UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain ADAM D. YUNDT
United States Air Force

ACM 38059

17 December 2013

Sentence adjudged 26 August 2011 by GCM convened at Hanscom Air Force Base, Massachusetts. Military Judge: Mark L. Allred.

Approved Sentence: Dismissal and confinement for 4 years.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Charles G. Warren; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

HELGET, HECKER, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial of dereliction of duty, making a false official statement, and larceny, in violation of Articles 92, 107, and 121, 10 U.S.C. §§ 892, 907, 921. Officer members sentenced him to a dismissal and confinement for 4 years. The convening authority approved the sentence as adjudged.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant raised two issues on appeal: (1) The military judge erred in accepting his guilty plea because the appellant was not mentally competent to enter into such a plea; and (2) His

counsel were ineffective by failing to fully investigate his sentencing case and present the testimony of certain mental health providers to the panel. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant served as a program manager for his unit (the Electronic Systems Center, Experimentation Branch) and was entrusted with a Government Purchase Card (GPC) for making purchases for the Government in amounts less than $25,000. After he was observed removing items from the unit's shipment receiving area in June 2010, an investigation was launched that ultimately led to the appellant being charged with multiple crimes, based on his multi-year scheme to purchase and steal hundreds of items of military and other property valued at over $560,000.

Starting in 2008, while legitimately ordering items needed by his unit with the GPC or through his duties as a program manager on the unit's contracts, the appellant would order extra items beyond or outside the unit's requirements, with the intent to permanently deprive the Government of that property. After the items were delivered to the unit, he removed them and placed them in various storage facilities and his residence. He explained to the military judge that he was a "hoarder" who has kept virtually all items he had touched throughout his life. He therefore never sold or disposed of any items he had procured through his scheme because he became "emotionally attached" to them. In fact, most of the items were recovered still in their original packages.

Mental Competency

Prior to his court-martial, the military judge granted the Government's request for a sanity board, which was based on the appellant's history of inpatient and outpatient psychiatric treatment at civilian and military mental health facilities. In August 2011, the sanity board (comprised of a psychologist) concluded the appellant had severe mental diseases/defects, namely bipolar disorder (not otherwise specified), obsessive compulsive disorder, and post-traumatic stress disorder (PTSD), but that these problems did not make him unable to appreciate the nature and quality or wrongfulness of his conduct regarding the charges. The sanity board also concluded the problems did not render him unable to understand the nature of the court-martial proceedings or unable to cooperate intelligently in his defense.

At the start of the appellant's court-martial, the military judge indicated he was aware of the sanity board's conclusions. The defense counsel indicated they had no concerns about the appellant's mental health, his ability to stand trial, or his sanity at the time of the offenses. The military judge also asked the appellant whether any of his medications would adversely affect his ability to communicate or participate in the court-martial. The appellant said he had no reason to believe the medications would cause any

such difficulties, and he was satisfied that none of his mental health issues rose to the level of a legal defense. The appellant and military judge then engaged in a careful and extensive discussion of the elements of the offenses and the facts underlying them, as well as the multi-paged stipulation of fact. During this inquiry, the appellant admitted he could have avoided taking the property if he had wanted to and that no circumstance forced him to take the property. The military judge ultimately accepted the appellant's guilty pleas. They also discussed the terms of the appellant's pretrial agreement and his decision to enter into it.

In sentencing, the defense presented testimony from a counselor who evaluated the appellant for almost a year at the request of his civilian defense counsel. He testified, inter alia, that the appellant's bipolar disorder manifested itself mainly as "hypomania," causing him to experience sleep disturbance, which required inpatient psychiatric hospitalization prior to his trial, while his obsessive compulsive personality disorder and family background led him to focus inordinately on certain details and processes, as well as hoarding items. When speaking to the counselor, the appellant indicated he knew his conduct was wrong, although he minimized the level of his misconduct. The panel was also provided a written "treatment summary" which included additional information on these subjects and also noted that the appellant was taking multiple medications and being seen by multiple mental health and medical providers for his "complicated emotional/psychological system."

