UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID T. LAFKO
United States Air Force

ACM 38177

05 November 2013

Sentence adjudged 15 May 2012 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Martin T. Mitchell (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 25 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter and Philip D. Cave (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, in accordance with his pleas, of one specification each of possessing and distributing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was sentenced to a dishonorable discharge, confinement for 25 months, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority approved only 24 months of confinement and the remaining adjudged sentence.

Before this Court the appellant raises three assignments of error: (1) The trial defense counsel was ineffective when he advised the appellant to plead guilty without proper investigation and discussion of the legal issues; (2) A factfinding hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), is required to determine whether the trial defense counsel failed to provide effective assistance of counsel; and (3) The approved sentence is illegal because the maximum punishment for each of the specifications is confinement for four months, forfeiture of two-thirds pay per month for four months, and reduction to E-1. Finding no error, we affirm.

Background

Between 21-26 March 2011, Detective CB, Colorado Springs Police Department, Internet Crimes Against Children Division, initiated a routine automated search using a specialized program that allowed him to search for known or suspected child pornography in the shared files of users. His search identified 13 files of known or suspected child pornography that were being shared at the appellant's Internet Protocol (IP) address. Detective CB downloaded 4 of these files. The Colorado Springs Police Department shared this information with the Air Force Office of Special Investigations (AFOSI), which then took over the investigation and obtained the appellant's confession.

During the providence inquiry, the appellant testified that between 23 December 2010 and 12 May 2011, while living on Peterson Air Force Base, Colorado, he downloaded approximately 22 video files off of the internet that contained images of minors engaging in sexually explicit acts. After viewing the images, the appellant stored them in a shared file that could be accessed by anyone through file sharing software programs known as LimeWire and FrostWire. These programs allowed the appellant's computer to connect directly to another computer through a network.

Ineffective Assistance of Counsel

The appellant contends that his trial defense counsel failed to provide effective assistance in three substantial ways which resulted in an involuntary plea of guilty: (1) Trial defense counsel failed to identify and litigate a motion to suppress pretrial statements made to law enforcement; (2) Trial defense counsel failed to properly investigate the allegations of the appellant's knowing and intentional possession of child pornography on a computer; and (3) Due to their failure to investigate, trial defense counsel inadequately advised the appellant on his guilty plea and associated pretrial agreement.

As a threshold matter, we first address the appellant's assertion that, rather than resolve these issues ourselves, we should order a *DuBay* hearing "to determine what steps, if any, the trial defense counsel took to properly investigate the taking of [his] statements and the evidence." We disagree.

Although this Court may not decide "disputed questions of fact pertaining to a post-trial claim" of ineffective assistance of counsel on the basis of conflicting affidavits, *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) (citation omitted), we may decide factual disputes without further factfinding when "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of the facts alleged by the appellant." *Id.* at 248. This is such a case.

The appellant's current submission of the purported facts seems highly improbable, considering the entire record of trial; the appellant's statements to AFOSI admitting his crimes; his signed Stipulation of Fact; his responses to the military judge during the providence inquiry wherein he testified that he knowingly possessed and distributed child pornography and further indicated he was satisfied with his trial defense counsel; and his clemency submission wherein he again admitted to his crimes. Accordingly, having reviewed the record, we conclude that we can resolve the appellant's claims without ordering a post-trial evidentiary hearing, as further discussed below vis-à-vis each of the appellant's claims of his counsel's ineffective assistance.

We review de novo claims of ineffective assistance of counsel. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002).

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010)). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56, (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, (1970)).

To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In evaluating the first prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688-89. The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). In order to show prejudice under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 698.

We apply a three-part test to determine whether an appellant has overcome the presumption of competence:

> 1. Are the appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If true, did defense counsel's level of advocacy "fall measurably below the performance ordinarily expected of fallible lawyers"?
>
> 3. If defense counsel was ineffective, "is there a reasonable probability that, absent the errors," there would have been a different result?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks, alterations, omissions, and citations omitted).

1. Lack of Motion to Suppress Pretrial Statements

The appellant first claims that his trial defense counsel should have moved to suppress his pretrial statements to investigators. On 12 May 2011, the appellant was interviewed by two AFOSI agents. A transcript of the videotaped interview was included as an exhibit to the report of the Article 32, UCMJ, 10 U.S.C. § 832 hearing. When the appellant was initially read his rights under Article 31, UCMJ, 10 U.S.C. § 831, he requested a lawyer. However, shortly thereafter, the appellant changed his mind and informed the agents that he wanted to talk to them. The agents re-read the appellant his Article 31, UCMJ, rights, which he waived and then confessed to possessing and distributing child pornography. The appellant now claims that because a possible suppression of this confession was not explored, discussed, or analyzed by him or his trial defense counsel, he was left to unknowingly plead guilty.

