UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AUDREY A. JONES
United States Air Force

ACM S32099

01 November 2013

Sentence adjudged 21 August 2012 by SPCM convened at Joint Base Andrews, Maryland. Military Judge: Joshua Kastenberg (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $400.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HARNEY, SANTORO, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SANTORO, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to her pleas, of use of marijuana, methadone, cocaine, and heroin; and distribution of marijuana and heroin, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence was a bad-conduct discharge, confinement for 3 months, forfeiture of $400.00 pay per month for 4 months, and reduction to E-1.[1] Before us, the appellant asserts that: (1) Her pleas of guilty to distribution of marijuana and heroin were

[1] A pretrial agreement provided that the charge and specifications would be referred to a special court-martial but imposed no other limitations.

improvident because the military judge failed to eliminate entrapment as a possible defense; (2) Her pleas of guilty to the use of methadone and heroin were improvident because the military judge failed to eliminate self-identification as a possible defense; and (3) She received ineffective assistance of counsel. We disagree and affirm.

Background

The appellant entered into a stipulation of fact in which she admitted that she used marijuana 150-200 times between December 2011 and May 2012, cocaine approximately 10 times between December 2011 and January 2012, methadone at least 5 times in February 2012, and heroin approximately 5 times in April 2012. Several of these uses occurred at her on-base residence.

In February 2012, the appellant's coworker, friend, and roommate (hereinafter "the CI") went to the base Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program to seek help for a friend who was using drugs. ADAPT officials directed her to her first sergeant. The first sergeant took the CI to the Air Force Office of Special Investigations (AFOSI) where she told investigators that the appellant had recently become increasingly depressed and panic-stricken resulting from incidents in her childhood. The CI also told the AFOSI that the appellant's husband was a drug addict. Thereafter, the CI began working with the AFOSI as a confidential informant.

The AFOSI surveyed the appellant's residence for several days and established that the appellant's husband was purchasing drugs off-base and bringing them onto the installation. They also found drug paraphernalia and marijuana in the trash outside the appellant's residence.

In March 2012, at AFOSI's request, the CI asked the appellant if she could obtain marijuana for her. The appellant told the CI that she would have to check with her husband. The CI repeated her request "on multiple occasions" over the ensuing two weeks. On 6 April 2012, the appellant and her husband sold the CI $140 worth of marijuana at the appellant's on-base residence. The appellant did not herself handle the marijuana or the money but did facilitate the meeting and the purchase. The appellant also told the CI that the marijuana they were selling had higher levels of THC (the active ingredient in marijuana) than "normal" marijuana.

A few weeks later, the CI asked the appellant "what else" she could get "for a good time." The appellant again said she would check with her husband. The CI repeated her request several times over the week. The appellant eventually told the CI that she could provide heroin and, on 26 April 2012, sold the CI $100 worth of heroin at her on-base residence. During the sale, the appellant told the CI how to use heroin and of its effects, and recommended that she not use too much.

On 8 May 2012, the appellant went to ADAPT to self-report her drug use. Later that same day, she told her commander and first sergeant that she had self-reported. Knowing that the appellant was already under investigation, the first sergeant escorted her to AFOSI and told her to "tell the truth." Thereafter the appellant confessed to the crimes to which she pled guilty. She consented to a urinalysis and a search of her home.

Providence of the Appellant's Pleas

The appellant asserts that during the *Care*[2] inquiry, she raised two issues that were inconsistent with her guilty pleas: (1) whether she was entrapped into committing the distribution offenses; and (2) whether her prosecution was barred because she self-identified her drug use. We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference." *Id.* (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). A military judge may not accept a guilty plea if the accused "sets up matter inconsistent with the plea." Article 45(a), UCMJ, 10 U.S.C. § 845(a). We do not, however, overturn a military judge's decision to accept a guilty plea based on a "mere possibility" of a defense. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

I. Entrapment

Prior to accepting the appellant's guilty pleas, the military judge properly explained to her the elements and definitions of the offenses. In response to the military judge's questions, the appellant said the CI had asked her for marijuana but that she had "refrained from honoring her request for about a week and a half to two weeks" before bringing the request to her husband because the CI repeatedly asked her.

Upon hearing this, the military judge recognized the need to explore the possibility of entrapment. Entrapment is an affirmative defense and exists when "the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." Rule for Courts-Martial 916(g).

The appellant initially told the military judge that she was worn down by the CI's requests and felt it became fruitless to say no. She also said her attorney had told her she could not raise entrapment as a defense to distribution because she was already under investigation for use. The military judge explained this was not necessarily the case and read to her the correct legal definition of entrapment. Thereafter, the appellant clarified her position; she told the military judge she had never distributed drugs before and probably would not have done so if a complete stranger had asked, but did so in this case because she trusted her friend and her husband. She specifically told the military judge

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

she knew she had a choice whether or not to distribute marijuana and did so voluntarily. Finally, she admitted she was predisposed to distribute marijuana as the judge defined that term.

