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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

NATHANAEL T. WESTERN
CRYPTOLOGIC TECHNICIAN (INTERPRETIVE) SECOND CLASS (E-5), U.S. NAVY

NMCCA 201100651
GENERAL COURT-MARTIAL

Sentence Adjudged: 01 September 2011.
Military Judge: Maj Brandon Bolling, USMCR.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holifield, JAGC, USN.
For Appellant: LT Toren Mushovic, JAGC, USN.
For Appellee: Capt David Roberts, USMC.

29 August 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.

PERLAK, Chief Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of aggravated sexual assault and abusive sexual contact with a minor between 12 and 16 years of age, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The convening authority approved the adjudged sentence of three years confinement, forfeiture of all pay and allowances,

reduction to pay grade E-1, a reprimand, and a bad-conduct discharge, and, except for the bad-conduct discharge, ordered it executed.

The appellant assigns the following errors: 1) that the appellant's waiver of his right to counsel was induced by misleading statements; 2) that the military judge erred in finding that the appellant initiated communication with the interrogator; 3) that civilian trial defense counsel (CDC) was ineffective by failing to advise the appellant of the maximum permissible punishment either before or during pretrial negotiations; 4) that CDC failed to properly advise the appellant regarding his right to testify for the limited purpose of the suppression motion; and, 5) CDC's changes to the appellant's unsworn statement during the sentencing phase of the court-martial amounted to ineffective assistance of counsel.[1]

We have considered the record of trial, the parties' pleadings, and the post-trial declarations under penalty of perjury. We conclude that the findings and sentence are correct in law and fact and that there are no errors materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a gifted linguist serving as a cryptologic technician (interpretive) at the Navy Information Operations Command, located at Fort Gordon, Georgia. In August of 2010, he attended a birthday party for a fellow Sailor. While at the party, the appellant, who was 20 years old at the time, engaged in flirting, tickling and horseplay with AB, the younger sister of a fellow Sailor also attending the party. AB informed the appellant that she was 14 years old, a fact likewise brought to the appellant's attention by other attendees observing their interaction. As the party drew to a close and other party-goers left or fell asleep, AB and the appellant began kissing and petting on the couch. This ultimately led to the appellant inserting his finger in AB's vagina and AB rubbing the appellant's penis. Additional facts are developed below as necessary to address the assigned errors.

The Appellant's Confession

[1] The fourth and fifth assignments of error were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant avers that the military judge erred in admitting his statement to the Naval Criminal Investigative Service (NCIS) for two reasons: First, because Special Agent (SA) Wildes from NCIS improperly induced him to waive his right to counsel by telling him that budget issues may prevent another meeting in the future; and second, because the appellant did not initiate communication with SA Wildes after invoking his right to counsel. As both Assignments of Error (AOE) I and II address the admission into evidence of the same statement, we will analyze them together. In reviewing the totality of the circumstances, we hold that the military judge did not abuse his discretion because the appellant's confession was voluntary, and thus admissible under Article 31(d), UCMJ.

We review a military judge's denial of a motion to suppress a confession for an abuse of discretion. *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). We will not disturb a military judge's findings of fact unless they are clearly erroneous or unsupported by the record. *Id.* (citing *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007). We review *de novo* any conclusions of law supporting the suppression ruling, including the voluntariness of the confession. *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005).

"The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). The burden is on the government to prove by a preponderance of the evidence that the confession was voluntary. *Id*. In determining whether a defendant's will was overborne in a particular case, the court examines the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Factors to be taken into account may include the accused's age, his education, his intelligence, advice given to the accused concerning his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id*.

An accused who invokes his right to counsel is not subject to further interrogation, until he has spoken to an attorney or "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *see also* MILITARY RULE OF

EVIDENCE 305(e)(1) and (f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Whether there has been an interrogation is a question of law that is reviewed de novo. *United States v. Young*, 49 M.J. 265, 267 (C.A.A.F. 1998); *see also Minnick v. Mississippi*, 498 U.S. 146, 156 (1990).

"'Interrogation' includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.'" MIL. R. EVID. 305(b)(2). "Interrogation" also includes any words or actions on the part of the Government that the police should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Determining whether words or actions are reasonably likely to elicit an incriminating response "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id*.

The military judge's findings of fact are supported by the record, and we adopt them as our own. The appellant is a highly intelligent second class petty officer who was 21 years old at the time of the challenged interview. Advised of his Article 31(b), UCMJ, rights, he signed a form indicating he understood those rights. After the appellant invoked his right to counsel, SA Wildes immediately terminated the interview and, as he was packing his belongings, the appellant spontaneously told SA Wildes that he was on top of AB while he and AB were kissing. Record at 35, 81, 89. SA Wildes finished packing his belongings and left the room to make the necessary inquiries on obtaining defense counsel for the appellant. When SA Wildes returned to the interview room, he relayed the information about how the appellant could obtain counsel. The appellant responded by saying that he would be willing to talk again after obtaining counsel. SA Wildes was on temporary duty at Kings Bay, a location without a permanent NCIS presence. He was noncommittal about the prospect or timing of any subsequent interview, citing budget issues relating to his agency's funding status under the continuing resolution authority.[2] Upon learning that they may not have another opportunity to speak, the appellant ultimately said, "Well, I'll talk with you while you're here today." *Id*. at 37. Then SA Wildes left the room to contact his superiors. After a discussion with the appellant clarifying his intention to speak with NCIS that day, SA Wildes re-advised the appellant of his Article 31(b) rights and again administered the Military

[2] To the appellant's benefit, the military judge treated this statement as if it were deceptive. However, it is not clear from the record whether budget issues at NCIS were legitimate considerations informing SA Wildes's assessment of future trips to Kings Bay.