At his court-martial, the appellant was represented by both Mr. FS and Captain (Capt) PE. Contrary to the appellant's position, his trial defense counsel both indicate, in their post-trial declarations, that they identified a potential suppression motion existed but, after conducting research, determined that the likelihood of prevailing was low. Specifically, Capt PE stated:

> In the months leading up to the trial, Mr. [FS] and I were in constant communication regarding the Appellant's case wherein we discussed our case strategy and the issues of the case. During these discussions, Mr. [FS] and I spoke on several occasions about the Appellant's statement to the Air

> Force Office of Special Investigations (AFOSI) and the low probability on prevailing on a motion to suppress given the facts and circumstances of the case. . . . Upon conducting our caselaw research and discussing the issue, we were both of the opinion that a motion to suppress the Appellant's statement to AFOSI had a low probability of success given that the Appellant re-engaged AFOSI once they had ceased the interview and subsequently waived his Article 31 rights upon being advised of them for a second time following his re-engagement with AFOSI. . . . Despite what the Appellant claims, Mr. [FS] and I did in fact discuss with the Appellant the possibility of raising such a motion when we discussed the potential pretrial agreement (PTA) with the Appellant and went over each of the terms of the PTA with the Appellant to ensure the Appellant understood what the terms meant. This meeting occurred in the ADC conference room at Peterson AFB in the weeks before trial and was rather lengthy. . . . One of the terms of the PTA required the Appellant to waive all waiveable motions. In advising the Appellant on this term and what it meant to his case, we discussed with him the potential motion to suppress and the low likelihood of success.

Additionally, Mr. FS, an experienced trial attorney, stated, "I have litigated many motions to suppress over a number of decades and am thoroughly familiar with the law in this area. Had I believed there was a legitimate issue to raise, I would have done so."

We find that the appellant's trial defense counsels' decision not to pursue a suppression motion was a well-reasoned, conscious decision based on applicable case law. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court held that once an accused has invoked his right to counsel, the police may not conduct "further interrogation" about the offenses until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police. *Id.* at 484-85; *see also* Mil. R. Evid. 305(g)(2)(B). In the present case, the appellant did initiate further communication after invoking his rights. He voluntarily informed the AFOSI agents that he wanted to talk to them and confessed after they properly re-advised him of his Article 31, UCMJ, rights. Under these circumstances, the trial defense counsel were not ineffective.

2. Adequacy of Pretrial Investigation of Allegations

The appellant next contends that his trial defense counsel were ineffective by failing to adequately investigate the merits of the charged offenses. He claims that "no reasonable defense counsel can suggest an accused plead guilty until the evidence has been evaluated by a defense computer forensics expert." He further declares that, "At all times during my meetings with my lawyers I stressed with them that I did not knowingly download or knowingly have child pornography. Any child pornography that got onto

my computers was there by accident and likely as a result of downloading legal pornography. I am well aware now as should have been my lawyers at the time that it is possible to accidentally and unknowingly have child pornography on a computer." Additionally, the appellant submitted the post-trial Declaration of Mr. EL, an expert in computer forensic examinations, who stated that his review of the initial computer forensics report in this case revealed there was insufficient information to determine how the alleged child pornography got on the appellant's computer. The appellant asserts that had a proper investigation been conducted, he would have pled not guilty.

In response to the appellant's arguments, Mr. FS, stated:

> I agree with his statement that someone can accidentally download child pornography, but he did not make such a claim to me, i.e., that he did so accidentally. If he had, then I would have obtained a forensic computer expert, just as I have routinely done in other cases where my clients claimed to have accidentally downloaded child pornography. I did not seek an expert in computer forensic examinations, because [the appellant]'s statements to me, to Captain [PE], my co-counsel, and to our experts in psychology, demonstrated a working knowledge of how to find child pornography on the internet and how to use file sharing programs.

Despite the conflicting assertions, a *DuBay* hearing is not required to decide this alleged error because we find, under the fourth *Ginn* factor, that even if the factual claims in the appellant's declaration are adequate to state a claim on ineffectiveness, the record as a whole "compellingly demonstrate[s]" the improbability of those claims. *Ginn*, 47 M.J. at 248. Contrasting his appellate assertions, we note that the appellant admitted to AFOSI, the military judge, and the convening authority in his post-trial submission that he knowingly possessed and distributed child pornography. He also signed a stipulation of fact that stated he had knowingly possessed and distributed child pornography. During the plea inquiry, the military judge asked the appellant whether there was "anything in the stipulation that [he] did not wish to admit [as] true." The appellant responded that there was not. The military judge then asked him if the matters contained in the stipulation "were true and correct to the best of [his] knowledge and belief." The appellant stated they were.

