

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Travis D. GREENE
Aviation Electrician's Mate Third Class (E-4), U. S. Navy**

NMCCA 200401272

Decided 29 March 2007

Sentence adjudged 03 April 2003. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of possessing child pornography, in violation of 18 U.S.C. §§ 2252 and 2252A, charged as violations of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.¹ The appellant was sentenced to total forfeitures of pay and allowances, reduction to pay grade E-1, confinement for 120 days, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.²

¹ Immediately after announcing findings, the military judge conditionally dismissed Specification 1 at the Government's election because the two specifications were for contingencies of proof, and renumbered Specification 2 as the sole specification. Record at 389.

² This case is before us for the second time. We first reviewed this case under Article 62, UCMJ, and reversed the military judge's suppression of evidence. See *United States v. Greene*, 56 M.J. 817 (N.M.Ct.Crim.App. 2002).

We have reviewed the record of trial, the appellant's sole assignment of error alleging the military judge abused his discretion by denying the appellant's motion to suppress filed after remand, and the Government's answer. 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.

Background

The appellant's roommate, Airman Recruit (AR) W,³ briefly saw images on the appellant's laptop computer that he thought may be improper. On 7 February 2000, AR W, without the appellant's permission, went onto the appellant's computer to see what those images were. By simply checking the list of most recently viewed documents, AR W found an image of a young girl naked from the waist down holding a carrot to her vaginal area and a second image of four young boys involved in explicit sexual activity. AR W immediately reported to the Military Training Instructor (MTI) in charge of the barracks, Aviation Electrician First Class (AE1) C, and requested a room change. When pressed for information, AR W stated that the appellant had "kiddie porn" on his computer. Record at 142. AR W, however, was not asked for and did not provide a description of what he saw on the appellant's computer.

AE1 C reported the child pornography allegation to the base legal office and the Naval Criminal Investigative Service (NCIS). One of those offices instructed AE1 C to block the appellant's access to his barracks room. Based on those instructions, AE1 C used his master key to lock the appellant's barracks room so that the appellant's swipe card did not work.

The appellant returned to his barracks room after class on 7 February 2000 and found that his swipe card did not work. He immediately reported to the MTI front desk, where special agent (SA) Marsh of the NCIS greeted him and took him to a separate room. There, SA Marsh informed the appellant that he was accused of possessing child pornography. Before SA Marsh could inform the appellant of his rights, the appellant acknowledged that he had some child pornography. The appellant gave NCIS authorization to search his barracks room, and a search was conducted. During that search, NCIS seized the appellant's

³ By the time AR W testified, he was an aviation electrician third class. Record at 15, 142. AR W is referred to throughout the military judge's findings of fact as AE3 or petty officer. See Appellate Exhibits X, XIX.

laptop computer. A later forensic analysis of that computer discovered 252 images of child pornography.

Unlawful Seizure

For his sole assignment of error, the appellant claims that the military judge abused his discretion by denying the appellant's motion to suppress the evidence on the grounds that his person and his property were seized without probable cause when AE1 C locked him out of his barracks room. We disagree.

We review a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). "In reviewing a ruling on a motion to suppress, we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)(citations omitted).

1. Military Judge's findings of fact.

The evidence presented on the appellant's first motion to suppress, which was the subject of the Government's interlocutory appeal, was also considered on the appellant's motion to suppress filed after remand. We note that the military judge's original findings, numbered one through 24, entered on the original motion to suppress,⁴ were considered by this court during our review pursuant to Article 62, UCMJ. With one exception, we found that those findings were supported by the record. *Greene*, 56 M.J. at 819-22. Those original findings, as previously amended and as further amended below, will be considered here. They are, as amended, supported by the record, not clearly erroneous, and again adopted as our own for resolving the current assignment of error. The military judge's additional findings of fact, numbered 25 through 34, with certain exceptions noted below, are supported by the record, not clearly erroneous, and also adopted as our own. See Appellate Exhibit XIX. We will address those findings that are not supported by the record.

Finding of fact number 8 states, in part, that the decision to lock the appellant out of his barracks room was made by barracks personnel. Subsequent testimony by AE1 C contradicts

⁴ Appellate Exhibit X.

that finding, and therefore that portion of finding number 8 is disapproved in favor of finding number 26 which states that AE1 C was instructed to lock the appellant's room by either base legal or NCIS. See Record at 140. Finding of fact number 11 states, in part, that AR W never told barracks personnel or NCIS where he had seen the child pornography. That finding was based on AR W's testimony on the first motion to suppress. On remand, AE1 C, the barracks leading petty officer, testified that AR W told him that the child pornography was located on the appellant's computer. Record at 142. To the extent that finding number 11 states that AR W never told barracks personnel where he saw the images, it is disapproved.

Finding of fact number 25 states, in part, that AR W's report to AE1 C "indicated that the accused *may have had* images of child pornography on his laptop computer located in their barracks room." Appellate Exhibit XIX (Emphasis added). AR W testified that he immediately reported that the appellant had images of "younger children," and when asked if it was child pornography, he responded "Well, yeah. I guess so." *Id.* at 20. AE1 C, however, testified that AR W told him that the appellant had "kiddie porn" on his computer. *Id.* at 142. To the limited extent that finding number 25 suggests a possession of child pornography in the past as opposed to contemporaneously with the allegation, it is disapproved. To the limited extent that finding 25 suggests an equivocal report of child pornography, it is also disapproved. Finding number 25 is amended to read as follows: "AE1 C, the barracks leading petty officer and MTI, was one of the individuals who received the report from AR W which indicated that the appellant had images of child pornography on his laptop computer located in their barracks room."

