UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NATHAN W. ELLIS
United States Air Force

ACM 37129

22 October 2008

Sentence adjudged 18 September 2007 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: Gordon R. Hammock (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 17 months, and reduction to E-2.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, and Captain Jamie L. Mendelson.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of wrongfully possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a bad-conduct discharge, 30 months confinement, and a reduction to the grade of E-2. The convening authority approved the findings, the bad-conduct discharge,

17 months confinement, and the reduction to the grade of E-2.[1] On appeal the appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), asserts that his: (1) trial defense counsel was ineffective, in that counsel did not inform the appellant that entering into a pretrial agreement waived the appellant's motion to suppress and (2) plea was improvident, where it was entered upon the mistaken belief that his motion to suppress would be preserved for appeal. We disagree and, finding no error, we affirm.

Background

On 28 August 2006, the appellant used Limewire, a peer-to-peer software program, to download two videos[2] and 13 still images of children[3] engaged in sexually explicit conduct. The appellant saved the videos to his computer memory stick, deleted the videos from his hard drive, and, after reviewing the still images, deleted the images from his hard drive. On 30 August 2006, the appellant placed his computer memory stick into a computer at work. He inadvertently left the memory stick plugged into the government computer, where it was found by a co-worker. The co-worker took the memory stick home, where he reviewed the contents of the memory stick and discovered what he believed to be child pornography. The next day, the co-worker took the memory stick to Technical Sergeant (TSgt) JR, his supervisor. After reviewing the contents of the memory stick, TSgt JR provided it to the Air Force Office of Special Investigations (AFOSI). On 12 September 2006, AFOSI agents interviewed the appellant. After a proper rights advisement, the appellant waived his rights and confessed to owning the memory stick.

The AFOSI agents obtained search authorization to search the appellant's residence for any electronic media. During the search, the AFOSI agents seized the appellant's personal laptop computer. A forensic examination of the appellant's memory stick and laptop computer revealed the two videos and 13 deleted still images of children engaged in sexually explicit conduct. At trial, the appellant initially moved to suppress the evidence obtained from his computer memory stick and the evidence derived therefrom, including the videos and images recovered from the appellant's computer and oral and written statements the appellant made to the AFOSI. However, after entering into a pretrial agreement, an agreement by which the appellant agreed to waive all waivable motions, the appellant withdrew his motion.

Discussion

Ineffective Assistance of Counsel

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[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charge in return for the convening authority's promise to not approve confinement in excess of 18 month.

[2] The videos were entitled, "Crazy video-PTSC Anya 12 yo at the beach" and "Hot spermed little girls mix," respectively.

[3] The children depicted in the videos and still images were approximately four to fourteen years of age.

Without question, service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel are presumed to be competent, and we will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Where there is a lapse in judgment or performance alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient, and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant submitted a post-trial sworn declaration, wherein he states Captain DR, one of his trial defense counsel, advised him that the pretrial agreement only required the appellant to waive all waivable motions at the trial level and that the appellant's motion to suppress would be preserved for appellate review. In response to the appellant's claim, Captain LT, the appellant's other trial defense counsel, submitted a post-trial affidavit wherein she states that both she and Captain DR advised the appellant that accepting the pretrial agreement would mean that the motion to suppress issue would be waived not only at the trial level but at the appellate level as well.

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone without resorting to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). However, we can resolve the factual dispute, without resorting to a post-trial hearing, if the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts. Under such circumstances, the Court may discount those factual assertions and decide the legal issue. *Ginn*, 47 M.J. at 248.

The appellate filings and the record as a whole compellingly demonstrate the improbability of the appellant's assertions. Of note is the appellant's colloquy with the military judge, wherein he advised the military judge that: (1) he understood the "waive all waiveable motions" term in his pretrial agreement will preclude the court *and any appellate court* from reviewing any potential motion; (2) his defense counsel explained this term and the consequences of this term to him; and (3) knowing what his defense counsel and the military judge had told him about this term, he wanted to give up the right to make the suppression motion in order to get the benefit of the pretrial agreement. In short, the *Care* inquiry highlights that trial defense counsel properly advised the

appellant that he would forever waive his motion to suppress by accepting the pretrial agreement. Moreover, it is inconceivable that the appellant was under a reasonable, mistaken belief that he could "have his cake and eat it too," namely that he could preserve the motion to suppress issue for appellate review while obtaining the full benefits of the pretrial agreement.

Additionally, assuming trial defense counsels' conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. On this point, the appellant has fallen considerably short. He offers no evidence that the motion to suppress would have been successful. Moreover, he offers no evidence of prejudice, and we are unwilling to presume prejudice. Simply put: (1) trial defense counsel fully and properly advised the appellant that acceptance of the pretrial agreement would preclude him from raising the motion to suppress issue at trial and before appellate courts and (2) assuming they did not, and this amounted to ineffectiveness of counsel, the appellant was not prejudiced.

Providency of the Appellant's Plea

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

Moreover, where there is an honest and mutual misunderstanding regarding a material term of a pretrial agreement, resulting in the appellant not receiving the benefit of his bargain, the appellant's pleas are improvident. *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003) (citing *United States v. Hardcastle*, 53 M.J. 299, 302 (C.A.A.F. 2000); *United States v. Williams*, 53 M.J. 293, 296 (C.A.A.F. 2000)); *United States v. Hamill*, 24 C.M.R. 274, 276 (C.M.A. 1957).

In the case *sub judice*, the record as a whole compellingly demonstrates that the appellant was not under any misunderstanding as to the effect the pretrial agreement would have on his ability to raise the motion to suppress issue at trial and at the appellate levels. As previously discussed, the appellant, in his inquiry with the military judge, acknowledged and agreed that his acceptance of the pretrial agreement waived his motion to suppress at trial and at the appellate level. The appellant's acknowledgment and

concurrence belie any notion that the appellant had an honest misunderstanding about how his acceptance of the pretrial agreement would affect his ability to move to suppress the evidence obtained from his computer memory stick and the evidence derived therefrom. Accordingly, his plea is provident.

Conclusion

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court