UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSEPH W. YANEZ
United States Air Force

ACM 38181

17 December 2013

Sentence adjudged 10 May 2012 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Jeffrey A. Ferguson.

Approved Sentence: Dishonorable discharge and confinement for 1 year.

Appellate Counsel for the Appellant: Major Matthew T. King and Major Daniel E. Schoeni.

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

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MARKSTEINER, Judge:

The appellant was convicted by a panel of officers, contrary to his plea, of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was also convicted, consistent with his plea, of violating a lawful general order by wrongfully possessing sexually explicit material in the United States Central Command Area of Responsibility in violation of Article 92, UCMJ, 10 U.S.C. § 892. He was sentenced to be dishonorably discharged and confinement for 1 year. The sentence was approved as adjudged.

Background

On 29 April 2011, the appellant was a Security Forces (SF) member performing roving patrol guard duty at Bagram Airfield (AF), Afghanistan. Contrary to established operating policies, he and Airman First Class (A1C) BW, another SF member serving at Bagram AF, were watching a movie on the appellant's laptop computer while performing guard duty. When they received word their supervisor would be checking in on them, they reasoned it would be easier to have A1C BW hide the laptop in the guard tower where he was working than it would for the appellant to hide it in the HMMWV truck he was operating. The appellant also gave A1C BW his computer password so A1C BW could finish watching the movie, however he nevertheless instructed A1C BW not to look through any other files because the computer also contained stored pictures of the appellant's wife, that he did not want A1C BW to see.

At some point while watching the movie, the computer "locked up." During his efforts to restart the movie, A1C BW came across files on the appellant's laptop that contained both sexually explicit photos of the appellant's wife and child pornography. He brought his discovery of the child pornography to the attention of the authorities, eventuating the investigation that lead to the appellant's court-martial.

The appellant assigned five errors: (1) The Government's failure to disclose information favorable to the defense deprived him of his Constitutional right to a fair trial; (2) He was denied his Sixth Amendment[1] right to effective assistance of counsel because his trial defense counsel failed to conduct adequate discovery; (3) He was denied his Sixth Amendment right to effective assistance of counsel at clemency; (4) The evidence supporting the court-martial's findings on Charge II and its Specification was factually insufficient; and (5) The military judge abused his discretion by ruling that communications subject to the spousal privilege were admissible.[2]

Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Failure to Disclose Information

The appellant alleges the Government failed to disclose, in response to a general discovery request, a duty roster showing he was assigned to perform roving patrol on 27 and 28 April 2011, two days encompassing the approximately nine-hour period during which the child pornography was downloaded to his computer. He also alleges, despite his urging, trial defense counsel never submitted a discovery request specifically asking for such a roster. He argues that since it would have been impossible for him to

[1] U.S. CONST. amend. VI.
[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

download images from the internet while he was performing roving patrol, the Government's failure to turn over such a roster was a discovery violation under *Brady*.[3]

"If the Government fails to disclose discoverable evidence, the error is tested on appeal for prejudice, which is assessed 'in light of the evidence in the entire record.'" *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) (quoting *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)). "As a general matter, when an appellant has demonstrated error with respect to nondisclosure, the appellant will be entitled to relief only if there is a reasonable probability that there would have been a different result at trial if the evidence had been disclosed." *Santos*, 59 M.J. at 321. "Under the standards set forth in [*United States v.*] *Roberts* [59 M.J. 323 (C.A.A.F. 2004)] and the cases cited therein, an appellate court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial." *Id.*

In the case before us, even if we were to assume a duty roster like the one the appellant sought were to have been produced and preserved for the 10 months that passed between the date of the offense and trial defense counsel's discovery request, and even if such roster showed he was assigned to perform roving patrol duties on the days in question, we would find no reasonable probability of a different result at trial if the evidence had been disclosed. *Id.* Other evidence in the record established that an internet signal was available on patrol and that the appellant was not on patrol all 48 hours during those two days. Moreover, even if he was, he was also perfectly willing to use his computer while on duty in spite of rules proscribing such conduct. We therefore find no merit in the appellant's first assigned error.

