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

BEFORE

C.A. PRICE **C.L. CARVER** **R.C. HARRIS**

UNITED STATES

v.

Frank J. OSHESKIE
Machinist's Mate Second Class (E-5), U.S. Navy

NMCCA 200001296 Decided 14 September 2004

Sentence adjudged 19 November 1999. Military Judge: R.W. Redcliff. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

Maj ERIC P. GIFFORD, USMC, Appellate Defense Counsel
Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
LT ROSS W. WEILAND, JAGC, USNR, Appellate Government Counsel

Senior Judge CARVER:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his plea, of murder by committing an inherently dangerous act, in violation of Article 118(3), Uniform Code of Military Justice, 10 U.S.C. § 918(3). The appellant was sentenced to a dishonorable discharge, confinement for 27 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, all confinement in excess of 19 years was suspended for 12 months.

The appellant alleges that he was denied effective assistance of counsel; that his sentence is inappropriately severe; and that his sentence is unconstitutional due to the disparity between the maximum punishments for military and civilian federal offenses. *See* Appellant's Brief of 22 Oct 2001; Supplemental Assignment of Error of 1 Jun 2002.

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 the 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.

Facts

On Mother's Day 1998, the appellant resided in base housing with his wife and two young children. That morning, the appellant let his wife sleep late and made her breakfast in bed. At approximately 1030, the appellant heard his three-month-old daughter, AO, crying. The appellant went into her room. He changed her diaper, but she continued to cry. The appellant was frustrated and upset because he had been up twice with AO in the night and wanted her to go back to sleep. He was also angry that his wife seldom helped him with the childcare, even though he worked all week. The appellant put AO face down in her crib, covered her with a blanket, and placed his left hand between her shoulder blades, holding her down with his left hand in an attempt to make her lie still. Even though he felt her struggling, he continued to hold her down for several minutes until she stopped moving and was quiet. Although the appellant was immediately concerned that he had hurt AO, he left her room without checking on her further. The appellant then went to his own room, engaged in sexual intercourse with his wife, and showered. At that point, approximately 30 minutes later, the appellant looked in on AO and found her unresponsive. He administered CPR until paramedics arrived, but AO could not be revived. She was pronounced dead at the hospital.

The appellant was originally charged with premeditated murder under Article 118(1), UCMJ. Eventually, the Government and defense entered into a pretrial agreement, under which the appellant would plead guilty to murder by committing an inherently dangerous act, pursuant to Article 118(3), UCMJ, in exchange for a cap on confinement. The Government, however, reserved the right to go forward on the charge of intentional murder under Article 118(2). The military judge accepted the appellant's plea of guilty, and the Government went forward on intentional murder. The military judge found the appellant not guilty of intentional murder, but guilty of murder by committing an inherently dangerous act.

Effective Assistance of Counsel

The appellant claims that he was denied the effective assistance of counsel, due to his counsel's failure to properly investigate the facts of his case and advise him of potential defenses and options. We disagree.

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 -- 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." *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." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

"Counsel has a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary." *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." *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*. (quoting *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)).

In support of his claim, the appellant filed an affidavit with this court. *See* Appellant's Motion to Attach of 22 Oct 2001. The appellant's allegations include that: 1) he informed both of his defense counsel that he had put AO and his other children to sleep numerous times in a similar manner without incident, and thus he did not realize that he was putting AO in danger; 2) he did not know that he could have pled guilty to a lesser offense without benefit of a pretrial agreement, and that such a lesser included offense (e.g., involuntary manslaughter or negligent homicide) more accurately reflected his level of culpability; and 3) his defense counsel did not research the "laying on of hands" technique as a means of calming an infant, which could have bolstered a defense or reduced his level of culpability. *Id*. Subsequently, this court ordered the Government to contact the trial defense counsel and obtain affidavits from them. *See* Order of 29 Jan 2003. The Government complied. *See* Government's Motion to Attach Documents of 28 Feb 2003. The two trial defense counsel corroborated much of the appellant's recollection, although disagreed that he had not been

advised of the right to plead guilty to a lesser offense without a pretrial agreement. *Id*.

Our superior court recently reiterated the scope of this court's fact-finding power, within the context of post-trial affidavits and claims of ineffective assistance of counsel:

> First, 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.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.
>
> Fourth, 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.
>
> Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.
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> Sixth, the Court of Criminal Appeals is required to order a fact-finding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *DuBay*[1] proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66 fact-finding power and decide the legal issue.

United States v. Fagan, 59 M.J. 238, 241-42 (C.A.A.F., 2004) (quoting *Ginn*, 47 M.J. at 248).

