basis for disqualification." R.C.M. 902(e).

In a court-martial before a military judge alone, the military judge "ordinarily shall not examine any sentence limitation contained in the [pretrial] agreement until after the sentence of the court-martial has been announced." R.C.M. 910(f)(3). However, a military judge's knowledge of a sentence limitation provision before announcing sentence is not necessarily a disqualifying circumstance. *United States v. Key*, 55 M.J. 537, 541 (A.F.Ct.Crim.App. 2001).

In the appellant's case, the military judge gave counsel on both sides the opportunity to *voir dire* him on his knowledge of the appellant's pretrial agreement limitations, and to challenge him if they desired to do so. Record at 7. The appellant's detailed defense counsel, satisfied with the military judge's disclosure and answers in response to trial counsel's questions, replied that the defense was satisfied with his disclosure and answers and, therefore, has "no questions for voir dire." *Id.* at 10. Further, the trial defense counsel then stated that he did not wish to challenge the military judge, and the appellant specifically elected to be tried by this particular military judge when given the opportunity to select military judge alone. *Id.* at 10-11.

Recognizing that a military judge's decision on whether he is disqualified from hearing a case is reviewed for an abuse of discretion, *United States v. Quintanilla*, 56 M.J. 37, 77

(C.A.A.F. 2001)(citing *United States v. Norfleet*, 53 M.J. 262, 270 (C.A.A.F. 2000)), we conclude that the military judge did not abuse his discretion by not recusing himself from the appellant's case. Pursuant to R.C.M. 902(e), the defense counsel waived the issue of recusal of the military judge when he expressed confidence in the military judge, and by declining to challenge him. *See United States v. Campos*, 37 M.J. 894, 900 n.2 (A.C.M.R. 1993).

The military judge, though he knew of the sentence limitation provision in the appellant's pretrial agreement, did not act in a manner contrary to R.C.M. 910(f)(3), in which it is stated only that the military judge "ordinarily shall not examine any sentence limitation contained in the agreement" before announcing the sentence. Therefore, the military judge properly accepted the appellant's waiver of this issue. *United States v. Keyes*, 33 M.J. 567, 569 (N.M.C.M.R. 1991). He also did not abuse his discretion when he declined to recuse himself. As such, in view of the relatively light adjudged and approved sentence, as addressed below, we decline to grant relief.

Ineffective Assistance of Counsel

In his second assignment of error, the appellant summarily asserts that he was denied effective assistance of counsel when his trial defense counsel failed to challenge the military judge at *voir dire* concerning the military judge's ability to remain impartial and render a fair judgment, given that the military judge possessed material information as to the sentencing terms of the appellant's pretrial agreement. The appellant avers that this court should set aside that portion of the approved sentence that includes a bad-conduct discharge. We disagree.

This court is well-aware of the standards of review concerning allegations of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). In addition to the standards of review, the defense counsel enjoys a strong presumption of competence. *United States v. Cronic*, 466 U.S. 648, 658 (1987); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998). Thus, in order to demonstrate ineffective assistance of counsel, an 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)). We are also guided by the principle that we normally "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v.*

Rivas, 3 M.J. 282, 289 (C.M.A. 1977)); *see also United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001); *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000).

In this case, it is clear to us that the appellant's trial defense counsel made a tactical decision not to object to this particular military judge hearing the appellant's case. The tactical reasons for the trial defense counsel not challenging this military judge in the appellant's case are obvious. Additionally, the appellant himself did not object to this particular military judge when he was given the opportunity during his forum selection. As such, we find no error prejudicial to the appellant and decline to grant relief.

Sentence Appropriateness

In the appellant's third assignment of error, he asserts that his sentence is inappropriately severe because the nature of his offenses does not warrant an unsuspended punitive discharge. The appellant avers that this court should set aside that portion of the approved sentence that includes a bad-conduct discharge. We disagree.

Based upon our review of the entire record, we find that the approved sentence is not inappropriately severe, given the nature and seriousness of the offenses and the character of the appellant. *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). As such, we decline to grant relief.

Conclusion

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

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court