UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JERRY J. ORONA
United States Air Force

ACM 36968

14 September 2009

Sentence adjudged 08 March 2006 by GCM convened at Misawa Air Base, Japan. Military Judge: Steven A. Hatfield.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Frank J. Spinner, Esquire (civilian counsel) (argued), Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major John S. Fredland, Major Lance J. Wood, Captain Griffin S. Dunham, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Captain Ryan N. Hoback (argued), Colonel Douglas P. Cordova, Major Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

Contrary to his pleas, a panel of officer and enlisted members sitting as a general court-martial found the appellant guilty of one specification of wrongfully possessing visual depictions of minors engaged in sexually explicit or suggestive conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. His adjudged and approved sentence consists of a dishonorable discharge, confinement for two years, forfeiture of all pay and

allowances, and a reduction to the grade of E-1. On appeal, the appellant asks the Court to set aside the findings and the sentence and to order a *Dubay*[1] hearing.

As the basis for his request, he asserts that: (1) the evidence is legally and factually insufficient to support his conviction; (2) the military judge abused his discretion in denying a defense motion to suppress evidence due to a lack of probable cause; and (3) the trial defense counsel provided ineffective assistance of counsel by failing to demand access to "Quincy," the software tool used to search his computer.[2] Finding no prejudicial error, we affirm the approved findings and sentence.

Background

On 19 December 2003, the appellant became a subject of Operation Falcon, a multi-agency task force assigned to investigate child pornography websites, including Regpay, a company which operated several of its own child pornography websites and collected fees via credit card for memberships to other child pornography websites. On 23 March 2004, Special Agent MB, an Air Force Office of Special Investigations (AFOSI) agent, sought authorization to search and seize the appellant's computers.

In her affidavit to the magistrate, Special Agent MB informed the magistrate, inter alia, that: (1) Regpay provided billing services for several child pornography websites; (2) on or about 17 June 2003, United States Immigration and Customs Enforcement (ICE) agents, pursuant to search warrant, seized the contents of computer servers, which two companies had maintained for Regpay;[3] (3) the servers contained customer transaction records with detailed information for each customer, including the customer's name, home address, e-mail address, credit card number, names of the child pornography websites to which access was purchased, and the date of purchase; (4) the appellant's

[1] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

[2] The appellant, via a post-trial affidavit, also alleges, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), 18 additional ways in which his trial defense counsel were ineffective. He asserts that they were ineffective because of their failure to: (1) suppress his statement to the Air Force Office of Special Investigations (AFOSI); (2) timely submit proposed voir dire questions and conduct an in-depth voir dire; (3) push for access to his hard drive; (4) obtain access to the AFOSI agents' personnel and case records; (5) object to references to "Wayback;" (6) explore the reliability of the information found on Regpay; (7) address that Regpay handles more than child pornography; (8) pursue the *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), issues related to the government's forensic data recovery methods; (9) address the unethical conduct of the assistant trial counsel; (10) address the perjury of a testifying AFOSI agent; (11) address the inconsistencies in the prosecution's e-mail; (12) attempt to demonstrate "Newsrover;" (13) aggressively obtain all requested witnesses; (14) address real versus virtual images; (15) object to hearsay in trial counsel's argument; (16) object to the total number of images; (17) address identity theft; and (18) address malware found on his computer. We have considered the additional ineffective assistance of counsel assertions of error, and we find them to be without merit and without worthiness of further discussion. *United States v. Straight*, 42 M.J. 244, 248 n.4 (C.A.A.F. 1995) (citing *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

[3] Agents with the United States Immigration and Customs Enforcement agency discovered copies of Regpay's business records on these computer servers, and it is these records that led law enforcement officials to suspect the appellant of downloading and possessing child pornography.

name, mailing address, e-mail address, Internet Protocol (IP) address, and Air Force Club card number were found in Regpay's customer transaction records; (5) on 12 May 2002, the appellant used his Air Force Club card to purchase access to a confirmed child pornography website; and (6) in addition to the specific facts of the appellant's investigation recited above, based on her knowledge, training, and consultations with the chief of computer investigations and operations in her squadron, it is common for individuals who commit such computer crimes to "maintain electronic evidence relating to their crimes for an indefinite period of time on their computer systems and storage media [and that] [c]ollectors of child pornography generally prefer to store images of child pornography in electronic form as computer files."