Applying this framework, we conclude that no *DuBay* hearing is required. With respect to the appellant's assertion that his

[1] *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

acts did not show "wanton disregard for human life," and that he did not realize that he was placing AO in jeopardy, the fifth *Ginn* factor applies. The appellant entered into a detailed Stipulation of Fact, and the military judge's providence inquiry was lengthy and extremely thorough. The appellant specifically acknowledged that his actions were inherently dangerous and that AO's death was a probable consequence of those actions. Record at 129-30. He continued to apply force to AO, pushing her face into a plastic-covered crib mattress, even as she struggled to breathe. *Id*. The following portion of the providence inquiry is illustrative:

> MJ: Do you believe that your act of pushing [AO] into the mattress, with her face into the mattress, was an inherently dangerous act toward her and showed a wanton disregard for her life?
> ACC: Yes, sir.
>
> MJ: And at the time, did you know that death or great bodily harm was a probable consequence of that act?
> ACC: Yes, sir.
>
> MJ: In fact, you believed that the act was not only inherently dangerous to her, but that it was the proximate cause of her death --
> ACC: Yes.
>
> MJ: -- as I've defined that term to you?
> ACC: Yes, sir.
>
> MJ: Can you explain to me, in your own words, if you can, how it is that your act was inherently dangerous, under these circumstances? What is it that you did which would be inherently dangerous, under these circumstances, to someone the size of [AO]?
> [The accused and his counsel confer.]
> ACC: I was well larger than [AO]. She was young. She was definitely not fully developed. She didn’t have the strength to fight me. She couldn't verbalize, either. She couldn't say it hurt.
>
> MJ: And you pushed her in a manner that obstructed her breathing?
> ACC: Yes, sir.
>
> . . . .
>
> MJ: And you pushed her into the mattress such that the materials of the mattress and the sheet obstructed her from breathing?
> ACC: Yes, sir.

MJ: Do you agree that that would be inherently dangerous to an infant?
ACC: Yes, sir.

MJ: Do you believe that that showed a disregard for her well-being?
ACC: Yes, sir.

Record at 138-39.

Similarly, we reject the appellant's contention that his counsel were ineffective because they should have explored the "laying on of hands" technique, under the fifth and first *Ginn* factors. To the extent that the appellant believes this theory would have supported a defense of accident or mistake, he expressly disavowed any such defenses after a thorough inquiry by the military judge and a full opportunity to discuss those possibilities with counsel. Record at 131, 135-37. We also note that the military judge discussed whether the appellant had employed this technique on previous occasions with AO. Record at 120-21. The only conflict between the appellant's affidavit and that of counsel is whether the appellant also told his attorneys that he had used this technique with all of his other children as well. We do not regard that difference as material, particularly when the history specific to AO was fully discussed on the record and rejected by the appellant as a potential defense. Even if this factual dispute were resolved in the appellant's favor, we would find no deficient representation and thus no error. *Cf. Ginn*, 47 M.J. at 248.

We are skeptical that any reputable pediatric expert would testify that a "firm" touch intended to soothe a crying infant could ever result in forcible suffocation for several minutes. *Cf. United States v. Sojfer*, 47 M.J. 425, 428 (C.A.A.F. 1998) (holding it was "improbable" that a sexual assault victim mistakenly believed that the accused's act of placing his hand on her genital area was an indecent assault rather than a proper abdominal examination). We are convinced that such a defense would not have been successful, even if it had been pursued. *See Ginn*, 47 M.J. at 247. "Accordingly, we will not now invalidate his guilty plea on the basis of post-trial speculation or innuendo as to his guilt or permit him to use his complaint of ineffective assistance of counsel to indirectly accomplish the same result." *Id*. at 248 (internal citations omitted).

The remaining allegation in the appellant's affidavit is that he was not aware of his right to plead guilty to a lesser included offense without the protection of a pretrial agreement. Applying the first *Ginn* factor, we conclude that even if this factual dispute were resolved in the appellant's favor, we would grant no relief. Because the Government elected to prove the alternate theory of intentional murder, we have the benefit of a fully developed record in this case, notwithstanding the appellant's guilty plea. Our review of the evidence presented,

including the appellant's detailed pretrial statement to the Naval Criminal Investigative Service (NCIS) and the testimony of Dr. Janice Ophoven, a pediatric forensic pathologist, convinces us beyond a reasonable doubt that the appellant was guilty of murder by an inherently dangerous act under Article 118(3), UCMJ, independent of his answers during the providence inquiry and the Stipulation of Fact. *See United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999); *see also* Art. 66(c), UCMJ.

Thus, we conclude that even if the appellant pled not guilty to murder but guilty to the lesser offense of involuntary manslaughter or negligent homicide, he would nonetheless have been convicted of the greater offense under Article 118(3), UCMJ. The only difference is that he would not have had the benefit of his pretrial agreement. The testimony at trial of Dr. Ophoven was particularly compelling. She stated that AO would have engaged in a frantic fight for life as the appellant pushed her face into the crib mattress, including flailing her arms and legs, arching her back, and "high gear crying" for a period of at least two to four minutes until she lost consciousness. Record at 331-33. The appellant would have needed to exert a significant amount of force on AO's back in order to keep her from turning or raising her head as she struggled for air. *Id*. Given this evidence, we regard the appellant's level of responsibility as much greater than the "culpable negligence" or "simple negligence" corresponding to involuntary manslaughter or negligent homicide, respectively. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶¶ 44c(2)(a) and 85c(2). Accordingly, even if the trial defense counsel failed to fully advise the appellant of all of his options, we would still find no prejudice.