The defense also submitted 31 pages of medical records from the appellant's inpatient treatment in late 2010. These records contained an extensive discussion of his past history, current diagnoses, medication regime, and prognosis. The defense consented to a Government-requested instruction regarding these records that stated:

> Medical records have been introduced into evidence without testimony from the medical provider who provided care for [the appellant]. Any documentation associated with [the appellant's] medical condition has been provided to you as part of the defense case as matters in extenuation and mitigation. These records should not be construed as evidence that is providing an explanation to [sic] his guilt or that in some way he has not committed any of the crimes for which he had plead guilty.

In his unsworn statement, the appellant said "[my] bipolar manic episodes and [ ] hoarding issues led me to purchase all these items that the Air Force didn't need and then keep them." The military judge excused the panel and asked the defense whether they were now contradicting their earlier representations that the appellant was mentally responsible for his actions. The military judge explained the defense of mental responsibility and the appellant's ability to pursue such a defense if he believed it applied to his situation, and emphasized that the appellant should not say something untrue simply to preserve his pretrial agreement. The defense counsel and the appellant both

agreed he was able to appreciate the nature and wrongfulness of his acts even though he suffered from bipolar disorder, and that his mental health issues were simply being offered in extenuation and mitigation regarding the appellant's motives for his actions.

The military judge thus found no reason to reopen the guilty plea inquiry and then instructed the panel that the appellant was mentally responsible for his actions and had the capacity to participate in the trial. At the Government's request, he then instructed the panel:

> [A]ny matter related to [the appellant's] mental health, including bipolar and obsessive compulsive disorder, or otherwise, should be considered by you as a matter in extenuation and mitigation. . . . not as to whether or not [he] is guilty. [The appellant] was able to appreciate the nature and quality of his acts, [and] he understood the wrongfulness of the act at the time he committed it and understands that today.

In his sentencing argument, the civilian defense counsel stated:

> You must look at [the appellant's] illnesses. Not to excuse the crime, they [have] never been offered to excuse a crime. We made that perfectly clear from the get go. They are offered because they are one of the common individual portions of [the appellant] that you must consider in considering [the appellant] as a total human being. [The prosecutor] can't separate [the appellant] from his Air Force service any more than you can separate [his] PTSD, and bipolar, and depression, and hoarding. And the other ailments described in [the] hospital records.
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> . . . [T]hose health problems were a significant factor in [the appellant's] psyche. Propelling him to commit the crimes that he knew were wrong.

In his clemency submission, the appellant took "complete responsibility for [his] crimes" and stated, "I am where I am today because of my choices and actions." However, he also stated that:

> [My mental health disorders] were NOT properly considered in my defense, nor was my defense able to properly demonstrate my medical conditions for fear of changing my plea and a determination of not being fit or mentally sane for trial. . . . There [sic] two reasons are more than extenuating circumstances that were not properly presented at my court-martial and to you the convening authority.

The appellant also complained that "there was a lack of proper witness subpoenaing of all medical experts providing treatment in time for my trial. . . . In fact, only one of the seven medical professionals was able to attend my trial and talk on my behalf." He complained that his sanity board improperly failed to review 18-months of mental health records prior to reaching its conclusion and described his obsessive compulsive disorder as causing "uncontrollable unmeasurable . . . tendencies and hoarding desires."

Providency of Guilty Plea

Pursuant to *Grostefon*, the appellant contends the military judge erred in accepting his guilty plea because he was not competent to enter such a plea due to his "severe mental health issue[s]."[1] In his appellate Declaration, the appellant alleges the results of his sanity board were faulty because the doctor did not review his entire mental health history and thus was not fully capable of making a decision about whether he was competent to assist in his own defense. He also claims that the 22 medications he was taking in August 2011 and his eight mental health disorders[2] made him incompetent to enter into a pretrial agreement and waive his right to contest the charges, and prevented him from working effectively with his counsel. He contends his counsel had to awaken him on multiple occasions during the trial, that he has little memory of most events, including the trial, and that those side effects subsided after his medication regime was altered following his trial.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). When conducting this inquiry, a military judge "can presume, in the absence of contrary circumstances, that the accused is sane." *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009). However, if the accused's statements or other material in the record indicate a history of mental disease or defect on the part of the accused, the military judge must determine whether that information raises either a conflict with the plea or only the "mere possibility" of such a conflict, as "the former requires further inquiry on the part of the military judge, the latter does not." *Id*. It is well settled that "[o]nce a military judge has accepted an accused's guilty pleas and entered findings of guilty, [we] will not set them aside unless we find a substantial basis in law or fact for questioning the plea." *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009) (citing *Inabinette*, 66 M.J. at 322).

