UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SHAWN E. MESSICK
United States Air Force

ACM 36992

16 September 2008

Sentence adjudged 23 January 2007 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett and Captain Anthony D. Ortiz.

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

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, a military judge sitting as a general court-martial found the appellant guilty of one specification of wrongfully possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority approved the findings and a sentence consisting of a bad-conduct discharge, 20 months of confinement, and a reduction to E-1.

On appeal, the appellant, pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), asserts that: (1) the evidence is legally and factually insufficient to sustain his conviction for wrongfully possessing child pornography and (2) he was denied

effective assistance of counsel when his trial defense counsel failed to investigate a second computer hard drive. We disagree and, finding no error, we affirm.

Background

Twice during 2004, Mrs. EM, the appellant's wife, discovered what she believed was child pornography on one of the appellant's two computers. She deleted the images. Approximately a year later, she reported the appellant to the Air Force Office of Special Investigations (AFOSI). In September 2005, the AFOSI seized the appellant's computers and computer media and forwarded the items to a forensic computer laboratory for analysis. The computer forensic analysis revealed approximately 138 known or suspected images of child pornography on the appellant's computers and computer media.

Discussion

Legal and Factual Sufficiency

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

"[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specification of which the appellant was convicted.

Specifically, we note the following evidence legally supports a conviction in this case: (1) Mrs. EM's testimony that she discovered what she believed was child pornography on one of the appellant's computers and that she never searched for nor allowed others to search for pornography on the computers; (2) Special Agent MP's testimony that he seized the appellant's computers and computer media and forwarded the items to a forensic computer laboratory for analysis; and (3) Mr. HB's testimony that he performed a computer forensic analysis on the appellant's computers and computer media, that the items contained approximately 138 known or suspected images of child

pornography, and that at least four child pornography movies were downloaded to the appellant's Windows Media Player account.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the charge and specification of which he was convicted.

Ineffective Assistance of Counsel

Unquestionably, 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 (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). When the appellant makes such an allegation, 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 affidavit wherein he states: (1) he advised his trial defense counsel of a missing hard drive that was not subjected to computer forensic analysis; (2) the examination of this hard drive would rebut his wife's testimony about her computer knowledge; and (3) his trial defense counsel did not want him to bring the issue up for fear of discovering something – presumably additional child pornography. Captain SS and Captain MC, the appellant's trial defense counsel, submitted post-trial affidavits. Captain SS stated that despite searching, he was unable to locate the missing hard drive and feared that if it existed, it would contain additional child pornography. Captain MC stated he impeached Mrs. EM on her computer knowledge at trial and did not believe the missing hard drive, if it existed, would help the appellant's case.

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, in the case *sub judice*, the affidavits do not conflict. In his affidavit, the appellant does not state that his defense counsel failed to investigate the existence and location of the second hard drive. Rather, he states that he brought the existence of the second hard drive to his counsel's attention, and they did not want him to discuss it. Captain SS's affidavit makes clear that he searched for the missing hard drive and could not locate it.

Moreover, both Captain SS's and Captain MC's affidavits make clear that they made a tactical and strategic decision to cease discussion of a second hard drive out of a concern that its production would result in additional evidence against the appellant. In short, we find that: (1) contrary to the appellant's motion, his trial defense counsel, specifically Captain SS, investigated the existence and location of the second hard drive; (2) his trial defense counsel made a tactical and strategic decision to cease discussion of a second hard drive; and (3) therefore, the appellant's trial defense counsel were not ineffective in their representation.

Additionally, assuming trial defense counsel's conduct were 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 694. Here the appellant failed to show the existence of a second hard drive, much less that its admission would have beneficially altered the results of trial. Under the aforementioned facts we find no prejudice.

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; *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