

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

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TIMOTHY E. FISHER
ENGINEMAN FIREMAN (E-3), U.S. NAVY**

**NMCCA 200700688
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 June 2007.
Military Judge: CAPT Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR Tracy Riker, JAGC, USN.
For Appellant: CAPT Steven Cohn, JAGC, USNR
For Appellee: Capt Geoffrey Shows, USMC.

17 June 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge, sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of receiving child pornography and one specification of possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and 2252A(a)(5)(B) respectively, as assimilated under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 5 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence and, pursuant to the terms of a pretrial agreement, suspended confinement in excess of eight months for the period of confinement served plus one year thereafter.

The appellant asserts two assignments of error.¹ After carefully examining the record of trial, the appellant's two assignments of error and his brief in support thereof, the Government's answer, the declarations under penalty of perjury of the appellant and the trial defense counsel, we conclude the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Multiplicity

The appellant pled guilty to receiving and possessing 27 digital images and one digital video of child pornography on his personal laptop computer on divers occasions between 1 March 2005 and 30 May 2006. Prosecution Exhibit 1, ¶ 2. The appellant admitted using the programs Limewire and ICQ File to search for child pornography from the Internet. He then downloaded these images into specific files or folders on the hard drive of his laptop computer. *Id.* at ¶¶ 2 and 6. He further admitted purposefully moving files containing the images from the "Limewire" folder to his "My Documents" folder. Record at 41.

The appellant received and possessed the same 27 digital images and one digital video of child pornography. Although the appellant did not move to dismiss on multiplicity grounds at trial, on appeal he asserted the military judge committed plain error by not declaring the receipt and possession specifications multiplicious, since the exact same images were involved. We disagree.

Law

Ordinarily, the appellant's unconditional guilty plea waives a multiplicity issue. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)(citing *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)); *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). Nevertheless, a claim of multiplicity is not waived by a guilty plea when the record shows the challenged "offenses are 'facially duplicative,' that is, factually the same." *Lloyd*, 46 M.J. at 23 (quoting *United States v. Broce*, 488 U.S. 563, 575 (1989)). Whether specifications are facially duplicative is determined by reviewing the language of the specifications and "facts apparent on the face of the record." *Id.* at 24.

In this case, the receipt and possession were charged, respectively, as a violation of 18 U.S.C. § 2252A(a)(2), (Specification 1 of the Charge), and a violation of 18 U.S.C. §

¹ I. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE DID NOT DECLARE *SUA SPONTE* THAT THE OFFENSES OF RECEIVING AND POSSESSING CHILD PORNOGRAPHY WERE MULTIPLICIOUS.
II. WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL RAISED PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982).

2252A(a)(5)(B) (Specification 2 of the Charge), and both specifications covered the time period between 1 March 2005 and 30 May 2006. Although the appellant now claims they were multiplicitious, he did not move to dismiss either specification at trial. The providence inquiry clearly establishes a factual distinction between the receipt and possession of the child pornography. The receipt of the child pornography was completed when the appellant, using "Limewire" and ICQ File Share accounts to link up with other users, "Limewire" downloaded child pornography to his computer. *United States v. Madigan*, 54 M.J. 518, 521 (N.M.Ct.Crim.App. 2000). The appellant's continued possession of the child pornography after its receipt, including his moving the images from the "Limewire" folder to his "My Documents" folder for later viewing, constituted the factually separate offense of possession. We hold the appellant waived any claim of multiplicity by not raising it at trial, and that the record of trial shows that the receipt and possession offenses are not facially duplicative.

In addition, we note that the appellant was charged, in Specification 2, with knowingly possessing a laptop computer that contained child pornography. Thus, the possession specification actually required proof of a laptop computer containing child pornography, not merely possession of the images themselves. Therefore, consistent with the strict "elements test" of *Blockburger v. United States*, 284 U.S. 299, 304 (1932) adopted by the military in *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993), the offenses are not multiplicitious as the possession of child pornography specification requires proof of an element that the receipt specification did not.