On 23 March 2004, the magistrate granted Special Agent MB search authorization, and on that same day she seized the appellant's computers. A subsequent examination of the computer hard drives revealed 10,000-15,000 images of young girls in various stages of undress and approximately 40 images of child pornography. At trial, the appellant filed a motion to suppress the evidence seized from his computer hard drives. In support of his motion, the appellant claimed, inter alia, that: (1) the government failed to show by a preponderance of the evidence that its search and seizure of his information from Regpay was legal; (2) the evidence seized from his computers was seized without his consent and without probable cause—specifically, there was "nothing in the affidavit to show the [appellant] downloaded, and thus came into possession, of any illegal image" and the information relied upon to support the affidavit was "stale;" and (3) the good faith exception to the exclusionary rule was inapplicable.

On this latter point, the appellant noted that while there was no evidence that Special Agent MB deliberately lied in her affidavit, she implied that the website the appellant visited was devoted solely to child pornography and failed to show how, and if, the appellant downloaded child pornography from the website. Such omissions in the affidavit evinced a reckless disregard for the truth. The appellant further notes that the magistrate conducted a "rubber stamp" judicial review and, in so doing, abandoned his judicial role. After hearing evidence and considering argument of counsel, the military judge denied the appellant's motion.

Discussion

Motion to Suppress Ruling

Though raised as the appellant's second assignment of error, we will address this assignment first, as a favorable ruling for the appellant on this assignment may affect the legal and factual sufficiency of his conviction. This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)). However, we review the legal question of sufficiency for findings of

probable cause de novo, based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). In reviewing a ruling on a motion to suppress, this Court will find that there has been an abuse of discretion only if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law. *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Search and Seizure of the Appellant's Information from Regpay's Servers

When the defense has made an appropriate motion or objection to evidence unlawfully obtained, "the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained [by lawful means] . . . or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search . . . ." Mil. R. Evid. 311(e)(1). The military judge found that the prosecution met its burden of showing by a preponderance of the evidence that the government's search and seizure of the appellant's information from Regpay's servers was not unlawful. We agree. The background details provided in Special Agent MB's affidavit pertaining to the ICE agents' seizure of the appellant's information from Regpay's servers; Mr. PB's testimony; and a review of the entire record of trial, including the defense motion to suppress, the government's response thereto, and the detailed findings by the military judge, convinces us that the search and seizure of the appellant's information from Regpay's servers was not unlawful.

Magistrate's Probable Cause Assessment

Probable cause exists when there is sufficient information to provide the authorizing official with a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f)(2). As our superior court noted, probable cause "deals with probabilities . . . . [i]t is not a technical standard, but rather is based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence." *United States v. Macomber*, 67 M.J. 214, 219 (C.A.A.F. 2009) (citing *Leedy*, 65 M.J. at 213). Alternatively stated, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a *fair probability* that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (emphasis added).

The central legal question on this issue is whether the military judge correctly ruled that the magistrate had a substantial basis for determining that probable cause

existed. *Macomber*, 67 M.J. at 218 (citing *Gates*, 462 U.S. at 238-39; *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001)). In making our assessment on this issue, our task is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the search authorization. *Id.* (citing *Monroe*, 52 M.J. at 331 (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984))).

"This standard reflects the law's preference for warrants and for independent review by magistrates." *Id.* We are also mindful that a probable cause determination by a neutral and detached magistrate is entitled to substantial deference. *Id.* (citing *Carter*, 54 M.J. at 419; *Monroe*, 52 M.J. at 331; *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996)). Furthermore, our superior court has "interpreted the Supreme Court's guidance to require that resolution of doubtful or marginal cases should be largely determined by the preference for warrants and that '[c]lose calls will be resolved in favor of sustaining the magistrate's decision.'" *Id.* (alteration in original) (quoting *Monroe*, 52 M.J. at 331; *Maxwell*, 45 M.J. at 423).