Here, the military judge was aware prior to trial that the appellant suffered from several mental health disorders and that the sanity board had concluded the appellant was

[1] The appellant does not claim he lacked mental responsibility for his offenses.

[2] In addition to the three conditions found by the sanity board, the appellant says he had been diagnosed with a hoarding disorder, anxiety disorder, borderline personality disorder, panic disorder, and attention deficit/hyperactivity disorder.

able to appreciate the nature and quality or wrongfulness of his conduct and was able to cooperate intelligently in his defense. Nonetheless, the military judge then engaged in a careful and deliberate guilty plea inquiry with the appellant, including an explanation of the mental responsibility defense. In response to his inquiries, the appellant and both defense counsel agreed that the defense did not apply and that the appellant's mental health illness and medications would not affect his ability to communicate and participate in the trial.[3]

The appellant's coherent and detailed statements during the extensive guilty plea inquiry and his unsworn statement corroborates his in-court assertion that he was mentally able to participate in the guilty plea inquiry and communicate with the military judge and his counsel. We do not find his contrary post-trial assertions credible. There is no substantial basis to question the providency of the appellant's guilty plea.

Ineffective Assistance of Counsel

Also pursuant to *Grostefon*, the appellant contends his attorneys failed to "fully investigate" his sentencing case and present the testimony of certain mental health providers to the panel, and therefore, he received ineffective assistance of counsel.[4]

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test in *Strickland v. Washington*, 466 U.S. 668, 687 (9184). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is so serious that counsel was

[3] Through two Declarations ordered by this Court, the appellant's military defense counsel described her interactions with the appellant before and after his trial. In her opinion, the appellant was competent to enter into his pretrial agreement and plead guilty based on her observations and interactions with him during that time frame. She also relied on the professional assessment of the sanity board on this matter. Prior to trial, the appellant informed her he was on medication, but did not indicate he was too drowsy or otherwise incompetent to stand trial, nor did he appear so. Similarly, the appellant's civilian defense counsel's Declaration describes interactions with the appellant prior to and at trial, stating the appellant "thoroughly discussed" the implications of pleading guilty and the pretrial agreement with both counsel and made a "conscious informed choice" to plead guilty and exhibited behavior consistent with someone competent to make such decisions despite being on medication. The civilian defense counsel did recall the appellant falling asleep at one point during the trial after failing to sleep during the preceding 24-hour period but states the appellant was "easily awakened" and remained awake for the remainder of the day.

[4] As described above, the appellant raised similar concerns as part of his clemency submission, though he did not claim he had received ineffective assistance of counsel before or at his trial. This Court ordered a second declaration from his military defense counsel, directing her to address whether she had discussed these concerns with him, whether she considered his letter to create a conflict of interest with regard to the defense team's performance at trial, and, if so, whether she discussed the ramifications of that conflict with the appellant. In her declaration, the military defense counsel indicated she explained to the appellant what the defense intended to do at trial and told him he could provide the convening authority with information that was not otherwise used at trial. In her opinion, his clemency letter was part of his strategy to elaborate on his mental health issues and was not a complaint about the defense team's representation of him. Given her declarations and considering all the information in the appellate and trial record, we find the military defense counsel was "mentally free of competing interests" at the time she prepared and submitted the appellant's clemency submission. *United States v. Cornelius*, 41 M.J. 397, 398 (C.A.A.F. 1995).

not functioning as the counsel guaranteed the defendant by the Sixth Amendment;[5] and (2) that the deficient performance prejudiced the defense through errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Tippit*, 65 M.J. at 76 (internal quotation marks omitted) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 687).