The military judge next discussed the heroin distribution specification. The appellant said the CI asked her for "something else that would provide a good time" and "asked her a couple more times." As with the marijuana distribution, about a week and a half after the CI's first request the appellant and her husband provided the heroin. She told the military judge that she had no belief that she was entrapped into distributing the heroin, and the discussion concluded:

> MJ: Do you believe that your will; your ability of self-control was overcome because somebody leaned on you so heavily that you felt like you had no choice?
>
> ACC: No, sir.
>
> MJ: [D]o you believe your will was overcome to a degree that you felt like you had no choice?
>
> ACC: No, sir.
>
> MJ: Okay. Now it was CI's original suggestion to commit this offense, is that true?
>
> ACC: Yes, sir.
>
> MJ: Why – is it fair to say you – with your complete faculties you were willing to go along?
>
> ACC: Yes, sir.
>
> MJ: Okay. And do you believe you were predisposed to commit this offense?
>
> ACC: Yes, sir.

Whether the appellant was entrapped into committing an offense is a matter of fact to be determined by the factfinder. By pleading guilty, the appellant knowingly waived a trial of the facts as to that issue. After being properly instructed, she admitted that she was predisposed to commit the offense.

As a matter of law, a government agent's request for drugs, even from one who had never previously distributed, is not *per se* entrapment. As a matter of fact, the appellant admitted that she was not entrapped. *See Faircloth*, 45 M.J. at 174. Therefore, we cannot conclude that the military judge abused his discretion in accepting the appellant's guilty plea. Nor do we find that the Government's conduct was so egregious as to violate due process.

II. Self-Identification

The appellant next asserts that she should not have been prosecuted for the use of heroin-methadone because the Government first became aware of it due to her self-identification. As authority, she cites Air Force Instruction (AFI) 44-121, which states, in pertinent part: "Commanders may not use voluntary disclosure against a member in an action under the UCMJ or when weighing characterization of service in a separation." AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, ¶ 3.7.1.3 (11 April 2011).

The protections provided by paragraph 3.7.1.3 are limited to "voluntary disclosure." The AFI states that disclosure is *not* voluntary if the member has previously been placed under investigation for "drug abuse."

> The determination of "placed under investigation" status is made based on the circumstances of each individual case. A member is under investigation, for example, when an entry is made in the SF blotter, when the SF Investigator's log shows an initial case entry, or when the AF Office of Special Investigations (AFOSI) opens a case file. A member is also considered under investigation when he or she has been questioned about drug use by investigative authorities or the member's commander, or when an allegation of drug use has been made against the member.

AFI 44-121, ¶ 3.7.1.4.2 (emphasis omitted).

The appellant's admissions during the *Care* inquiry make clear that unbeknownst to her, she was already under investigation for drug abuse at the time she attempted to self-identify. Therefore, we conclude that the military judge did not abuse his discretion in not inquiring further into this issue before accepting her guilty plea.

Ineffective Assistance of Counsel

The appellant alleges her trial defense counsel was ineffective either by advising her the entrapment defense was not available for the distribution charges because she was already under investigation, or, in the alternative, for allowing her to plead guilty when it was plain she did not understand his advice.

"A determination regarding the effectiveness of counsel is a mixed question of law and fact. We review findings of fact under a clearly erroneous standard, but the question of ineffective assistance of counsel flowing from those facts is a question of law we review de novo." *United States v. Baker*, 65 M.J. 691, 696 (Army Ct. Crim. App. 2007) (citations omitted), *aff'd*, 66 M.J. 468 (C.A.A.F. 2008). In assessing such claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984), *quoted in United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007).

To prevail, the appellant bears the burden of showing both: (1) that her counsel's performance fell measurably below an objective standard of reasonableness; and (2) that any perceived deficiency operated to the prejudice of the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). With regard to the first prong, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. With regard to the second prong, an appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"When challenging the performance of counsel, [an appellant] bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citing *Polk*, 32 M.J. at 153). As a general matter, reviewing courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977). Where the alleged deficient performance is used to challenge a guilty plea, the appellant must show, under the second prong of the *Strickland* test, a "reasonable probability that, but for counsel's errors, [she] would not have pleaded not guilty." *United States v. Ginn*, 47 M.J. 236, 246-47 (C.A.A.F. 1997) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

We ordered the submission of an affidavit from trial defense counsel. While there are inconsistencies between appellant's and counsel's affidavits, we need not order additional fact-finding to resolve the assigned error. *Ginn*, 47 M.J. at 248.

As discussed above, the appellant told the military judge during the *Care* inquiry that she thought her attorney told her entrapment was not a defense. While it is not clear from the record whether the appellant articulated what she actually believed at the time or was momentarily confused about a complex legal issue, what *is* clear is that the military judge corrected any misunderstanding that she may have had. Thereafter, and before accepting her guilty plea, the military judge inquired of her several times whether she was satisfied with her counsel, whether she believed his advice was in her best interest, and whether she still wished to plead guilty. She answered all of those questions affirmatively and at no time asked for clarification or to withdraw her guilty plea.