Suspect's Acknowledgement and Waiver of Rights form. Prosecution Exhibit 1. Only after this second waiver did SA Wildes resume asking the appellant questions about the case.

During the period between the appellant's invocation of his rights and his second waiver, SA Wildes spoke to him only to relay information on how to obtain counsel. Nothing in the record demonstrates that SA Wildes attempted to elicit an incriminating response during this time frame." In *United States v. Traum*, 60 M.J. 226 (C.A.A.F. 2004), a special agent asked the accused if she would be willing to take a polygraph examination without advising her of her rights under Article 31(b). The Court of Appeals for the Armed Forces held that the agent's question did not constitute an interrogation. *Id*. at 229. The court found that an incriminating response was not a "reasonable consequence" of the inquiry because the inquiry was procedural in nature. *Id*. Similarly, in this case we find that a discussion regarding how to obtain counsel services and whether the appellant would be able to speak to SA Wildes again was not likely to elicit an incriminating response and was therefore not an interrogation.

Additionally, we find that the appellant reinitiated communications with SA Wildes after having invoked his right to counsel. The appellant's spontaneous statement "I was on top of her" initiated communication and displayed a willingness to discuss the case further. Even more obvious is the appellant's statement, "Well, I'll talk with you while you're here today." After the appellant made this statement, SA Wildes left the room, giving the appellant plenty of time to consider his decision.

In *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983), the Supreme Court found that an accused who inquired, "Well, what is going to happen to me now?" after invoking his right to counsel, "evinced a willingness and a desire for a generalized discussion about the investigation." *See also United States v. Bonilla*, 66 M.J. 654, 658 (C.G.Ct.Crim.App. 2008) (holding that the accused's question "Can you tell me what this is about?" after invoking his right to counsel constituted an initiated communication). As in *Bradshaw*, we find that the appellant's unequivocal statement, "Well, I'll talk with you while you're here today," followed by an additional rights waiver leaves little doubt of the appellant's willingness to submit to an interrogation.

The appellant, in a post-trial declaration under penalty of perjury, avers that SA Wildes acted angrily, lied during the court-martial, and employed trickery in obtaining the statement. These assertions are insufficient to now render the appellant's second waiver involuntary, or otherwise overcome the state of the record before us. *See United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991) ("Trickery does not make it impossible *per se* to find that a defendant voluntarily waived his rights."). Considering the totality of these circumstances, we hold that the military judge did not abuse his discretion in finding that the appellant's initiated communication with SA Wildes after invoking his right to counsel and that the appellant's confession was voluntary.

Ineffective Assistance of Counsel

The appellant next contends that his CDC was ineffective because he failed to inform the appellant of the maximum punishments for the offenses with which he was charged. We hold that even if such error occurred, it resulted in no prejudice to the appellant.

We have for our consideration the record of trial and declarations under penalty of perjury from the appellant and his CDC. The appellant alleges that "[t]he government offered a deal for a PTA [pretrial agreement] in March-April 2011" with a nine month cap on confinement, a referral to special (instead of general) court-martial, and a guilty plea to one specification of committing a lewd act in violation of Article 120. Appellant's Motion to Attach of 6 Mar 2012, Declaration at 1. The appellant asserts that his CDC advised him not to accept the terms and failed to advise him prior to trial that he faced a maximum penalty of 55 years of confinement. *Id*. Rather, the appellant claims that his CDC only told him that he was facing "heavy time." *Id*. Finally, the appellant asserts that, had he been informed of his maximum confinement — or had he even been told that he could expect three to four years of confinement if convicted — he would have accepted the terms. *Id*. at 2.

In response to the appellant's declaration, the Government submitted a declaration from the CDC. The CDC alleges that he advised the appellant of the maximum punishment for the offenses charged before the Article 32, UCMJ, investigation, which directly contradicts the appellant's declaration. Government's Motion to Attach of 16 Apr 2012, CDC's Declaration at 1. The CDC also recalls ongoing PTA negotiations. According to the CDC, the discussion that is the basis for this assignment of

error occurred at the Article 32 investigation when the Government counsel told the CDC that he would support a PTA with a nine-month cap on confinement, but would not support an administrative separation in lieu of court-martial or a guilty plea to an Article 128, UCMJ, offense that would not require sex-offender registration. *Id*. at 2. At the time of the discussion, the victim and her family were unwilling to participate at trial. *Id*. CDC claims that the sex offender registration was the deciding factor for the appellant. *Id*. Pretrial negotiations continued until just before trial, when the trial counsel offered to support a two-year cap on confinement. The appellant declined to accept that offer. *Id*. at 2.