Failure of Trial Defense to Conduct Adequate Discovery

The appellant notes that although his counsel made a general discovery request asking for "evidence favorable to the defense," they neglected his "repeated[] instruct[ion] to submit a discovery request specifically asking for the security forces schedule for 27-28 April 2011," thereby depriving him of a defense. In their post-trial affidavits the appellant's trial defense counsel recount their efforts to locate a copy of the duty roster the appellant sought, describing interviews the military counsel conducted with two of the appellant's supervisors, and assistance he sought from the assistant trial counsel. No one the appellant's military defense counsel interviewed was aware that such a roster was ever created, and similarly, no witnesses whom counsel interviewed could confirm that the appellant was assigned to mobile patrol on 28 April 2011.

We review ineffective assistance of counsel claims de novo. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001) (citing *United States v. Wean*,

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

45 M.J. 461, 463 (C.A.A.F. 1997)); *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997) (citations omitted).

It is well-established that an accused has a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Before any relief is warranted on appellate review because of ineffective representation, an appellant must show his counsel's performance was deficient and that the deficient performance prejudiced the outcome of the case. *Id.* Appellate courts give great deference to trial defense counsel's judgments, and "presume[] counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993) (citing *Strickland*, 466 U.S. at 689). Tactical decisions will not be second-guessed. *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 600 (1993). In *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987), the Court of Military Appeals applied the rules announced by the United States Supreme Court in *Strickland* for testing whether an accused received the effective assistance of counsel. In *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991), the Court articulated a three-part analysis to resolve claims of ineffective assistance of counsel:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy "fall[ ] measurably below the performance ... [ordinarily expected] of fallible lawyers"?
>
> 3. If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"
>
> (Citations omitted).

Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Applying these standards, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing.

As applied to the facts before us, we are able to resolve our inquiry by reference to factors 1 and 2 of the *Polk* analysis. 32 M.J. at 153. The appellant's allegation appears true insofar as trial defense counsel never made a formal discovery request specifically asking for a duty roster. However, his counsel also had a reasonable explanation for their actions because through the exercise of reasonable diligence they learned that no such roster existed. We find no material conflict in the respective declarations now before us,

Ginn, 47 M.J. 236, and that trial defense counsels' advocacy did not fall measurably below that expected of fallible lawyers. *Polk*, 32 M.J. 150. We therefore find no merit in this assignment of error.

Ineffective Assistance of Counsel at Clemency

The appellant asserts his defense counsel failed to adequately inform him about his right to request deferral or waiver of forfeitures. As a result of an apparent oversight, he continued to receive pay for several months after being confined. Military pay officials at the Defense Finance and Accounting Service (DFAS) ultimately informed him he had been erroneously paid over nine thousand dollars, and that he would be required to repay the money. The appellant now avers the debt has placed him in financial hardship he could have avoided had his trial defense counsel properly advised him.

The appellant specifically asserts his defense counsel did not adequately explain to him how the forfeiture process works. To paraphrase, he essentially says that following his court-martial, at the time his lawyer discussed these subjects with him, he was still getting paid, and he asked his lawyer *not* to pursue waiver or forfeiture because he did not want to do anything that would *stop* his pay. Implicit in his assertion is that his attorney: (1) should have realized the appellant misunderstood the forfeiture rules; (2) should have re-visited and re-explained how forfeitures typically do not take effect in a case like the appellant's for 14 days following trial; and (3) should have re-visited and re-explained that the only way to potentially avoid the stoppage in pay 14 days after trial would be to request waiver or deferment. Had his attorney done so, the appellant argues, he would have been able to avoid the financial hardship caused by the requirement for him to repay the Air Force funds he received as a result of the DFAS oversight.

Considering all the evidence before us, we believe reference to the first and second *Polk* factors answers the appellant's allegations in this regard. 32 M.J. at 153. Before trial, the appellant was provided with a detailed handout outlining his post-trial and appellate rights, the last paragraph on the front page of which details his right to request deferment or waiver of forfeitures of pay. Though the explanation is hardly a model of clarity, the appellant confirmed for the military judge that he had thoroughly read the document, that his counsel had explained it to him, and that he had no questions about his rights. The signed copy of his acknowledgement of such rights is in the record of trial. The appellant's trial defense counsel also filed a post-trial declaration wherein he reports having specifically advised the appellant about his options with regard to forfeitures three separate times – "several days before his court-martial," again during the clemency portion of his trial, and "[w]ithin a couple of days after his court-martial." The crux of the appellant's assigned error is not that his trial defense counsel didn't explain his rights regarding waiver or deferral of forfeitures; rather it is that explaining those rights three times *isn't enough*. On these facts we find any conflict in the respective declarations to be resolvable by reference to the record and appellate filings now before us. *Ginn*,

47 M.J. 236. Having referred to that record and those filings, we do not find trial defense counsels' advocacy or conduct to have fallen measurably below that expected of fallible lawyers. *Polk*, 32 M.J. 150. We therefore find no merit in this assignment of error.