In conclusion, we do not find deficient representation under the *Strickland* standard. To the contrary, the trial defense counsel effectively defended the appellant at trial on the charge of intentional murder, and also negotiated what turned out to be a very favorable pretrial agreement. To the extent that counsel did not investigate the "laying on of hands" theory or advise the appellant of his right to plead guilty to a lesser offense without a pretrial agreement, we find no prejudice. Accordingly, we decline to grant the requested relief.

Sentence Appropriateness

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused on the basis of the nature and seriousness of the offense and character of the offender." *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(citing *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully considering the providence inquiry, evidence in aggravation and mitigation, including appellant's unsworn statement, and noting the

authorities cited in the briefs of counsel, we conclude that appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ. Courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003)(citing *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)). Thus, a sentence should not be disturbed on appeal unless the harshness of the sentence is so disproportionate as to "cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.M.C.M.R. 1980).

The appellant pled guilty to suffocating his three-month-old daughter. The Government's case in aggravation included the testimony of Dr. Ophoven. Dr. Ophoven testified that a child of AO's age would have fought vigorously as she was suffocating, that she would have experienced the same pain as an adult unable to breathe, and that this struggle for life would have continued for at least two to three minutes. Even though the appellant believed he had injured AO, he departed her room, engaged in sexual intercourse with his wife, and showered before checking on AO or summoning medical attention. The maximum authorized punishment for this offense was confinement for life. *See* MCM, Part IV, ¶ 43e(2). While a 27-year sentence is undeniably severe when considered in a vacuum, we do not find it unduly harsh given the seriousness of the offense, the vulnerability of the victim, and the callousness of the appellant's actions. Accordingly, we decline to grant relief.

Constitutionality of Sentence

The appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), asserts that his rights under the Due Process and Equal Protection clauses of the U.S. Constitution are violated by the disparate sentencing scheme between the Uniform Code of Military Justice and federal law. *See* Supplemental Assignment of Error of 1 Jun 2002. We disagree.

Homicide under the UCMJ is not structured identically to its civilian counterparts. Although most criminal justice systems recognize both murder and manslaughter as distinct offenses, the definitions and elements vary. *Compare* MCM, Part IV, ¶¶ 43-44, *with* 18 U.S.C. §§ 1111-1112. However, we do not agree with the appellant's assertion that his actions would necessarily have been charged as manslaughter under the U.S. Code. "Second degree murder is a general intent crime requiring malice aforethought, an element that may be established, *inter alia*, by evidence of conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *United States v. Brown*, 287 F.3d 965, 974 (10th Cir. 2002)(internal quotations omitted). Under federal law, the substantive distinction is the severity of

the reckless and wanton behavior: “Second-degree murder involves reckless and wanton disregard for human life that is extreme in nature, while involuntary manslaughter involves reckless and wanton disregard that is not extreme in nature.” *Id*. at 975. This description of extreme recklessness would appear to match closely with the Manual's definition of "wanton disregard of human life." *See* MCM, Part IV, ¶ 43c(4)(a).

We also note that under state law in Hawaii, where the appellant's crime occurred, murder is the "intentional" (similar to Art. 118(2)) or "knowing" (similar to Art. 118(3)) killing of a human being, carrying a mandatory sentence of life imprisonment. *See* HAW. REV. STAT. §§ 707-701.5 and 706-656 (2003). Knowledge that death or great bodily harm is a probable consequence of the inherently dangerous act is likewise a required element of murder by an inherently dangerous act under Art. 118(3), UCMJ. *See* M.C.M., Part IV, ¶ 43c(4)(b). We, thus, see no significant inconsistency between the UCMJ and its federal and Hawaii counterparts.

Even assuming that the appellant would have been subject to prosecution for only manslaughter under the U.S. Code, he has provided no authority to support his Due Process or Equal Protection claims. The appellant is not alleging that he is the member of a suspect class, or that the difference between military and civilian offenses encroaches on a fundamental constitutional right. *Cf. United States v. Means*, 10 M.J. 162 (C.M.A. 1981). In light of the military mission, it is clear that servicemembers, as a general matter, do not share the same autonomy as civilians. *See United States v. Marcum*, 60 M.J. 198, (C.A.A.F. 2004). Moreover, “the exercise of discretion by a prosecutor in choosing between two statutes proscribing identical conduct, does not violate the Equal Protection or Due Process clauses of the Fifth Amendment, even though the prosecutor may be influenced by the greater penalty authorized under the statute he chooses.” *United States v. Casteel*, 17 M.J. 713, 714 (N.M.C.M.R. 1983)(citing *United States v. Batchelder*, 442 U.S. 114 (1979)). We, therefore, decline to find constitutional error merely because Congress has arguably enacted a more severe sentencing scheme for homicides under military jurisdiction.

Conclusion

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

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court