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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Jeffrey P. HEISLER
Yeoman Second Class (E-5), U.S. Navy

NMCCA 200201325 Decided 29 April 2005

Sentence adjudged 16 April 2002. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, U.S. Naval Support Activity, Naples Italy.

J. BYRON HOLCOMB, Civilian Appellate Counsel
ED ZIMMERMAN, Civilian Appellate Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT ELYSIA G. NG, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

REDCLIFF, Judge:

A general court-martial composed of a military judge alone convicted the appellant, pursuant to his pleas, of attempting to communicate indecent language and commit indecent acts with a minor, indecent language, solicitation, and wrongful enticement of a minor to engage in prohibited sex acts, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The appellant was sentenced to a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, having previously deferred forfeitures for 90 days.

The appellant alleges that his personal electronic mail (e-mail) messages were private communications that cannot be criminalized; that seizure of these messages violated his Fourth Amendment rights; that his prosecution violated the military's "don't ask, don't tell" policy regarding homosexual conduct; that

the court-martial lacked jurisdiction over the wrongful enticement charge; and that the appellant was denied effective assistance of counsel.[1]

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Electronic Mail as Private Communications

All of the appellant's offenses stemmed from his electronic mail communications with individuals he believed to be minor boys at the Department of Defense high school in Naples, Italy. The appellant initiated contact with one of the boys by slipping his e-mail address into the boy's school locker. Eventually, the appellant communicated with four individuals, all via e-mail. The first three were students at the high school. The last, "Jason," was actually an agent of the Naval Criminal Investigative Service (NCIS) posing as a 15-year-old student. When the appellant arranged a meeting with "Jason" and traveled to "Jason's" fictitious residence, he was apprehended.

The appellant maintains that his electronic mail communications with the three real high school boys were private communications among consenting adults,[2] and, therefore, cannot be prosecuted as criminal conduct. We hold that the appellant waived this issue by his unconditional guilty plea.

The appellant's e-mail messages were introduced during the sentencing proceedings by the defense. *See* Defense Exhibit E. They contain graphic descriptions of the appellant's sexual exploits, fantasies, and propositions to the three real students.

The elements of indecent language under Article 134 are:

1. That the accused orally or in writing communicated to another person certain language;
2. That such language was indecent;
3. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[1] On 25 Feb 2004, the appellant requested oral argument on these asserted errors. This request is hereby denied.

[2] During the providence inquiry, the appellant stated he believed the three students were all 17 years old, which is above the legal age of consent for military indecency crimes. *See* Arts. 120 and 134, UCMJ (establishing 16 years of age for legal consent).

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 89b. The Manual defines indecent language as:

> ...that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

Id. at ¶ 89c.

To set aside a plea of guilty as improvident, this Court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ; *see United States v. Mease*, 57 M.J. 686, 687 (N.M. Ct. Crim. App. 2002). Such a conclusion must overcome the generally applied waiver of the factual guilt inherent in voluntary pleas of guilty. *Id.* (quoting *United States v. Dawson*, 50 M.J. 599, 601 (N.M. Ct. Crim. App. 1999)). Our standard of review is not whether appellant might have challenged the indecency of his language at trial. Rejection of a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea. *See United States v. Fisher,* 58 M.J. 300, 303 (C.A.A.F. 2003)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002), and *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

From this undeveloped record, we do not know what the actual ages of the boys were, only what the appellant believed. The appellant's assertion that his e-mail communications were private activity between persons capable of legal consent might have been litigated at a contested trial or a pretrial motion. However, the appellant pursued neither option, opting to avail himself of the benefits of a pretrial agreement instead. This was his choice. We hold that the appellant waived his right to a trial on the facts when he elected to plead guilty; he cannot now challenge the sufficiency of the evidence that might have been offered against him at trial.

Finally, we note that the appellant's trial was in April 2002. Developments in federal law since that time have significantly altered the landscape of sexual privacy, particularly for practicing homosexuals. *See Lawrence v. Texas*, 539 U.S. 558 (2003)(holding that private, consensual sex between adults is generally a protected liberty interest); *cf United States v. Marcum,* 60 M.J. 198 (C.A.A.F. 2004)(holding that homosexual sexual relations between senior and subordinate personnel fell outside the liberty interest recognized in *Lawrence*). Nonetheless, at the time of the appellant's trial, both our superior court and the U.S. Supreme Court had previously held that consensual sodomy was unprotected conduct and properly

charged as a criminal offense. *See Bowers v. Hardwick*, 478 U.S. 186 (1986); *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992). The appellant now asserts that his conduct with the three 17-year-old boys would not have been criminal under *Lawrence*. However, the Supreme Court specifically held that its decision in *Lawrence* did not extend to sexual activity involving minors. Thus, we find no substantial basis to question the validity of the appellant's pleas of guilty.