Factual Sufficiency of Charge II and its Specification

The appellant alleges there was insufficient evidence to establish that he "knowingly possessed" child pornography. We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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 [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The circumstantial evidence establishing the appellant's knowing possession of the materials at issue, which is ample and persuasive, includes but is not limited to: The appellant owned the laptop; he spent so much time using his laptop his supervisors had to impose a "laptop curfew" so he would get sufficient rest to perform his duties; A1C BW said the appellant never shared his laptop apart from the single time he let A1C BW use it on the night the offending materials were discovered; a computer forensic examiner testified that the child pornography was downloaded using a peer-to-peer application called "Frostwire;" the Frostwire application by default downloads files to a folder it creates on users' systems; someone had created a folder entitled "Forbidden" on the appellant's laptop and moved into that folder the child pornography originally downloaded to the Frostwire default folder; and during the same 9-hour window when the child pornography was downloaded, whomever was operating the computer was logged onto Facebook under the user name "Joseph Yanez" and interacting with other Facebook users under that user name. We are convinced beyond a reasonable doubt the appellant knowingly possessed the child pornography at issue. *Turner*, 25 M.J. 324; *Reed*, 54 M.J. 37; *Washington*, 57 M.J. at 399.

Admissibility of Spousal Communications

The appellant argues that sexually explicit photographs of his wife, which were stored in the same "forbidden" file on his computer as the child pornography, were confidential marital communications that the trial judge should have excluded under Mil. R. Evid. 504(b), in accordance with trial defense counsels' motion requesting he do

so. The appellant argues that admitting the photos of his wife was not only error, but that doing so was case dispositive based on the Government's argument at trial. Specifically, trial counsel had argued the members could find the appellant's knowing possession of child pornography because he stored the images of children in the same "forbidden" folder – the "private stash" where he stored "the naked pictures of his wife."

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000) (citing *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999)); *see United States v. Westmoreland*, 312 F.3d 302, 306 (7th Cir. 2002) ("We review the trial court's resolution of a marital privilege issue for an abuse of discretion.") (citing *United States v. Lea*, 249 F.3d 632, 641 (7th Cir. 2001)). Whether a communication is privileged is a mixed question of fact and law. *McElhaney*, 54 M.J. at 132 (citing *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997)). "The party asserting the marital privilege has the burden of establishing its applicability by a preponderance of the evidence." *United States v. Durbin*, 68 M.J. 271, 272 (C.A.A.F. 2010) (citing *United States v. McCollum*, 58 M.J. 323, 335-36 (C.A.A.F. 2003)).

Assuming we were to find error,[4] a military judge's erroneous admission of a confidential marital communication is reviewed to determine whether any prejudice arising from such admission was harmless. *Id*. at 275. "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*. (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)) (internal quotation marks omitted).

Applying the *Kerr* factors to the case before us, we find no prejudice. The strength of the Government's case was considerable, as noted in the discussion above. By comparison, the defense's case was based on the strained theory that someone other than the appellant could have downloaded the child pornography to his computer. The third prong of the *Kerr* test is "merely a test for relevancy and materiality." *United States v. Ediger*, 68 M.J. 243, 250 (C.A.A.F. 2010) (citations omitted) (internal quotation marks omitted). The trial counsel's argument that the colocation of the child pornography and the photos of the appellant's wife was a sound one; the materiality and quality of the evidence – i.e., that a husband could reasonably be expected to privately store sexually explicit photos of his wife – was persuasive. Nevertheless, on balance and in light of the overwhelming strength of the Government's case even absent those photos, we find any error occasioned by the admission of such photos to be harmless. *Durbin*, 68 M.J. 271.

[4] We leave for another day whether we do so on these facts.

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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court