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

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ROBERT C. PHELAN
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200900192
GENERAL COURT-MARTIAL

Sentence Adjudged: 04 December 2008.
Military Judge: LtCol David Oliver, USMC.
Convening Authority: Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Maj B.C. Corcoran, USMC.
For Appellant: LT Sarah E. Harris, JAGC, USN.
For Appellee: Maj Elizabeth A. Harvey, USMC.

17 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification each of receipt and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for 36 months, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, with the exception of the dishonorable discharge, ordered the sentence executed.

The appellant raises six assignments of error including: (1) the offenses of receiving and possessing child pornography were multiplicious; (2) failure to contest the age of individuals depicted in suspected child pornography constituted ineffective assistance of counsel; (3) defense counsel's incorrect description of the appellant's convictions and failure to include character letters in the request for clemency constituted ineffective assistance of counsel; (4) failure to present matters in extenuation and mitigation during presentencing constituted ineffective assistance of counsel; (5) the appellant's sentence was unjustly severe; and (6) substantial and material portions of the record of trial are unavailable for review.

Having reviewed the record and the pleadings of the parties, we conclude that there is merit to the appellant's first and third assignments of error. We will take remedial action in our decretal paragraph and return the case to the Judge Advocate General of the Navy for new post-trial processing.

Background

In 2007, the appellant lived in the enlisted barracks onboard Camp Fuji, Japan. His personal computer was connected to the internet via a shared network provided by Marine Corps Community Services. *Id.* at 67-68. On 13 May 2007, a Marine residing in the same barracks as the appellant opened, through a "peer-to-peer" file sharing network, a folder bearing the appellant's name which contained files with titles and content indicative of child sexual activity. *Id.* at 69. The appellant's commander subsequently authorized the search and seizure of the appellant's personal computer. *Id.* at 90, 96.

Forensic analysis of the appellant's computer hard drive determined that there were approximately 17 files containing suspected child pornography, three of which were identified as child pornography in the National Center for Missing and Exploited Children (NCMEC) database. *Id.* at 125, 166, 169. These files consisted of both actual downloaded video files and "preview" video files. *Id.* at 154, 166-67, 180.

Multiplicity

The appellant asserts that the possession of child pornography alleged in this case was incidental to its receipt, as the files "resided where they did as a direct result of their receipt." Appellant's Brief of 20 Jul 2009 at 5, 9. He further argues that the charges are facially duplicative, that his conviction on both charges constitutes plain error, and that the possession specification must be

set aside. *Id*. at 10. The Government concedes that the possession of child pornography specification is multiplicious with the receipt specification, and should be set aside. Government's Answer of 31 Aug 2009 at 7-8. We agree.

"The prohibition against multiplicity is grounded in compliance with the constitutional and statutory restrictions against Double Jeopardy." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)(citation and internal quotation marks omitted); *see also United States v. Craig*, 67 M.J. 742 (N.M.Ct.Crim.App. 2009), *rev. granted,* __ M.J. __, 2009 CAAF LEXIS 1295 (C.A.A.F. Nov. 19, 2009). Specifications are multiplicious for findings if each alleges the same offense, if one offense is necessarily included in the other, or if they describe substantially the same misconduct in two different ways. RULE FOR COURTS-MARTIAL 907(b)(3)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Discussion; *see also United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000).

Forensic examination of the appellant's computer hard drive revealed 17 suspect files, including 12 incomplete or previewed files of child pornography, five of which were also fully downloaded. Record at 166, 169, 197, 200; Prosecution Exhibits 3, 7, 8, 12. There is no evidence that the appellant possessed media containing child pornography in this case discrete from that of receipt of the original images which he saved to his computer hard drive. *See Craig*, 67 M.J. at 746-47. As such, the appellant's acts of receiving and possessing the files in question were "facially duplicative, that is factually the same" and do not allow for separate convictions. *Heryford,* 52 M.J. at 266 (citations and internal quotation marks omitted). We will set aside the finding of guilty of Specification 2 of the Charge, possession of child pornography, in our decretal paragraph.

That does not conclude our analysis, as we must assess what, if any, prejudice the appellant may have suffered. We may only reassess a sentence to cure the effect of prejudicial error when we are confident that, absent any error, the sentence adjudged would have been at least a certain severity and when so convinced may reassess and affirm only a sentence of that magnitude or less. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(citation omitted); *see also United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

With the exception of the change in the authorized maximum confinement, the sentencing landscape is unchanged

by our determination. *See Buber*, 62 M.J. at 479-80. The maximum authorized confinement at trial was 30 years, whereas following dismissal of the possession specification the maximum authorized confinement would be 20 years. At trial, the authorized maximum confinement was not central to punishment awarded. The Government requested four years confinement, the defense argued for confinement of no more than one year, and the military judge awarded 36 months confinement. Record at 233-35.

Otherwise, the Government and defense sentencing theories were unaffected, and evidence admissible on sentencing is unchanged. We conclude that a rehearing on sentence is not required as a result of our setting aside the finding of guilty of Specification 2 of the Charge.

Ineffective Assistance of Counsel

The appellant alleges ineffective assistance of trial defense counsel on the merits, during the presentencing hearing and post-trial. We analyze "claims of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984) and consider[] (1) whether counsel's performance fell below an objective standard of reasonableness, and (2) if so, whether, but for the deficiency, the result would have been different." *United States v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008)(citations omitted). The appellant has the burden of demonstrating both deficient performance and prejudice. *Id.*

To demonstrate prejudice, the appellant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

In determining if the appellant's argument satisfies this two-part test, we are aided by the appellant's unsworn statement and an affidavit from his trial defense counsel. *See generally United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997).