In assessing the record of trial and the appellate filings, apart from the conflicting affidavits, it is clear the evidence supported the allegation that the appellant knowingly downloaded the child pornography. We thus find that the appellant has failed to establish that trial defense counsel's decision not to investigate an accidental downloading was unreasonable, *Strickland*, 466 U.S. at 688-89, or that the "representation amounted to incompetence under 'prevailing professional norms,'" *Harrington*, 131 S. Ct. at 788 (citing *Strickland*, 466 U.S. at 690).

3. Advice on Plea and Plea Agreement

Finally, the appellant claims that his trial defense counsel told him that if he didn't plead guilty he would "likely" receive 30 years of confinement. As a result, he was "scared" into pleading guilty. His trial defense counsel agree they advised him on the maximum potential punishment of 30 years of confinement and "[t] the advantage of the plea agreement . . . is that going in [he'd] know that no matter what, [his] sentence will not exceed the cap." However, they deny that they told him he would likely receive 30 years of confinement.

We again find an evidentiary hearing unnecessary under the fourth *Ginn* factor. Considering the totality of the circumstances in this case, the record as a whole "compellingly demonstrate[s]" the improbability of the appellant's claims. *Ginn*, 47 M.J. at 248. During the providence inquiry, the military judge asked the appellant several times whether his plea of guilty resulted from force, coercion, or if *anyone* had made promises to him in an attempt to get him to plead guilty. Each time the appellant said no. We further note that in response to the military judge's question regarding the maximum punishment the appellant's guilty plea exposed him to, trial defense counsel stated, "we informed our client that on its face its 30 years, we told him however that we would be raising an issue of sentence multiplicity; that did not have any impact on his willingness to plead guilty." This insight into their pre-conviction discussions reveals that the appellant understood the 30-year maximum imposable period was not immutable whether or not he pled guilty. Finally, trial defense counsel argued in sentencing that "we all know in this room that you're not going to put him in prison for life. I think it's probably safe to say . . . you're not going to give him 30 years . . . I think it's probably safe to say . . . that you're not going to sentence him to 10 years . . . the challenge for you is to say ok is prison necessary and if so to what degree?" Indeed, trial defense counsel argued that an appropriate sentence would include no confinement. It is bewildering how the appellant can claim his defense counsel led him to believe he would "likely" receive 30 years of confinement when the defense apparently believed there was a chance he could avoid any confinement at all.

Having tested the appellant's claims under *Strickland*, we find the appellant has failed to show either that his trial defense counsel was deficient, or that any deficiency resulted in prejudice. Accordingly, we find the appellant's claim without merit.

The Maximum Punishment

An offense not specifically listed in, included within, or closely related to an offense listed in the *Manual for Courts-Martial, United States*, (*MCM*), is punishable as authorized by the United States Code (hereinafter the Code). Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii). Because the charged child pornography offenses were not specifically listed in the *Manual* at the time of trial, the parties agreed that the maximum

punishment included confinement for 30 years based on the analogous offenses under 18 U.S.C. § 2252A.

Specification 1 alleged that the appellant wrongfully and knowingly possessed "one or more visual depictions of minors engaging in sexually explicit conduct." Specification 2 alleged that he wrongfully and knowingly distributed "one or more visual depictions of minors engaging in sexually explicit conduct."

In *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011), our superior court held that a specification which alleged possession of images of "*what appears to be* a minor engaging in sexually explicit activity" was insufficient to invoke the Code's maximum for possession of child pornography, but found no abuse of discretion in using the higher maximum of the analogous Code offense for a specification alleging "possession of visual depictions of *minors* engaging in sexually explicit activity." *Id*. at 42-43 (emphasis added).

The appellant asserts that the approved sentence is illegal because the military judge advised him that he could be guilty of possession and distribution of "actual or virtual" images and that the maximum authorized punishment is confinement for four months, forfeiture of two-thirds pay for four months, and reduction to E-1. However, the military judge never instructed the appellant in such a manner.

The military judge instructed the appellant that: (a) a minor means any person under the age of 18; (b) the material he possessed and distributed must contain visual depictions of minors engaged in sexually explicit conduct; (c) an image shows sexually explicit conduct if it contains actual or simulated intercourse, including genital to genital, oral to genital, anal to genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbating; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person; and (d) in determining whether any depiction contains "lascivious exhibition of the genitals or pubic area of any person," six factors should be considered: (1) whether the focal point of the visual depiction is on the child's genitals or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, for example, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or potentially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

During the ensuing providence inquiry, the appellant admitted that he possessed and distributed images of minors under the age of 18 and that they were engaged in sexually explicit conduct. There was absolutely no discussion of any virtual or "appearing to be a minor" images. Additionally, based upon our review of the video files

submitted as evidence to support the charged offenses and referred to during the providence inquiry, they only contain images of actual minors. Accordingly, we find the military judge properly applied the correct maximum punishment consisting of confinement for 30 years.

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. §§ 59(a), 66(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court