

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER E. HINEBAUGH
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 201200093
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 November 2011.

Military Judge: LtCol Nicole K. Hudspeth, USMC.

Convening Authority: Commanding General, Training Command,
Quantico, VA.

Staff Judge Advocate's Recommendation: Maj C.M. Burnett,
USMC.

For Appellant: LCDR Brandon Boutelle, JAGC, USN.

For Appellee: Maj Crista D. Kraics, USMC.

24 October 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to sell military property, two specifications of selling military property, and two specifications of larceny of military property, in violation of Articles 81, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 908, and 921. On 29 October 2011, the military judge sentenced the appellant to

confinement for six years, reduction to pay grade E-3, a \$10,000.00 fine, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority (CA) suspended confinement in excess of 12 months.

The appellant now raises three issues on appeal: 1) his pleas were improvident because there was a substantial misunderstanding as to the maximum punishment; 2) he received the ineffective assistance of counsel when his trial defense counsel failed to return his phone calls from the brig regarding clemency matters; and 3) the dishonorable discharge is inappropriately severe. The appellant raises the second and third issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). For the reasons below, we find no error.

Background

The appellant stole over \$150,000.00 worth of Marine Corps equipment, including night-vision goggles, jackets, pants, gloves, lanyards, tents, and 1,500 cases of Meals Ready to Eat. He and his wife sold the items over the internet and shipped them through the mail to the buyers. The appellant stole and sold the items over the course of three years while stationed at Twentynine Palms, California, and at Camp Lejeune, North Carolina.

Providence of the Appellant's Pleas

The appellant pleaded guilty to all five offenses that were referred to court-martial. During the providence inquiry, the military judge properly advised the appellant that the maximum punishment for the offenses was confinement for 50 years, total forfeitures, a fine, reduction to pay grade E-1, and a dishonorable discharge. Record at 18. The appellant said he understood that was the maximum punishment. *Id.* at 19. The military judge accepted the appellant's pleas and entered findings accordingly.

After the presentation of evidence during presentencing, trial defense counsel moved to merge the two specifications of wrongfully selling military property under Charge II, and to merge the two specifications of larceny under Charge III, asserting they were multiplicitous for sentencing. The military judge granted the motion. *Id.* at 76. The military judge then recalculated the maximum confinement to be 30 years. *Id.* at 77. The appellant now claims his pleas were improvident based on a

substantial misunderstanding as to the maximum confinement that could be adjudged.

The appellant correctly asserts that a plea can be set aside if there is a substantial misunderstanding of the possible maximum punishment. *United States v. Walls*, 9 M.J. 88, 90-91 (C.M.A. 1980); *United States v. Castrillon-Moreno*, 7 M.J. 414, 415 (C.M.A. 1979). However, the appellant fails to establish that he did in fact substantially misunderstand the maximum sentence and that his decision to plead guilty was affected by such a misunderstanding.

This is not a case where the erroneous calculation of the maximum punishment was discovered for the first time on appeal. See *United States v. Mincey*, 42 M.J. 376, 377 (C.A.A.F. 1995); *Walls*, 9 M.J. at 90. Indeed, the appellant does not assert that the military judge erroneously calculated the maximum punishment after she granted the motion to merge specifications, or that he learned of the lower maximum punishment only after his court-martial. Instead, the military judge announced the correct, lower maximum punishment in open court in the presence of the appellant. The military judge had previously advised the appellant that he could seek to withdraw his pleas any time prior to sentencing. Record at 48-49. He did not do so after learning of the lower maximum punishment. Additionally, the maximum punishment was recalculated upon the successful motion of the appellant's trial defense counsel. The appellant has not alleged that his trial defense counsel misled him about the maximum punishment or about asserting a multiplicity motion, and does assert that he did not know his attorney would seek to have specifications consolidated, thereby lowering the maximum punishment. The appellant is in no position to claim now that he misunderstood the maximum punishment. Even assuming arguendo some degree of misunderstanding, we do not find it to be a substantial misunderstanding.

Ineffective Assistance of Counsel Claim

The appellant alleges he received ineffective assistance of counsel during post-trial processing. Specifically, he contends that after waiving his right to submit clemency matters, he changed his mind and tried to contact his trial defense counsel, but they never responded to him. This court ordered trial and assistant trial defense counsel to submit affidavits addressing the appellant's assertions and ordered the Government to produce any waiver of the right to submit clemency matters signed by the appellant.

The effective assistance of counsel during post-trial proceedings is a fundamental right for a military accused. *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000). The appellant bears the burden of overcoming the presumption that his counsel rendered competent, professional, assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Because the CA provides the "best hope" for relief for an appellant through the clemency process, counsel's failure to submit clemency matters without a waiver from the appellant can constitute the ineffective assistance of counsel. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005).

Here, the appellant signed a written waiver of his right to submit clemency matters after consultation with his counsel. RULE FOR COURTS-MARTIAL 1105(d)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) states that, "The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked." We have nothing in the record to show the waiver was "filed" with the CA. However, we need not decide whether it was "filed" for purposes of R.C.M. 1105(d)(3) and was therefore irrevocable, because the appellant's counsel knew the appellant signed the written waiver and were entitled to rely upon the waiver unless and until the appellant told them otherwise.

The appellant claims in his sworn statement that, after his court-martial, he changed his mind about submitting clemency. He states that he spoke with his assistant trial defense counsel in December, but gives no explanation for why he did not discuss any desire to withdraw his waiver and submit clemency. The assistant defense counsel confirms the December conversation and confirms the appellant did not ask to submit clemency. The assistant defense counsel received another communication from the appellant through a brig counselor's email in January, but it did not indicate why the appellant wanted to consult. The assistant defense counsel tried to reschedule an appointment, but never received a response from the appellant. Both trial defense counsel indicate in their affidavits that they never received any other communications from the appellant indicating that he wanted to submit clemency.

The appellant has failed to show that his counsel were ineffective or acted outside the standards of professional conduct. His assistant trial defense counsel talked with him in December and made appropriate efforts to talk with him in January. Trial defense counsel appropriately relied upon the appellant's written, signed, waiver of his right to submit

clemency matters. We therefore reject the appellant's claim of ineffective assistance of counsel.

Sentence Appropriateness

The appellant claims his dishonorable discharge is inappropriately severe. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We independently determine the appropriateness of the sentence in each case we affirm. See *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

The appellant accurately notes his respectable military career and service. However, he conspired with his wife to steal innumerable and varied items of Marine Corps gear over the course of three years, at two separate duty stations, and of a value of over \$150,000.00. We are convinced on these facts that the appellant received the punishment he deserves.

Conclusion

We conclude that the findings and the 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. The findings and the sentence are therefore affirmed.

For the Court

R.H. TROIDL
Clerk of Court