Fourth Amendment Rights in Electronic Mail

The appellant next asserts that he had an expectation of privacy in his e-mail messages, and that these messages were wrongfully seized by law enforcement in violation of the Fourth Amendment. Again, we disagree.

"The transmitter of an e-mail message enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant." *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000) (citation omitted). Once a message is transmitted, however, it is beyond the sender's control, and the expectation of privacy is diminished. *Id*. The appellant's e-mail messages were not only transmitted, but they were also offered as evidence *by the defense* during the sentencing phase of the trial.

The appellant did not raise a suppression motion at trial, or invoke his Fourth Amendment rights in any manner. It is well-settled that motions to suppress evidence must be raised before the entry of pleas. RULE FOR COURT-MARTIAL 905(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). And failure to raise a suppression motion constitutes waiver of that issue. R.C.M. 905(e). In this case, the appellant chose instead to introduce the e-mail transmissions on sentencing. His trial defense team then referred to that evidence to argue, in mitigation, that the other parties to the transmission were willing participants. The appellant cannot now enter a belated challenge to the search or seizure of that evidence when he employed the evidence for tactical reasons at trial.

The appellant cites *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) in support of his contention that he had an expectation of privacy in his e-mail transmissions. Assuming *arguendo* that the appellant has not waived this issue, we find that *Maxwell* is readily distinguishable from the present case. First, the Fourth Amendment issues were fully litigated in *Maxwell*. Further, in *Maxwell*, the accused purchased and maintained all of his home computer equipment with his personal funds. *Id*. at 411. His use of that equipment and America Online (AOL) services had no connection with his official duties. *Id*. More importantly, he used the AOL service only while at home and off-duty. *Id*. Finally, the seized e-mail messages came not only from the accused's computer, but also from the storage facilities at AOL itself. The appellant, by contrast, accessed his personal

Yahoo e-mail account on government-owned work computers. Prosecution Exhibit 1 at 4. It was, apparently, those computers that were seized by NCIS. Record at 98. In addition, the *Maxwell* decision acknowledged that internet-based e-mail applications were inherently less private than the AOL system employed in that case. *See* 45 M.J. at 417. Thus, the facts of this case are more analogous to *Monroe*, where the accused sent e-mail from his work computer and enjoyed a much lower expectation of privacy.

Although the appellant correctly points out that the accused in *Monroe* received a banner message advising him of potential monitoring of communications, we do not find that such a distinction warrants a different result in this case. From this record, we do not know whether such a banner was employed when the appellant logged onto his Navy-owned computer, nor do we know the specifics of how NCIS seized his e-mail. The primary reason we do not have this information is because the appellant elected not to litigate these issues at trial. Having determined that the appellant waived this issue by failing to seek suppression at trial and by using the challenged e-mails in his own sentencing case, we decline to grant the requested relief.

Department of Defense Policy and Homosexual Conduct

The appellant contends that his prosecution violates the Department of Defense's (DoD) policy regarding homosexual conduct, commonly referred to as the "don't ask, don't tell" policy. *See* 10 U.S.C. § 654. We disagree.

We note that the DoD's "don't ask, don't tell" policy is a matter of personnel management, not a defense to criminal charges. *See United States v. Nadel*, 48 M.J. 485, 488-89 (C.A.A.F. 1998). Moreover, assuming *arguendo* that the policy or its corresponding service regulations afford any substantive rights during a court-martial (e.g., to provide for suppression of evidence), the appellant failed to litigate the issue at trial and, therefore, has waived it. R.C.M. 905(e); *cf. Nadel*, 48 M.J. at 486. Likewise, the appellant's attempt on appeal to claim entrapment or improper investigation as potential defenses fail, given his affirmative waiver on the record of such defenses. Record at 81.

To support his contention, the appellant relies upon *McVeigh v. Cohen*, 983 F.Supp. 215 (D.D.C. 1998), a federal decision involving an administrative separation. Our superior court in *Nadel* expressly declined to extend the premise of the D.C. District Court's *McVeigh* decision to a court-martial context. *Nadel*, 48 M.J. at 487 n.3. We also note that the e-mail information obtained in *McVeigh* was far less salacious than the language employed by this appellant. Finally, we agree with the Government that it is the age of the appellant's would-be sexual partners, not their gender, which was the key to this prosecution. We believe that had the appellant sent similar e-

mail messages to underage high school girls, he would have faced the same charges and received a similar sentence. We decline to grant the appellant relief on the basis of 10 U.S.C. § 654 or Department of Defense directives implementing the statutory policy.