We also find pursuant to the five factors enunciated in *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001) that there has not been an unreasonable multiplication of charges.

Ineffective Assistance of Counsel

In his post-trial declaration, the appellant asserts his rights were violated by an unlawful interrogation, and the subsequent search and seizure of his personal laptop computer. He claims, however, that his trial defense counsel advised him the evidence would likely nevertheless be admissible, and as a result he agreed to plead guilty to receive the benefit of a pretrial agreement. The appellant now asserts his trial defense counsel was ineffective by failing to give him all the information he needed to make an informed decision. Appellant's Brief of 16 Nov 2007 at 7, 8.

The test for determining ineffective assistance of counsel has two prongs: deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet the deficiency prong, the appellant must show his defense 'counsel' "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

To show prejudice, the appellant must demonstrate that any errors made by the defense counsel were so serious that they deprived him of a fair trial. *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Scott*, 24 M.J. at 182. In order to show ineffective assistance, the appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

We have for consideration the record of trial, the appellant's declaration under penalty of perjury,² the declaration, under penalty of perjury, from the trial defense counsel,³ and a letter from the trial defense counsel to the CA regarding pretrial negotiations, dated 30 April 2007, submitted as an attachment to the trial defense counsel's declaration. Since this is a post-trial claim based on declarations, we resolve it on the record before us, and the principles enunciated in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The appellant's declaration asserts that his trial defense counsel was ineffective because he failed to move to suppress evidence seized in violation of the appellant's Fourth and Fifth Amendment rights, and, advised the appellant to waive these rights to secure a pretrial agreement. The appellant further asserts his trial defense counsel failed to present a statement during sentencing from his psychologist, and improperly influenced a statement submitted by his father. Declaration of Appellant of 1 Nov 2007.

The trial defense counsel states he engaged in detailed and extensive discussions with the appellant regarding the potential evidentiary issues, and recommended the appellant sign the pretrial agreement only after ensuring he understood the evidentiary issues, as well as the likelihood of success and the risk of losing a motion to suppress. Trial defense counsel also claims the appellant's psychologist insisted she could offer nothing beneficial to the appellant's sentencing case, and that he did not try to improperly influence the letter the appellant's father wrote, but rather crafted what he thought was the most effective statement. Declaration of Trial Defense Council of 15 Apr 2008.

In *Ginn*, our superior court listed six principles applicable to post-trial claims of ineffective assistance of counsel. *Id.* at 248. The fifth principle states that 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

² Declaration of Appellant of 1 Nov 2007.

³ Declaration of Trial Defense Council of 15 Apr 2008.

issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's 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.*

Here, pursuant to a specially negotiated provision of the pretrial agreement, the appellant agreed to waive motions to suppress evidence taken from his laptop computer as well as evidence obtained from his voluntary statement to an agent of the Naval Criminal Investigative Service (NCIS). Appellate Exhibit I, ¶ 15e. During the providence inquiry, the appellant agreed that he discussed the motions to suppress with his counsel prior to signing the pretrial agreement. The appellant further stated this provision originated with the defense in order to get a better deal. Finally, the appellant stated that it was in his best interest to waive both of these motions. Record at 92-94. These representations are consistent with the appellant's own post-trial declaration in which he admits he extensively discussed these issues with his counsel, and discussed them with his family before deciding to forego these motions and plead guilty. The appellant also indicated during the providence inquiry that his trial defense counsel's advice was in his best interest. *Id.* at 19, 20.

After carefully reviewing the record of trial and the declarations of the parties, we are satisfied there is no merit in the appellant's claim of ineffective assistance of counsel. The trial defense counsel's advice to waive potential motions to suppress was a tactical decision made after careful weighing the likelihood of success and failure, and explaining the risks and benefits to the appellant. After ensuring the appellant understood the risks and benefits of waiving any evidentiary issues, the trial defense counsel leveraged those issues to secure a highly beneficial pretrial agreement. This tactical decision was well-within the accepted range of reasonably competent professional assistance. *See Strickland*, 466 U.S. 668, 687.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge WHITE and Senior Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court