IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **E.E. GEISER**

UNITED STATES

v.

Gregory A. ZANETELL
Machinist's Mate First Class (E-6), U. S. Navy

NMCCA 200201744 Decided 24 January 2006

Sentence adjudged 3 January 2002. Military Judge: K.E. Grunawalt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast, Naval Submarine Base New London, Groton, CT.

LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
CAPT MARK W. PEDERSEN, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of committing indecent acts on two different females who were under 16 years of age, and a single specification of indecent assault upon a third female. The appellant's crimes violated Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The adjudged and approved sentence consists of a dishonorable discharge, confinement for 31 months, and reduction to pay grade E-3. In taking action, the convening authority suspended that portion of confinement in excess of 30 months for a period of 12 months. The suspension was ordered to conform to the requirements of a pretrial agreement.

The appellant presents two assignments of error for our consideration. He first argues that because the Government failed to provide his counsel with a sworn statement of a possible witness, his counsel were unable to properly advise him concerning his decision to plead guilty, thus depriving him of his right to adequate representation and rendering his decision

to plead guilty as uninformed. He next argues that a dishonorable discharge was an inappropriately severe sentence.

We have carefully considered the record of trial and the appellant's assignments of error, as well as the appellant's two affidavits of 23 October 2005, the appellant's affidavit of 9 November 2004, the affidavit of the appellant's wife of 25 November 2004, and the sworn statement of Private First Class (PFC) Kowalchuk of 1 November 2001. We have also considered the Government's response, and the appellant's reply. Upon completion of review and consideration of these materials, we have identified error that requires correction. Following that corrective action, we conclude that the findings and sentence are correct in law and fact and that no error remains that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Right to Due Process

In his first assignment of error, the appellant alleges as a due process violation that the Government failed to provide to the defense a copy of PFC Kowalchuk's statement prior to trial. The appellant characterizes this statement as "impeachment evidence." Appellant's Brief of 11 Jan 2005 at 7.[1] Although his counsel were aware of the existence of this statement, the appellant alleges that they had not seen it when they advised the appellant that he should consider entering into a pretrial agreement. The appellant also alleges that he was unable to review a police report prepared by the Escambia County, Florida, Sheriff's concerning the initial allegations and statement made by one of the female minors. He argues that if he had this information, his attorneys would have been able to "successfully cross-examine" her. Appellant's Brief at 3.[2] The appellant argues that because neither he nor his counsel were aware of the content of PFC Kowalchuk's statement, and did not have the Escambia County police report prior to trial, that his counsel were prevented "from being able to competently discuss and advise him on whether to accept the plea agreement, or contest the charges at trial."[3] Appellant's Brief at 8. The appellant asks that we set aside his conviction of Specifications 1 and 2 of the Charge. The appellant does not challenge his conviction to the specification under Additional Charge II.

In examining this issue, we have conducted three separate legal analyses. First, has the appellant been deprived of effective assistance of counsel? Second, was the appellant

[1] The appellant's brief is not paginated.

[2] We find this argument speculative and of no merit.

[3] In his affidavit in support of his reply brief, the appellant suggests that he did not date the pretrial agreement and that he signed it on 2 November 2001. At trial, however, the appellant told the military judge that he signed the pretrial agreement on 5 November 2001. Record at 52.

deprived of discoverable material that raises a reasonable probability the deprivation changed the result of the trial? Finally, did the appellant enter a knowing, voluntary and informed guilty plea to the specifications under the Charge?

1. Adequacy of Counsel.

The appellant argues that he was deprived of effective assistance of counsel because his counsel advised him to plead guilty even though they had not examined the statement of PFC Kowalchuk. We disagree.

In its recent decision in *United States v. Davis*, 60 M.J. 469 (C.A.A.F. 2005), our superior court provided a comprehensive explanation of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint that he was deprived of the effective assistance of counsel, the appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

As we review this record, and the appellant's post-trial protestations, we find little support for his position. The appellant has the burden to demonstrate that his counsel failed to meet the minimal standards of competency. He has not supported his allegations with facts. We have no allegation from his counsel that they did not see PFC Kowalchuk's statement, rather we have the appellate defense counsel stating in a 24 November 2004 motion to compel that the appellant told him that he had spoken with both of his trial defense attorneys, and that neither of them recall whether they saw PFC Kowalchuk's statement. In that same motion to compel, it is also reported that the "prosecution had an open policy and regularly turned over other documents to the defense." Motion to Compel at 2.

Counsel are presumed to be competent, and the appellant must surmount a high hurdle to overcome that presumption. He has failed to do so in this case. Rather, he engages in second-guessing, sweeping generalizations, and hindsight.

2. Discovery.

The appellant contends and the Government concedes that the Government was required to provide PFC Kowalchuk's statement to the defense without request. RULE FOR COURTS-MARTIAL 701(a) (1) (C)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). We, however, have no proof that PFC Kowalchuk's statement was not provided to the defense team. While the court ordered the Government to produce proof of service of PFC Kowalchuk's

statement upon the defense team, we are aware of no requirement to document such service. As noted above, the appellant's defense team has not stated that they were not served the document. Furthermore, the appellant acknowledges that his counsel were aware of the document. Given the presumption of competence of the trial defense team, and the acknowledged practice of the prosecutors in this case to allow for open discovery, we are not persuaded that the factual predicate for the appellant's argument has been established. For purposes of this decision, however, we will presume that the Government did not provide PFC Kowalchuk's statement to the defense in a timely fashion.