A. Merits - failure to contest the age of individuals depicted in suspected child pornography

We are not persuaded that the trial defense counsel's representation fell below an objective standard of reasonableness by virtue of his failure to contest the ages of the individuals depicted in the relevant pornographic files. The trial defense counsel, in his affidavit, states that "it was plain to [him] then and now that the individuals depicted in the pornography were children." Affidavit of Trial Defense Counsel of 11 Aug 2009. He also

reasoned that, "the trier of fact would be absolutely unpersuaded and offended" by a defense strategy claiming that the pornography at issue was adult and not child pornography. *Id*.

Applying the fourth *Ginn* factor, the record as a whole compellingly demonstrates the improbability of the appellant's assertion that the individuals depicted in the pornographic images may not be children. *Ginn*, 47 M.J. at 248. In reviewing a trial defense counsel's performance, we do not "second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977). The appellant's trial defense counsel articulated a rational explanation for his decision not to contest the age of the persons depicted in the relevant files and our review of the evidence leads to a similar finding – the evidence includes multiple depictions of children engaged in sexual activity or in sexually suggestive positions. We find this assertion without merit.

B. Presentencing - failure to present matters in extenuation and mitigation

The appellant alleges that he provided his trial defense counsel the names of three potential extenuation and mitigation witnesses and that his trial defense counsel failed to fully explore these individuals as potential witnesses. Appellant's Declaration at 1. The trial defense counsel retorts that the appellant provided him a list of 15 names of potential presentencing witnesses and, after contacting all of those individuals, he determined that they either were nonresponsive or did not recall the appellant personally. Affidavit of Trial Defense Counsel at 2.

On the question of the trial defense counsel's performance with regard to the potential extenuation and mitigation witnesses, we are not persuaded that his performance was deficient and even assuming any factual discrepancy was resolved in the appellant's favor, we conclude the facts alleged would result in no relief. *Ginn*, 47 M.J. at 248.

Further, assuming, without deciding, that Trial Defense Counsel's performance was deficient, we conclude that the appellant has not satisfied the second *Strickland* prong. The appellant asserts that counsel should have requested and submitted, readily available supporting statements. Review of the record and statements subsequently attached to the record upon the appellant's motion, leads us to conclude that the appellant has failed to demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gutierrez*, 66 M.J. at 331 (citation and internal quotation marks omitted).

Finally, the trial defense counsel presented a case in extenuation and mitigation by calling two favorable witnesses familiar with the appellant's military character. Record at 224-32. We conclude that the appellant was not deprived of the effective assistance of counsel at the pre-sentencing hearing.

C. Post-trial - misrepresentation of the appellant's conviction in the clemency request and failure to provide the convening authority character letters

The appellant alleges that, post-trial, his counsel submitted a clemency request that indicated he was convicted of "distributing child pornography" and failed to submit a number of character letters in his possession. Appellant's Brief at 15-16. The appellant also claims that he experienced difficulty communicating with his trial defense counsel, that his trial defense counsel indicated their attorney-client relationship was severed at the completion of trial, and that new post-trial processing is required. The Government concedes that new post-trial processing is appropriate in this case. We agree.

"An appellant is entitled to effective post-trial representation, judged by the same standard as representation at trial." *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)(citation omitted). Post-trial processing, and more particularly clemency, is a "critical point in the criminal proceedings against [an appellant]." *United States v. Johnston*, 51 M.J. 227, 229 (C.A.A.F. 1999). It cannot be overstated that a clemency request submitted to a convening authority represents "the accused's best hope for sentence relief." *United States v. Bono*, 26 M.J. 240, 243 n.3 (C.M.A. 1988)(citation omitted).

Though some discrepancies exist between the appellant's allegations and trial defense counsel's affidavit, there are sufficient uncontroverted facts to decide the legal issue without additional fact-finding. *See Ginn*, 47 M.J. at 243.

We note a number of deficiencies with the trial defense counsel's post-trial representation of the appellant. First, the clemency request submitted by trial defense counsel erroneously indicated, multiple times, that the appellant was found guilty of the more serious offense of "*distributing*" or "*distribution*" of child pornography." Clemency Request of 16 Mar 2009 (emphasis added). Second, the appellant's trial defense counsel failed to include character statements in the clemency request that he had earlier indicated were received and would be included. Third, it appears that the appellant's trial defense counsel misunderstood his role in representing the appellant post-trial.

Here, the trial defense counsel's performance deficiencies outlined above effectively resulted in "an *absence* of counsel functioning on behalf of [the appellant]" at the clemency stage." *United States v. Moseley*, 35 M.J. 481, 484 (C.M.A. 1992)(citations omitted)(emphasis in original). "[T]he only way to make up for the absence of counsel at that stage is to re-do that stage with benefit of counsel acting in appellant's interests." *Id.* at 484-85. We will take appropriate action in our decretal paragraph.

Sentence Severity and Incomplete Record

Based upon our order of new post-trial processing, there is no sentence approved by the convening authority currently referred to this court to review. Art. 66(c), UCMJ. Finally, we find no substantial omissions in the record. *See United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000).

Conclusion

The finding of guilty of wrongful possession of child pornography, Specification 2 of the Charge, is set aside. The convening authority's action dated 18 March 2009 is set aside. The record is remanded to the Judge Advocate General of the Navy for new post-trial processing not inconsistent with this opinion.

Senior Judge VINCENT and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court