The appellant made both oral and written unsworn statements during presentencing proceedings. In her oral statement, the appellant told the military judge that when the CI initially approached her for marijuana she did not feel comfortable with it because the CI knew the appellant was trying to get her and her husband away from a drug lifestyle. The appellant then explained her reason for providing the marijuana was she thought she was "just helping a friend." Later, the appellant told the judge:

> I wasn't thinking about [distributing marijuana and heroin] being illegal or wrong or anything in that aspect, I looked at it as in this is my friend, she's asking me – she's been asking me continuously if – if she wants it that bad, she could get it somewhere else but she had asked me.

In her written statement, the appellant told the military judge:

> [My husband] and I cleaned ourselves up towards the end of February and remained drug free through the end of March. Around this time, my best friend began asking if I could get her some marijuana. I told her I would ask my husband, but wanted to keep him clean so I just dropped it. [My husband] soon started using again, however, this time with heroin. I eventually snorted some myself because he told me it would make the pain in my back and hips go away.
>
> I can't remember how many times my friend asked me for drugs, but it was more than twice. The first time I helped her, I told [my husband] what she wanted and then told her when to come over to get it. . . . As for the second time, I remember her asking what else she could get for a good time. I relayed the message to my husband and he told me he could get her heroin. So that's what I told her and she said okay. . . . I never thought I was "drug dealing." I just thought I was helping my best friend.

Captain (Capt) MB, the appellant's trial defense counsel, also submitted an extensive clemency package on the appellant's behalf. In his memorandum to the convening authority, dated 5 October 2012, he wrote:

> Had it not been for [the appellant's] desire to accept responsibility for her actions and try to move forward from these events, the Defense would certainly have raised the issue of entrapment when it came to the distribution charges. Indeed, OSI had no evidence of [the appellant's] distributing drugs to anyone until they utilized CI. And even after CI requested these drugs, she had to make several requests over a period of weeks before [the appellant] eventually complied. Not only do these circumstances indicate that [the appellant] was not simply dealing drugs to

> anyone who wanted them, they show that OSI and its confidential informant had to actively and aggressively pursue [the appellant] before she ultimately relented. And she only did so because CI was her best friend.
>
> . . . .
>
> Another significant rehabilitative step is [the appellant's] decision to plead guilty at her court-martial. . . . [She] could have nevertheless exercised her constitutional right to plead not guilty . . . . [The appellant] was well aware of her rights, but chose to accept responsibility for her actions.

Further shedding light on why the appellant may have chosen not to raise the affirmative defense of entrapment was her relationship with the CI. As Capt MB wrote in his clemency submission:

> During the court-martial, [the appellant] also made an important choice not to identify one of her accusers; specifically, her friend CI. As was her right under the Sixth Amendment, [the appellant] could have requested CI as a witness or at the very least referenced her as a confidential informant working for OSI during her unsworn statement. Instead, [the appellant] specifically requested that the military judge not identify CI, which the military judge expressed great reticence over. . . . Despite his cautions, [the appellant] insisted that CI's name be withheld and her request was ultimately granted.

In her post-trial affidavit, the appellant wrote that her defense counsel initially told her that entrapment was a potential defense to distribution and gave her a copy of the legal definition. She then stated that "[a]fter that, my defense counsel and I discovered I was already under investigation for drug use when the distributions occurred. Since I was already under investigation for drug use, my defense counsel advised me that the defense of entrapment was no longer available to me for drug distribution." She said that had she been aware that entrapment remained a viable defense, she would not have pled guilty to the distribution specifications.[3]

Capt MB represented the appellant at trial. In his declaration, he stated that he and the appellant discussed entrapment at length and that he never told her the defense was unavailable because she was already under investigation. Instead, Capt MB stated that the appellant herself decided not to pursue an entrapment defense because (1) she had previously used and shared drugs with another individual not listed in the current charges,

[3] The appellant's declaration also states that her counsel did not tell her that Air Force Instruction 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, ¶ 3.7.1.3 (11 April 2011), might have provided a defense to the methadone and heroin offenses and that if he had, she would not have pled guilty to these offenses. However, the appellant does not allege this as a basis for counsel's alleged ineffectiveness.

(2) she had never specifically refused the CI's requests for drugs, and (3) her acceptance of money from the CI, and the later use of that money to purchase more drugs, might have suggested a profit motive that would undercut an entrapment defense. Capt MB also stated that the CI refused to tell him whether the appellant had distributed drugs to her or others on occasions other than those charged. Capt MB stated that after considering all of these matters and his advice, the appellant decided to plead guilty.

Capt MB's declaration sets forth reasonable tactical decisions that are consistent with both his and the appellant's statements at trial and in their clemency submissions. To the extent there may have been any miscommunication or misunderstanding between the appellant and counsel, she would have been aware of those matters prior to telling the military judge, under oath, that she was satisfied with her counsel and his advice. Her post-trial affidavit asserts no facts or law not known to her at the time of trial. We therefore conclude that the appellant has failed to meet her burden to establish that counsel's performance fell below an objectively reasonable standard.

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. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court