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

Before
M.D. MODZELEWSKI, C.K. JOYCE, K.K. THOMPSON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

EUGENE JACKSON
CHIEF WARRANT OFFICER 4 (CWO-4), U.S. MARINE CORPS

NMCCA 201200148
GENERAL COURT-MARTIAL

Sentence Adjudged: 6 December 2011.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding General, 1st Marine Logistics Group, MarForPac, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol W.N. Pigott, Jr., USMC.
For Appellant: CAPT Ross L. Leuning, JAGC, USN.
For Appellee: Maj David N. Roberts, USMC.

22 August 2012

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of failure to obey a lawful order, four specifications of conduct unbecoming an officer, and two specifications of possessing or soliciting child pornography in violation of Articles 92, 133, and 134, Uniform Code of Military Justice, 10 U.S. C. § 892, 933, and 934. The appellant was

sentenced to six years confinement and a dismissal. In accordance with the pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of eighteen months.[1]

The appellant raises two assignments of error: first that the adjudged dismissal awarded is unjustifiably severe; and, second, that the appellant's trial defense counsel failed in his obligation to effectively assist in the appellant's defense.[2] We disagree and decline to provide relief.

Sentence Appropriateness

In his first assignment of error, the appellant asserts that a sentence including a dismissal is inappropriately severe for these offenses and this offender. The appellant argues that the loss of his retirement benefits, valued in excess of five million dollars, exponentially exceeds any monetary punishment the court could impose. He further argues that his long and distinguished career should weigh against the loss of his retirement as a result of the dismissal awarded by the court. Appellant's Brief of 14 Jun 2012 at 7.

We review the appropriateness of sentences *de novo. United States v. Roach,* 66 M.J. 410, 412 (C.A.A.F. 2008). We may only affirm a sentence that we find correct in law and fact based on our review of the entire record. Art. 66(c), UCMJ. We are mindful of our mandated judicial function under *United States v. Healy,* 26 M.J. 394, 396 (C.M.A. 1988), and analysis required by *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)).

Although dismissal is a harsh punishment with serious ramifications, in this particular case it is not an unjustifiably severe punishment. Neither is the appellant's remaining approved punishment. We reach that conclusion after careful consideration of the entire record of trial, including the evidence presented in extenuation and mitigation, and the

[1] Although not raised as error, we note that the SJAR includes as an enclosure the results of trial promulgated by the trial counsel. In this document, the trial counsel erroneously summarized provisions of the pretrial agreement. In any event, we discern no error or materially prejudicial effect on any substantial right of the appellant. Arts. 59(a) and 66(c), UCMJ.

[2] This second assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1981).

matters submitted in clemency. We balance that consideration against the nature of the offenses committed by the appellant. The appellant, a chief warrant officer of Marines, maintained online correspondence with minor teenage girls ranging in age between thirteen and seventeen years old. In initiating these online relationships, the appellant would lie about his age (stating that he was twenty-one years old), retouch photos of his face with Photoshop, and state that he was not married. His contact with some of the victims lasted years, both online via chat rooms and email, and offline by texting with cell phones. As these online relationships continued, the appellant asked for videos of these minor girls which resulted in them performing sexual acts for him and sending him nude and sexual photos of themselves. Further, the appellant admitted to fraternization with a female Marine corporal who worked directly for him and shared an office with the appellant while deployed together in Afghanistan.

After giving the appellant "individualized consideration . . . on the basis of the nature and seriousness of the offense and character of the offender," we are convinced that his sentence is not inappropriately severe. *Snelling,* 14 M.J. at 268. Granting relief absent a substantive legal error would be an act of clemency, a congressionally allocated function entrusted to other authorities, but not to this court. *Healy,* 26 M.J. 395-96. In light of the foregoing, we resolve this assignment adversely to the appellant, finding no error in his adjudged or approved sentence based upon severity.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense counsel was ineffective by persuading him to admit to unsupported and untrue facts during the providence inquiry simply to preserve the pre-trial agreement. We resolve this assignment adversely to the appellant.

In assessing the effectiveness of counsel, we apply the standard established in *Strickland v. Washington,* 446 U.S. 668, 687 (1984), and presume competence absent evidence to the contrary. *United States v. Cronic,* 466 U.S. 648, 658 (1984); *see also United States v. Gilley,* 56 M.J. 113, 124 (C.A.A.F. 2001). An appellant must demonstrate both that his counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland,* 466 U.S. at 687. We will not second-guess strategic or tactical trial decisions of defense counsel absent the appellant's showing of specific defects in his

counsel's performance that were "'unreasonable under prevailing professional norms.'" *United States v. Mazza,* 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Perez,* 64 M.J. 239, 243 (C.A.A.F. 2006)). We review ineffective assistance of counsel claims *de novo. Id.* at 474.

We decline to accept the appellant's argument that, during the recesses taken during the providence inquiry, the trial defense counsel unduly pressured the appellant to lie under oath about his involvement in committing the offenses in order to providently answer the military judge's questions. The record shows that the military judge took at least three recesses, either at the request of the trial counsel, trial defense counsel or on the military judge's own volition, in order for the trial counsel to ascertain birthdates of the victims, to change language in the charging document to reflect the state of the evidence, or for the appellant to clarify or refresh his recollection of the evidence in order to providently answer the military judge's questions. On each occasion it appears that the appellant's subsequent responses were based on his refreshed recollection or actual review of evidence, which supported his belief that he did, indeed, commit the offenses and believed himself to be guilty of those offenses. The evidence of the recesses relied upon by the appellate defense counsel in his brief are equally supportive of an argument that the appellant did refresh his recollection, gather his thoughts, and testify truthfully concerning the questions asked by the military judge during the providence inquiry. Absent additional evidence to support the assertion, we are limited to the record of trial.[3] After reviewing the matter *de novo,* we conclude that the defense trial counsel was not ineffective during the providence inquiry or in his overall representation of the appellant. The basis of the assigned error fails to establish anything approaching counsel ceasing to meaningfully function as counsel. Reviewing the matter *de novo* and in light of the requirements under *Strickland,* this assignment of error has no merit.

Conclusion

We have examined the record of trial, the appellant's assignments of error, and the parties' pleadings, and conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial

[3] There is no indication that appellate defense counsel relied upon any other evidence in support of this assigned error, i.e., a post-trial affidavit from the appellant.

rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence as approved are affirmed.

For the Court

R.H. TROIDL
Clerk of Court