Against this backdrop, we start our analysis by assessing whether the magistrate had a "substantial basis" for determining that probable cause existed. *Leedy*, 65 M.J. at 213 (citing *Gates*, 462 U.S. at 238); *United States v. Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992). In making this assessment, we look at the information made known to the magistrate at the time of his decision and analyze the manner in which the facts became known to the magistrate. *Leedy*, 65 M.J. at 213-14. This inquiry centers on the information set out in the four corners of the affidavit, as illuminated by the source's veracity, reliability, and basis for knowledge, coupled with other factors to determine the existence of probable cause. *Id.* at 214.

Under a totality of circumstances, the following facts, as Special Agent MB laid out in her affidavit, raise a fair probability that the appellant possessed child pornography at the time of the search authorization request: (1) on 17 June 2003, ICE agents discovered the appellant's name, mailing address, e-mail address, IP address, and credit card number in the Regpay's customer transaction records and subsequently notified AFOSI of its findings; (2) Regpay is known as a major facilitator of child pornography; (3) Regpay customer transaction records indicated that the appellant had accessed redlagoon.com/lustgallery.com, a verified child pornography website[4] for which Regpay provided billing services, on 12 May 2002; (4) AFOSI sought search authorization because it was conducting an investigation involving the appellant's possession of child pornography; and (5) Special Agent MB noted that based on her knowledge, training, and consultation with an AFOSI chief of computer investigations and operations, it is common for individuals who commit such computer crimes to maintain electronic

[4] On this point, Special Agent MB states that on 26 March 2003, and again on 24 July 2003, federal agents purchased a one-month membership in redlagoon.com/lustgallery.com and personally verified that the site contained child pornography.

evidence of such crimes for an indefinite period of time on their computers and storage media.

In short, we find that the magistrate had a substantial basis for determining that probable cause existed, and that the military judge therefore did not abuse his discretion in ruling that the magistrate had a substantial basis for determining that probable cause existed.[5]

Assuming arguendo that the magistrate lacked a substantial basis for determining that probable cause existed, either based on a lack of evidence or because of a staleness issue, we next must determine whether the good faith exception to the exclusionary rule is applicable. If the good faith exception is applicable, the evidence seized would be admissible even if the magistrate lacked a substantial basis for determining that probable cause existed. *Carter*, 54 M.J. at 421.

Good Faith Exception

The good faith exception to the exclusionary rule is applicable in cases where the official executing the warrant objectively and reasonably relied on the magistrate's probable cause determination and the technical sufficiency of the warrant. *United States v. Leon*, 468 U.S. 897, 922 (1984). The Supreme Court has listed four circumstances in which the good faith exception would not apply: (1) a false or reckless affidavit; (2) a "rubber stamp" judicial review where the magistrate abandoned his judicial role; (3) a facially deficient affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) a facially deficient warrant. *Id.* at 923-24.

The good faith exception enunciated in *Leon* is contained in Mil. R. Evid. 311(b)(3). *See Carter*, 54 M.J. at 420. Mil. R. Evid. 311(b)(3) provides that evidence obtained as a result of an unlawful search or seizure may be used if: (1) the search or seizure resulted from a search warrant issued by a competent authority; (2) the individual issuing the warrant had a substantial basis for determining the existence of probable cause; and (3) the officials seeking and executing the warrant reasonably and with good faith relied on the issuance of the warrant. In *Carter*, our superior court examined the relationship between Mil. R. Evid. 311(b)(3) and the elements of the *Leon* good faith exceptions and concluded that Mil. R. Evid. 311(b)(3)(A) is identical to its civilian

[5] We are mindful of a federal court of appeals decision which held that the ordering of child pornography alone is insufficient to establish probable cause for possession of child pornography. *See United States v. Lacy*, 119 F.3d 742, 745 (9th Cir. 1997) (citing *United States v. Weber*, 923 F.2d 1338, 1344 (9th Cir. 1990)). However, that opinion, at best, is persuasive. Additionally, we have considered the appellant's "staleness" argument and find it to be without merit. The nature of the crime as well as the fact that the magistrate was apprised of the date on which the appellant accessed the child pornography website and was informed that individuals who commit such crimes keep evidence on their computers and media storage devices for an indefinite period of time militate against a finding of staleness.

