

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.O. VOLLENWEIDER, J.E. STOLASZ, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DENNIS K. PAYNE
AVIATION MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200600430
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 January 2005.
Military Judge: CAPT Melvin Newman, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CAPT D.L. Bailey,
JAGC, USN.
For Appellant: CDR Hans Graff, JAGC, USN.
For Appellee: LT Derek Butler, JAGC, USN.

13 September 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and 18 U.S.C. 2252A(a)(5)(B). The appellant was sentenced to confinement for 8 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

After considering the record of trial, the appellant's two assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Ineffective Assistance of Counsel

The appellant's alleges ineffective assistance of counsel by both his military and civilian trial defense counsel because they (1) failed to inform him that his conviction would be a felony, (2) that he would have to register as a sex offender, and (3) that his guilty plea would waive appellate review of the military judge's ruling on a motion to suppress evidence. We disagree.

In support of his assertions, the appellant provided a declaration in which he claims, "If I had been informed of the consequences of my guilty plea by my trial defense counsel, I would not have voluntarily entered a guilty plea."¹ Unsworn Declaration of Appellant of 18 Sep 2006 at 1. The appellant avers that his attorneys advised him that his conviction would not "go down as a felony conviction," and that they failed to inform him he would have to register as a sex offender when he returned to his home state of Missouri. *Id.* He also claims that his civilian defense counsel advised him would still be able to pursue the appeal of his suppression motion raised at trial and denied by the court. *Id.* Further, he claims not to recall being asked by the military judge if he understood his guilty plea would waive appellate review of the court's ruling. *Id.*

Pursuant to this court's order, the Government provided affidavits from both the appellant's detailed military defense counsel and civilian defense counsel. The military defense counsel definitively states that she advised the appellant of the differences between special and general courts-martial, to include the distinction between misdemeanor and felony convictions. Affidavit of Detailed Defense Counsel of 3 Jan 2007 at 1. At the same time, she also advised the appellant that, depending on the outcome of his case, "he may have to register as a sex offender." *Id.* She recalls discussing a felony conviction and sex offender registration with the appellant a second time, in the office of his civilian defense counsel and after an offer of a pretrial agreement by the Government trial counsel. *Id.* She specifically remembers the civilian defense counsel explaining to the appellant that the

¹ The appellant's unsworn declaration is incorrectly styled and referred to by counsel as an affidavit. Even though the declaration was made under penalty of perjury and contains a specific date, it was not attested to before a notary public. See 28 U.S.C. § 1746.

sex offender registration would depend upon the laws of the state where the appellant would reside after he completed any confinement in the brig. *Id.*

The detailed defense counsel further recalls discussing these issues again with the appellant during a meeting on 17 November 2004, when the appellant signed his pretrial agreement. She recalls discussing the waiver of the suppression issue as it was a specific paragraph contained in the pretrial agreement. *Id.*

The appellant's civilian defense counsel states that he advised the appellant that the offense he was pleading guilty to was a felony. Affidavit of JAH of 21 Dec 2006. He also states that he advised the appellant he would have to register as a sex offender if he remained in the state of Florida, and that other states have similar laws; he did not specifically advise the appellant about Missouri law. *Id.* He emphatically states that he did not advise the appellant he would have a right to appeal the suppression issue; to the contrary, he informed the appellant that his guilty plea would waive the issue. *Id.*

The recollections of both trial defense counsel regarding the appellant's waiver of the suppression issue are buttressed by the record. The pretrial agreement signed by the appellant clearly states that he was fully advised by his counsel of the meaning and effect of his guilty plea, and the appellant's understanding of "all attendant effects and consequences." Appellate Exhibit XV at ¶ 6. A specially negotiated term of the pretrial agreement contains the appellant's agreement that he waive all motions except those prohibited by RULE FOR COURTS-MARTIAL 705(c)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), which would include the suppression issue. AE XV at ¶ 15(e). This provision was discussed by the military judge with the appellant during his colloquy regarding the pretrial agreement, and specifically referenced "appellate review of the motion which was brought on [the appellant's] behalf." Record at 353. The appellant stated that he did not have any questions about any of the provisions in his pretrial agreement, and that he understood each every one of them. *Id.* at 355. On two occasions during the colloquy the appellant stated he had read and discussed the provisions of the agreement with his counsel, and that he was satisfied that their advice was in his best interests. *Id.* at 356.

In order to prevail on a claim of ineffective assistance of counsel, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). When an ineffective assistance claim is raised by an affidavit submitted by the appellant, we can resolve that legal issue without requiring a post-trial

evidentiary hearing by using one of six principles set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).²

The first *Ginn* principle permits us to reject the claim of ineffective assistance of counsel "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor." *Id.* at 248. Under the fourth principle, we may discount the appellant's affidavit and decide the legal issue "if the affidavit is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts." *Id.* Under the fifth principle, "when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id.*

Applying these *Ginn* principles, we conclude that the appellant's claim of ineffective assistance of counsel lacks merit. The appellant is not entitled to relief under the first principle because, even if we assume he was uninformed by his counsel of the collateral consequence of sex offender registration, he would not prevail in his claim of ineffective assistance of counsel as a matter of law. *United States v. Miller*, 63 M.J. 452, 458 (C.A.A.F. 2006).

Applications of the fourth and fifth *Ginn* principles render the same result. We find that the record as a whole compellingly demonstrates the improbability, if not outright falsehood, of the appellant's assertions that he was not informed his guilty plea would result in a felony conviction, and waive appellate review of the military judge's denial of his motion to suppress evidence. We are thoroughly convinced by the record that the appellant was sufficiently informed of all aspects and consequences of his guilty plea.

We conclude that the appellant has failed to establish that he was denied effective assistance of counsel. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007).

Post-Trial Delay

The appellant's alleges that he was denied speedy post-trial processing because it took 481 days from the day he was sentenced until his appeal was docketed with this court.

² Even though we do not consider the appellant's unsworn declaration to be an affidavit, we will still apply the *Ginn* principles.

Assuming, without deciding, that the appellant was denied the due process right to speedy post-trial review, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). Even if such error were not harmless, any relief we could fashion would be disproportionate to the possible harm generated from the delay in light of the appellant's offense. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). We are aware of our authority to grant relief under Article 66, UCMJ, and in this case we choose not to exercise it. *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006); *Toohy v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*).

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge VOLLENWEIDER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court