

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HOLDEN, HOFFMAN, and SULLIVAN
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant RICARDO A. BARRON
United States Army, Appellant

ARMY 20060718

United States Army Infantry Center and Fort Benning
Richard E. Gordon, Military Judge
Colonel Lyle W. Cayce, Staff Judge Advocate

For Appellant: Colonel Christopher J. O'Brien, JA; Lieutenant Colonel Steven C. Henricks, JA; Major Sean F. Mangan, JA; Captain Candace N. White Halverson, JA (on brief).

For Appellee: Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Major Christopher B. Burgess, JA; Captain Lynn I. Williams, JA (on brief).

29 September 2008

MEMORANDUM OPINION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of absence without leave [hereinafter AWOL] and missing movement by design, in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887 [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a bad-conduct discharge, confinement for one-hundred and twenty days, and reduction to Private E1. This case is before our court for review under Article 66, UCMJ.

Appellant's asserts he was denied effective assistance of counsel because his trial defense counsel failed to raise the affirmative defense of mental responsibility and failed to request a sanity board under Rule for Court-Martial [hereinafter R.C.M.] 706. He further asserts the military judge erred by "not ordering a sanity board *sua sponte*." See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

BACKGROUND

Appellant's unit was scheduled to deploy to Iraq in January 2005. Appellant's unit postponed his deployment so appellant could help care for his father, who had become ill and was hospitalized. By 19 March 2005, appellant's rescheduled deployment date, appellant's father was no longer hospitalized and had been transferred to a nursing home in Selma, Alabama, for continued care.

Instead of returning to his unit on 19 March 2005 for movement to Iraq, appellant missed that movement and remained in Selma, Alabama. Appellant remained absent from his unit without authority until 15 January 2006, a period of approximately ten months.

On 15 January 2006, appellant surrendered himself to the Martin Army Community Hospital at Fort Benning, Georgia. His medical complaints included suicidal ideations. Appellant was hospitalized for approximately two weeks before being released back to his unit. When appellant was discharged from the hospital, he was diagnosed with "major depression"; however, the doctor noted appellant was "mentally competent to participate in outpatient treatment and administrative proceedings."

At trial, appellant pled not guilty and his defense counsel raised the affirmative defense of duress. Appellant testified at trial, explaining he went AWOL in order to care for his ill father. The military judge ultimately found appellant guilty of AWOL and missing movement by design. Evidence of appellant's depression, his concern for his father's illness, and stellar military service was presented and emphasized by appellant's defense counsel during the sentencing phase of his trial.

LAW

Ineffective Assistance of Counsel

The right to counsel under the Sixth Amendment includes the right to the effective assistance of counsel. *Strickland*, 466 U.S. 668, 686; *see also United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987). Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Dobson*, 63 M.J. 1, 10 (C.A.A.F. 2006) (citing *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997)).

For an appellant to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate his counsel was deficient and he was prejudiced by such deficient performance. *See Strickland*, 466 U.S. at 687. Assistance of counsel is deficient when counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* An appellant

has suffered prejudice when counsel's performance deprived him of a fair trial. *Id.*; *Scott*, 24 M.J. at 188.

“On appellate review, there is a ‘strong presumption’ that counsel was competent.” *United States v. Grigoruk*, 56 M.J. 304, 306-07 (C.A.A.F. 2002) (citing *Strickland*, 466 U.S. at 689). A service member “who seeks to relitigate a trial by claiming ineffective assistance of counsel must surmount a very high hurdle.” *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

Lack of Mental Responsibility

Lack of mental responsibility is an “affirmative defense.” *See* Article 50a, UCMJ; R.C.M. 916(k)(1). “Like other affirmative defenses, the defense of lack of mental responsibility is subject to the rule of waiver.” *United States v. Lewis*, 34 M.J. 745, 750 (N.M.C.M.R. 1991), *pet. den.*, 36 M.J. 60 (C.M.A. 1992).

R.C.M. 706(a) states, in part, that:

If it appears . . . to any investigating officer, trial counsel, defense counsel . . . that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacked capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

Furthermore, R.C.M. 909 states a person being tried must be “[]able to understand the nature of the proceedings against them or conduct or cooperate intelligently in the defense of the case.”

DISCUSSION

In an affidavit, appellant now declares he suffered from “post-traumatic stress disorder (PTSD) and severe depression” during the time of his offenses.¹ Appellant, however, does not now and has never asserted those conditions had any effect on his ability to understand the wrongfulness of his conduct or that it affected his ability to appreciate the nature of the court-martial proceeding. *See* R.C.M. 916(k)(1)-(3)(a);

¹ *See United States v. Long Crow*, 37 F.3d 1319 (8th Cir. 1994) (PTSD may be considered a qualifying severe mental disease or defect), and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. at 339 (1994) (defining major depression as one or more major depressive episodes, which involves depressed mood for a period of at least two weeks accompanied by serious interference in functioning).

see also *United States v. Cosner*, 35 M.J. 278, 280 (C.M.A. 1992) (citation omitted). Appellant testified at trial in detail regarding his conscious decision to go AWOL in order to care for his ailing father. The record does not suggest appellant was anything but lucid and sane in explaining why he went AWOL and how that decision was a deliberate act. As previously noted, the medical report completed after appellant returned from AWOL indicated appellant was “mentally competent to participate in outpatient treatment and administrative proceedings” prior to trial.

While appellant was diagnosed with depression and PTSD, this diagnosis alone does not raise the affirmative defense of mental responsibility or require a R.C.M. 706 hearing. Appellant has failed to demonstrate how the PTSD or depression impacted his mental responsibility for the offenses or his mental capacity to stand trial.² See *United States v. Schlarb*, 46 M.J. 708 (N.M. Ct. Crim. App. 1997); *Lewis*, 34 M.J. 745. Cf. *United States v. Headley*, 923 F.2d 1079, 1083 (3rd Cir. 1991) (defendants cannot attack the efficacy of their counsel on appeal unless the record is sufficient to allow determination of ineffective assistance of counsel).

Applying the presumption of mental responsibility and the requirements of Article 50a, UCMJ and R.C.M. 916(k)(3) to the facts of this case, we conclude the allegation and the record do not contain evidence which, if unrebutted, overcomes the presumption of competence of counsel. See *United States v. Melson*, 66 M.J. 346 (C.A.A.F. 2008); *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995) (“trial defense counsel should not be compelled to justify their actions until a court of competent jurisdiction reviews the allegation of ineffectiveness and the government response, examines the record, and determines that the allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence.”).

CONCLUSION

Accordingly, we find relief is not appropriate. On consideration of the entire record, including the assignments of error and matters personally asserted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the findings of guilty and the sentence are affirmed.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court

² Additionally, appellant does not ask this court to order an inquiry into his mental capacity to participate in his appeal pursuant to R.C.M. 706 and 1203(c)(5).