

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

**Before
L.T. BOOKER, E.C. PRICE, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DENNIS J. STEPHENSON
AVIATION ELECTRICIAN'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200900210
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 January 2009.

Military Judge: CAPT Moira Modzelewski, JAGC, USN.

Convening Authority: Commander, Naval Air Force Atlantic, Norfolk, VA.

Staff Judge Advocate's Recommendation: LCDR B.T. Bowlin, JAGC, USN.

For Appellant: Patrick McLain, Esq.; LCDR Anthony Yim, JAGC, USN.

For Appellee: Capt Michael Aniton, USMC.

12 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of violating a lawful general regulation, and one specification each of unlawfully receiving and possessing child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The approved sentence was confinement for 15 months, reduction to pay grade E-1, and a bad-conduct discharge.

The case was initially submitted to us without assignment of error on 17 June 2009. We granted the appellant's motion to stay the proceedings to enable him to file a brief and assignments of error (AOEs).¹

Ineffective Assistance of Counsel

The appellant asserts that both of his trial defense counsel were ineffective, *inter alia*, by entering into a stipulation of fact,² as part of a pretrial agreement, which, like each of the charges and specifications before the court, contained the words, "on divers occasions on or about January 2008." The appellant specifically takes issue with so much of the stipulation as relates to the phrase, "on divers occasions."

In order to prevail on a claim of ineffective assistance, the appellant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(citing *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland*, 466 U.S. at 687. To meet the deficiency prong, the appellant must show that 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 his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; see also *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

Applying the guidance of *Strickland*, we are able to address and resolve this assignment of error focusing solely on the absence of prejudice. 466 U.S. at 697. We note that the phrase

¹ AOE I: APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE TRIAL DEFENSE COUNSEL WAS PREJUDICIALLY DEFICIENT BY FAILING TO FIND SUBSTANTIVE FLAWS IN THE STIPULATION OF FACTS AND APPELLANT'S PLEAS OF GUILTY.

AOE II: THE COURT-MARTIAL FAILED TO ESTABLISH THE EACH [SIC] ELEMENT NECESSARY TO FIND APPELLANT GUILTY UNDER CHARGE II, SPECIFICATION 1.

AOE III: THE COURT-MARTIAL FAILED TO ESTABLISH THE EACH [SIC] ELEMENT NECESSARY TO FIND APPELLANT GUILTY UNDER CHARGE II, SPECIFICATION 2.

² Prosecution Exhibit 1 at 2.

"on divers occasions," as contemplated by the discussion of RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) is typically applied to conduct covering an extended period of time. We similarly note that the phrase "on or about" is used to comprehend a particular date. As indicated above, all three specifications before the court use both phrases to place the accused on notice, focusing on January 2008. During this general court-martial, as facts were gleaned from the appellant during the providence inquiry, it became apparent to the military judge that the conduct relating to Charge I and to Specification 2 of Charge II all occurred on a date certain and did not in fact cover an extended period of time. Accordingly, the military judge properly excepted out and entered findings of not guilty to the words, "on divers occasions" from each of those specifications. Record 75-77. In light of the actions of the military judge, the court can find no resultant prejudice of any kind from the broader language in the stipulation.

In support of this assignment of error, we also have before us the sworn declaration of the appellant.³ Considering the affidavit and the record as a whole, we find no basis for relief. Even if the factual disputes alleged were resolved in the appellant's favor, no relief would result. Similarly, we do not find any basis which serves to support the assertion of ineffective assistance of counsel nor which sets forth facts that rationally explain variances in the statements made at trial and the assertions of the affidavit. The record contains unqualified statements by the appellant which express satisfaction with trial defense counsel and which support the voluntariness of the pleas entered, neither of which is rebutted in the affidavit. *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997).

Remaining Assignments of Error

In his second and third assignments of error, the appellant avers that the court-martial failed to establish each element necessary to find him guilty of both specifications under charge II. We disagree.

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from a guilty plea *de novo*. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008); *United States v. Irvin*,

³ Declaration of AE1 Dennis J. Stephenson, U.S. Navy, of 13 Nov 2009.

60 M.J. 23, 24 (C.A.A.F 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

Applying the *de novo* standard, we find that the providence inquiry (Record at 37-55) and Prosecution Exhibit 1, the stipulation of fact, amply demonstrate all elements of both specifications were met. The appellant conducted an internet search for and consequently did knowingly receive and possess child pornography. The record reveals no basis in law or fact for questioning the acceptance of guilty pleas to Specifications 1 and 2 under Charge II.

Conclusion

We conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant exists. Arts. 59(a) and 66(c), UCMJ. Accordingly, we affirm the findings and sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court