The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Moulton*, 47 M.J. at 229). The "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant contends he received ineffective assistance of counsel because his trial defense counsel did not "fully investigate" his sentencing case, interview his mental health providers, or ensure they were present to testify at his trial. In support of that claim, he has submitted a letter from a psychiatrist who treated the appellant over a five-week period in early 2011 that stated, "I believe [the appellant] had no idea that his judgment and behavior were considerably influenced by his mental illness and that he had either no thought or only a vague notion that his actions would be viewed as criminal in nature." This letter was addressed to the appellant's civilian defense counsel and was dated six months prior to the appellant's trial, but was not presented at the trial.

The appellant also submitted a March 2012 letter from a doctor who treated him during his inpatient hospitalization in late 2010 that stated:

> Both bipolar disorder and obsessive-compulsive disorder are purely biological illnesses that people have essentially no control over without treatment. . . . I never . . . had the opportunity to explain [to his counsel] that it was more likely than not that [the appellant's] illegal acquisition of various items that belonged to the Air Force was a result of his mental illness. His hoarding disorder would lead him to feel the excruciating need to take various items and store them while his bipolar disorder would

[5] U.S. CONST. amend. VI.

> cause him to act in an impulsive manner and not to think rationally about what is right and wrong as it is a disorder of both mood and thought.

In this letter, the doctor contends he was only contacted once by the defense counsel about writing a letter and possibly testifying on the appellant's behalf, but was never contacted again.

In their Declarations, the two trial defense counsel responded to the appellant's claim that they failed to "fully investigate" his sentencing case and present the testimony of his mental health providers to the panel. The civilian defense counsel was responsible for interviewing the mental health providers and his Declaration indicates he had several brief conversations with the inpatient provider whose letter was submitted during clemency, which convinced him that lack of mental responsibility was not a viable defense. He also described arranging for the appellant to be treated by the counselor who testified at trial and working with the appellant to select the most favorable subset of his inpatient records for use at trial. The military defense counsel stated the defense "made good faith efforts to obtain and present" the appellant's mental health providers at trial, including asking the Government to subpoena the inpatient mental health provider.

Neither counsel could recall why that provider did not appear at trial, but the military defense counsel recalled suggesting they only call one provider in order to provide background information without undercutting the appellant's acceptance of responsibility for his actions. The defense counsel then made the tactical decision to present only the counselor at trial, based on a variety of factors, including the timing of the treatment and the availability of the witness. The civilian defense counsel's Declaration also explains that the defense elected not to present evidence from the psychiatrist who treated the appellant in early 2011, due to concerns about the accuracy of some of the information he received from the appellant.

Although there are some inconsistencies between the materials submitted by the appellant and his counsel, we need not order an evidentiary hearing since these issues can be resolved based on the "appellate filings and the record." *Ginn*, 47 M.J. at 248. The filings and record "compellingly demonstrate" the improbability of the appellant's allegations that he received ineffective assistance of counsel. *Id.* Concerning the alleged failure to investigate witnesses and introduce evidence from mental health providers, the record of trial and the appellate filings convincingly demonstrate that trial defense counsel had sound and reasonable tactical reasons for the course of action they chose in presenting the panel with evidence of the appellant's mental health issues. We therefore find the appellant has failed to meet his burden of demonstrating that his counsels' conduct was deficient.

We also find the appellant has failed to demonstrate prejudice. Through the testimony of the counselor who treated the appellant for almost a year and the written

mental health records from his inpatient treatment, the defense was able to present persuasive and relevant information regarding those mental health problems and how they impacted his actions, including very detailed information prepared by mental health providers who did not appear at trial and thus were not subjected to cross-examination, which could have undercut the weight of this evidence. There is no "reasonable probability" that a different result would have occurred if the information from the two other mental health providers was provided to the panel.[6]

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[7] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[6] When considered in context with the other information in the record of trial, we do not find (and the appellant does not contend) that these other mental health providers would have presented evidence that raised the possibility the appellant was not mentally responsible for his offenses at the time he ordered and stole the items. For example, his surreptitious behavior while conducting those actions demonstrates he was able to appreciate the nature and quality and the wrongfulness of his conduct.

[7] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).