Ineffective assistance of counsel involves a mixed question of law and fact. *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005). Factual findings are reviewed under a clearly erroneous standard, but a *de novo* standard of review is applied to the ultimate determination of whether an appellant received ineffective assistance of counsel and whether there was prejudice. *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007).

To prevail on a claim of ineffective assistance of counsel, the appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that the deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). The appellant has the burden of demonstrating both deficient performance and prejudice. *United States v. Gutierrez,* 66 M.J. 329, 331 (C.A.A.F. 2008). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

"Our review of counsel's performance is highly deferential and is buttressed by a strong presumption that counsel provided adequate professional service." *United States v. Edmond*, 63 M.J. 343, 351 (C.A.A.F. 2006) (citation omitted); *see also Strickland,* 466 U.S. at 689 (holding that the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.").

The failure of a defense counsel to inform the accused of the maximum punishment he faces prior to making fundamental decisions in his case may constitute ineffective assistance of counsel. *United States v. St. Blanc*, 70 M.J. 424, 428 (C.A.A.F.

2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (holding effective assistance of counsel critical to the negotiation of a plea bargain); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (finding prejudice where a defendant stood trial after rejecting an offer for a plea agreement based on bad advice of counsel); *United States v. Herrera,* 412 F.3d 577, 581 (5th Cir. 2005) (holding attorney's underestimation of client's sentencing exposure by 27 months to be ineffective assistance of counsel where, but for attorney's underestimation, client would have accepted more favorable plea offer); *but see United States v. Marshall,* 45 M.J. 268, 273 (C.A.A.F. 1996) (holding an erroneous sentence estimation by defense counsel is not necessarily ineffective assistance of counsel). The court in *Lafler* established a standard for analyzing prejudice in cases involving a plea agreement: "[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . ." 132 S. Ct. at 1385.

In *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), the Court of Appeals for the Armed Forces provided a framework for resolving post-trial, collateral, affidavit-based claims. We apply those principles to this case.

First, we find that the second, third, and fifth *Ginn* principles do not apply to this case because the appellant's declaration consists of more than speculative or conclusory observations, there is a relevant dispute of fact between the appellant's and his CDC's declarations, and this was a contested case. *Id*.

First *Ginn* Principle

Under the first *Ginn* principle, "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, the claim may be rejected on that basis." *Id. at* 248. The only relevant fact in dispute is whether the CDC notified the appellant of the maximum confinement.[3] For purposes of the first *Ginn* principle, we assume without deciding that the CDC did not advise the appellant of the maximum punishment. Using this framework, we find no prejudice to the appellant.

[3] Also in dispute is whether the appellant would have accepted certain terms under negotiation; however, this amounts to mere speculation.

The trial counsel did not have the authority to approve a PTA in March/April 2011. In fact, it appears from later negotiations that the trial counsel was willing to endorse terms more favorable to the appellant than were acceptable to the convening authority. CDC's Declaration at 2. Therefore, the discussions that are the basis for AOE III were only preliminary negotiations. Since there was no PTA, it is speculation for the appellant to argue that he would have availed himself of any potential protections of a PTA. The appellant has failed to demonstrate a reasonable probability that the plea offer would ultimately have been agreed to by the parties or otherwise approved by the convening authority. Accordingly, the appellant has failed to demonstrate prejudice.

Fourth *Ginn* Principle

The fourth *Ginn* principle holds that "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, the court may discount those factual assertions and decide the legal issue." *Ginn*, 47 M.J. at 248.

We find the appellant's declaration factually adequate on its face; however based on the evidence before us, we do not find it credible that the appellant would have accepted the terms offered by trial counsel in March/April 2011. Our reasons are three-fold: 1) the appellant's priority was on avoiding sex offender registration status; 2) the appellant understood that he was facing several years confinement; and 3) the defense posture was strong in March/April 2011, with the very real possibility that the victim would not pursue the matter. Accordingly, we find that the appellant failed to demonstrate a reasonable probability that the plea negotiations would have resulted in a PTA that would have been accepted by the convening authority, and ultimately by the court-martial.

We find it unlikely that the appellant's decision with regard to the potential plea offer would have been significantly impacted solely based on the fact that the maximum punishment was fifty-five years confinement. A discussion in which the appellant learned of the maximum confinement time would inevitably likewise involve discussions estimating the actual confinement likely to be adjudged. The efforts of the CDC to argue for some consolidation or merger of the specifications for sentencing purposes had yet to be litigated, rendering any prior

advisement subject to revision, such as occurred on the record prior to sentencing.

Based on the entirety of the record and upon consideration of the declarations, we find no prejudice to the appellant and no merit in the assigned error.

Conclusion

The remaining assignments of error are without merit. The findings and sentence as approved by the convening authority are affirmed.

Senior Judge MODZELEWSKI and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court