When the Government errs by failing to provide discovery, an appellate court reviews the error to determine whether "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Stickler v. Greene*, 527 U.S. 263, 280 (1999)(quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). We are convinced that the results would have been no different.

While the appellant has characterized the statement of PFC Kowalchuk as impeachment evidence, our examination of the statement reveals little, if any, information that would have benefited the defense at trial. We are convinced beyond a reasonable doubt, that had the appellant's attorneys seen the statement, they still would have advised the appellant to plead guilty.

In essence, PFC Kowalchuk's statement reveals that had the appellant contested the charges, the Government had another witness they could have called against the appellant. This witness, PFC Kowalchuk, was not one of the victims in the case. She was a former girlfriend of the appellant to whom he had made admissions concerning the offenses he was facing. The appellant does not explain how he hoped to use this statement. While the appellant may take issue with the accuracy of some of the information contained in the statement, it would have been of little impeachment value, and only if the Government called PFC Kowalchuk as a witness. We are confident the appellant's competent defense attorneys would have explained that to him and the appellant would have still plead guilty.

3. **An Informed Decision.**

"A plea of guilty waives a number of important constitutional rights. *United States v. Care*, 18 C.M.A. 535, 541-42, 40 C.M.R. 247 (1969). As a result, the waiver of these rights must be an informed one. *United States v. Hansen*, 59 M.J. 410, 413 (C.A.A.F. 4004)." *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005). In *Harris* our superior court held that where an accused had not been aware that he "suffered from a

severe mental defect or disease at the time of the offenses" that he could not make an informed guilty plea to those offenses. *Id*.

That same rationale could apply in the case before us, except for the fact that even if the appellant had been aware of the content of PFC Kowalchuk's statement, it would not have constituted a defense, nor would it have been beneficial to the appellant's case. Furthermore, we are confident, that the appellant received competent representation that ensured that he made an informed decision to plead guilty.

Sentence Appropriateness

"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)).

After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentencing relief in addition to that which the convening authority granted in his action would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

We note that the appellant was convicted of three separate sexual offenses involving three different females. Two of the females were less than 16 years old. One offense occurred in 1996, the next in 1999, and the last in 2000. During its case in aggravation, the Government presented victim impact evidence concerning the two minor female victims. Although the appellant was convicted of committing indecent acts upon their bodies, through their testimony in aggravation, it is clear that they were not participants in the appellant's sexual activities with them. The third offense involved the appellant's indecent assault upon a guest in the house in which he was staying while she was either asleep or passed out. The maximum sentence the appellant faced included 19 years of confinement.

We contrast the offenses against the offender. As of the date of trial the appellant had served in the Navy for over 20 years, and had been selected for promotion to chief petty officer. Without question, the appellant has an impressive record of service, but had his first young victim stepped forward in 1996, it is unlikely that the appellant would reached 20 years of service or further advanced in rank. We have thoroughly considered the appellant's argument that the adjudged dishonorable discharge is inappropriately severe in this case. The argument might have merit were we faced with a single

specification and a single victim. But in the case before us, we must consider the fact that there are three victims and three crimes spread out over 3½ years. We have applied the appropriate standard of review, and find the sentence as modified below to be appropriate for this offender, for these offenses.

Providence

A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *Care*, 40 C.M.R. at 247. Before accepting a guilty plea, the military judge must ordinarily explain the elements of the offense, and must ensure that a factual basis for the plea exists. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980); R.C.M. 910(e), Discussion. Acceptance of a guilty plea requires an appellant to substantiate the facts that objectively support the guilty plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

In each of the two specifications of indecent acts with a minor female and the specification of indecent assault, the appellant was convicted of the language contained in the specifications without modification. All three specifications allege that the appellant engaged in more sexual activity with his victims than he admitted to during the inquiry into the providence of his guilty pleas, and more than he admitted to in the stipulation of fact. Prosecution Exhibit 1. With all three victims the appellant only admitted that he touched their labia, nothing more. Corrective action is required.

Conclusion

In light of our conclusion that the plea providence inquiry does not support a guilty finding of all the sexual activity that is alleged in Specifications 1 and 2 of the Charge, and the specification under Additional Charge II, we affirm the finding to those three specifications and the Charges, excepting out of each specification all the alleged sexual activity in each specification except for the words "placing his fingers on her labia". In that our action reduces the appellant's criminality, it is necessary that we reassess the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *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).

Upon reassessment of the sentence, we affirm only so much of the sentence as extends to a dishonorable discharge, confinement for 24 months, and a reduction to pay-grade E-3. The

supplemental promulgating order will reflect the findings and the sentence as modified by this decision.

Senior Judge CARVER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court