counterpart, i.e. a search warrant must be issued by a competent authority. *Carter*, 54 M.J. at 421. Additionally, Mil. R. Evid. 311(b)(3)(B) addresses the first and third *Leon* exceptions, i.e. the affidavit must not be intentionally or recklessly false and must be more than a "bare bones" recital of conclusions. *Id.* The Court also concluded that Mil. R. Evid. 311(b)(3)(C) addresses the second and fourth *Leon* exceptions, i.e. there can be no good faith when the police know that the magistrate "rubber stamped" their request or when the warrant is facially defective. *Id.*

In the case sub judice, the military judge addressed the three prongs of Mil. R. Evid. 311(b)(3) and found that they were all met. We agree. Concerning the first prong, the military judge concluded that the warrant was issued by a competent authority. On this point, we note that the evidence highlights the magistrate was a competent authority to issue the search authorization. With regard to the second prong, the military judge concluded that there was no evidence that Special Agent MB provided false information to the magistrate or that Special Agent MB acted in bad faith by failing to advise the magistrate that the appellant's background showed no pedophilia tendencies.

We likewise note there is neither evidence that the information Special Agent MB provided in the affidavit was false much less deliberately false nor evidence that Special Agent MB exhibited a reckless disregard for the truth in providing information to the magistrate. Her failure to provide the information trial defense counsel highlighted in his motion simply does not evince a reckless disregard for the truth. Moreover, we have examined the affidavit and note that it is more than a "bare bones" recital of conclusions. The affidavit is replete with facts from which the magistrate could conclude, correctly or incorrectly, that the appellant had possessed and was still in possession of child pornography.

Lastly, the military judge found, contrary to the appellant's assertion, that there was no evidence the magistrate "rubber stamped" Special Agent MB's request and, in so doing, abandoned his judicial role. Rather, the evidence shows the magistrate was neutral and detached and he conscientiously exercised his judicial role. In the final analysis, we agree with the military judge's conclusion that the good faith exception is applicable. Accordingly, we find that the military judge did not err in admitting the evidence Special Agent MB seized from the appellant. The evidence was properly admissible because the magistrate had a substantial basis for determining that probable cause existed and, barring that, the evidence is properly admissible under the good faith exception.

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, 324 (C.M.A. 1987)).

In 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 conclude that 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 that the following evidence is legally sufficient to support the appellant's conviction: (1) Mr. PB's testimony that on 19 December 2003, the appellant became a subject of Operation Falcon because he used his credit card to purchase access to a child pornography website; (2) Special Agent MB's testimony that, pursuant to a search authorization, she seized the appellant's computers and his credit card, the computers were sent off for computer analysis, and the appellant's credit card number matched the number provided by Operation Falcon; (3) Special Agent EO's testimony that an analysis of the appellant's hard drives revealed 10,000-15,000 images of young girls in various stages of dress and approximately 40 images of young female children undressing; (4) Mr. WH's testimony that an analysis of one of the appellant's hard drives revealed 40 images of child pornography, 32 of which were positively identified by the National Center for Missing and Exploited Children as images of known child victims; and (5) Prosecution Exhibits 3 and 4, the actual child pornography and sexually suggestive images of children seized from the appellant's hard drive.

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—Failure to Demand Access to "Quincy"

There can be little doubt that 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 heavy 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 performance was in fact deficient, and, if so; (2) whether counsel's deficient performance prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

In response to the appellant's ineffective assistance of counsel assertion, the government submitted two post-trial affidavits, one from each of the appellant's trial defense counsel. Of particular note are counsel's assertions that they opted not to push the "Quincy" issue because they believed that "Quincy" did not put information on the appellant's hard drive and there was a risk of finding additional adverse evidence. 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, 243 (C.A.A.F. 1997).

However, in the case sub judice, the affidavits do not conflict.[6] All agree that trial defense counsel failed to seek access to "Quincy." Thus, we can resolve this issue without resorting to a post-trial fact finding hearing. Under these facts, we find that trial defense counsel made a tactical decision not to seek access to "Quincy" and that such a decision does not amount to ineffectiveness of counsel. Moreover, assuming trial defense counsel's performances 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 687. 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).

[6] We realize the appellant claims his trial defense counsel's ineffectiveness in, inter alia, failing to demand access to "Quincy" denied him potentially exculpatory evidence because it is possible that the child pornography on his computer hard drive did not exist prior to the forensic analyst's use of "Quincy." Such claims are speculative at best and can be resolved without a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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