Jurisdiction

The appellant disputes the jurisdiction of his court-martial over the wrongful enticement charge. A court-martial must have jurisdiction over the accused and the offense being tried. R.C.M. 201(b)(4) and (5). An accused may move to dismiss a charge at trial for lack of jurisdiction, but jurisdictional issues cannot be forfeited. R.C.M. 907(b)(1); *see generally United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999); *United States v. Reid*, 46 M.J. 236, 240 (C.A.A.F. 1997). The question here is whether the appellant was subject to the provisions of 18 U.S.C. § 2422, incorporated into Article 134, UCMJ, for actions occurring in Naples, Italy.

The statute provides, in pertinent part, that:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

18 U.S.C. § 2422(b). During the providence inquiry, the appellant admitted to each element of this offense, including the "foreign commerce" nature of his communications. Record at 64-65.

Initially, we do not believe that these offenses occurred beyond the "territorial jurisdiction" of the United States. The appellant committed these offenses on his work computer, on board the Naval Support Activity in Naples, Italy. The federal criminal code defines its jurisdiction to include "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . ." 18 U.S.C. § 7(3). A military installation overseas clearly meets this definition.

Even assuming an extra-territoriality analysis is required, we believe Congress intended a broad application of this statute. *See United States v. Martens*, 59 M.J. 501, 505 (A.F.Ct.Crim.App. 2003), *rev. granted,* 59 M.J. 30 (C.A.A.F. 2003)(conducting similar analysis for federal prohibition on child pornography). As our sister court held, "[c]onsidering the nature of crimes

involving computers, it does not appear that the necessary locus of such offenses would be limited to the territory of the United States." *Id; see also United States v. Kolly*, 48 M.J. 795 (N.M. Ct. Crim. App. 1998)(concluding earlier version of same act applied extraterritorially). The exploitation of children often possesses an international aspect, and limiting the applicability of statutes designed to prevent such abuse would "`greatly curtail the scope and usefulness of the statute.'" *Martens*, 59 M.J. at 505 (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)). Thus, we hold that the appellant's court-martial had jurisdiction over the challenged offense and find no merit in this assigned error.

Assistance of Counsel

Lastly, the appellant asserts that he was denied the effective assistance of counsel because his trial defense team was deficient in several aspects of their investigation and strategy. We find no deficient performance by counsel.

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel (IAC) -- deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. This Constitutional standard applies equally to military cases. *See United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). The Strickland two-part test applies to guilty pleas and sentencing hearings that may have been undermined by ineffective assistance of counsel. *See United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)(citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In order to show ineffective assistance, however, an appellant must surmount a very high hurdle. *See United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

Counsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary. *See United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002)(citing *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999)). We do not look at the success of a trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001). In order to satisfy the "prejudice" requirement in a guilty plea case, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *See United States v. Ginn*, 47 M.J. 236, 246-47 (C.A.A.F. 1997). Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the

crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. *Id*. (citing *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)).

The appellant alleges eight areas of deficient performance, primarily asserting failure of his trial defense team to investigate or pursue potential defenses. Appellant's Brief at 22. Two of these claims go to the merits of issues we have already decided against the appellant and we find no possibility of prejudice for trial defense counsels' failure to raise those issues. Having reviewed the e-mail exchanges between the appellant and the NCIS agent identified as "Jason," we likewise see no obvious entrapment defense and note that counsel specifically stated on the record that they had researched that issue and determined it was not a viable defense. Record at 81. The remaining IAC assertions constitute nothing more than bare allegations concerning the trial defense counsels' perceived omissions, unsupported by any affidavit of the appellant or other credible evidence.[3] *Cf. Ginn*, 47 M.J. at 248. We will not presume that counsel did not investigate or research these potential avenues of defense, particularly where the appellant indicated his explicit satisfaction with counsel several times during the proceedings. We also find that the appellant's trial defense team presented a strong case in extenuation and mitigation, resulting in a sentence to confinement considerably less than what the convening authority was willing to offer in a pretrial agreement. In addition, the pretrial agreement negotiated by the defense provided tangible financial protection for the appellant's spouse.

Finally, as discussed previously, there have been significant developments in the pertinent case law, particularly *Lawrence v. Texas*, regarding the privacy rights surrounding homosexual conduct. We decline to find the appellant's trial defense team deficient for failing to raise those issues prior to the *Lawrence* decision.

[3] We note that the damning and baseless rhetoric of the appellate defense counsel, in which detailed trial defense counsel are accused of unethical and criminal conduct, is neither warranted by the record, supported by post-trial affidavits, nor beneficial to this court.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court