The military judge's findings of fact, as amended, combined with other evidence within the record, establish that the following occurred on 7 February 2000:

a. The appellant's roommate, AR W, suspected the appellant of having child pornography on his personal computer based on AR W's personal observation of images on that computer. After morning classes, AR W, returned to their shared barracks room where he got on the appellant's personal computer and found two images of what he believed were child pornography. One image was of a nude Asian girl holding a carrot and the other was of four nude boys engaged in some form of sexually activity. Appellate Exhibit X at findings 4, 5, and 6.

b. At approximately 1200, AR W reported to AE1 C, the barracks leading petty officer, that the appellant had child pornography on his computer in their shared barracks room. Appellate Exhibit X at finding 7, as previously amended; Appellate Exhibit XIX at finding 25, as amended, and 29; Record at 142.

c. AE1 C was in charge of the appellant's barracks and was responsible for maintaining discipline. Record at 140.

d. AE1 C reported AR W's allegations to the base legal office and to NCIS. Appellate Exhibit X at finding 7, as previously amended; Appellate Exhibit XIX at finding 26.

e. Someone either at the base legal office or at NCIS told AE1 C to secure the appellant's barracks room by blocking the appellant's swipe card from opening the room. Appellate Exhibit XIX at finding 26.

f. At the time AE1 C was directed to secure the appellant's barracks room, the person directing that action had no information other than what AR W had told AE1 C. *Id.* at finding 27.

g. SA Marsh, NCIS, arrived at the barracks at approximately 1430.⁵ Appellate Exhibit X at finding 9.

h. The appellant attempted to enter his barracks room but his swipe card did not work. Based on prior experience, the appellant knew to report to the barracks quarterdeck when his swipe card did not work. The appellant followed that procedure and reported to the quarterdeck. Appellate Exhibit X at finding 8 and 10.

i. SA Marsh, NCIS, first met the appellant at 1445 to 1500 that afternoon at the barracks quarterdeck. Appellate Exhibit X at finding 10; Appellate Exhibit XIX at finding 29.

j. SA Marsh and the appellant moved to a private room where SA Marsh advised the appellant that he, Marsh, was investigating an allegation of child pornography and asked for consent to search the appellant's computer and room. The appellant spontaneously stated "Yeah, I have some, but I was going to get rid of it." Appellate Exhibit X at finding 13.

⁵ Finding of fact number 29 acknowledges that AE1 C testified that SA Marsh arrived as early as 1300, but that finding is for comparison purposes only with SA Marsh's recollection. Appellate Exhibit XIX.

k. The appellant gave written consent to search his barracks room and to seize anything "desired for investigative purposes." Appellate Exhibit X at findings 14 and 16.

l. That consent was not the product of being locked out of his barracks room and was not coerced. Appellate Exhibit X at finding 18; Appellate Exhibit XIX at finding 30.

m. The appellant was not in custody when he granted consent. Appellate Exhibit XIX at finding 32.

n. SA Marsh knew that if the appellant did not give consent to search his barracks room, that he would have to obtain search authorization. Record at 59.

o. AR W did not describe the images he saw on the appellant's computer to NCIS or AE1 C prior to NCIS obtaining consent to search the appellant's room. Appellate Exhibit X at finding 11, as amended.

p. The appellant enjoyed a reasonable expectation of privacy in his barracks room and his personal computer located therein. Appellate Exhibit X at finding 3.

q. The barracks room search began at 1540 and ended at 1615. Appellate Exhibit X at finding 19; Appellate Exhibit XIX at finding 29.

2. Military Judge's conclusions of law.

The appellant claims that the military judge abused his discretion by finding that although there was no probable cause to seize the appellant's person or his property, the Government's intrusion by locking the appellant out of his room was not *per se* unreasonable under the circumstances, and denying the motion to suppress. Appellant's Brief of 31 May 2006 at 6. The appellant relies on *Illinois v. McArthur*, 531 U.S. 326 (2001), as the controlling authority for resolving this assignment of error. We agree that *McArthur* controls, however, that case does not support a conclusion favorable to the appellant.

At the heart of the appellant's argument is his claim that probable cause did not exist. The appellant relies on that conclusion to distinguish *McArthur*. Appellant's Brief at 6. The military judge also concluded, as a matter of law, that probable cause did not exist. Appellate Exhibit XIX at 3.

However, we review a military judge's conclusions of law *de novo*, *Ayala*, 43 M.J. at 298, and conclude that probable cause did exist to believe that evidence of a continuing crime was located inside the appellant's barracks room.

In *McArthur*, the accused's spouse asked police officers to accompany her to the home where she lived with the accused, in order to keep the peace while she gathered her belongings. The officers remained outside the home while the spouse collected her property. When she came out of the home, she told the officers that she had just seen her husband "slide some dope underneath the couch." *McArthur*, 531 U.S. at 329. The officers then asked the accused for permission to search the residence and the accused refused. While standing on the porch, the accused was told that he could not reenter the residence without an officer escort while a search warrant was sought. *Id.* Based on these facts, the Supreme Court determined that:

[T]he police had probable cause to believe that McArthur's trailer home contained evidence of a crime and contraband, namely, unlawful drugs. The police had had an opportunity to speak with [McArthur's spouse] and make at least a very rough assessment of her reliability. They knew she had had a firsthand opportunity to observe her husband's behavior, in particular with respect to the drugs at issue. And they thought, with good reason, that her report to them reflected that opportunity. (Citation omitted).

Id. at 331-32.

In *McArthur*, the source stated only that she saw "dope," but not what she actually saw. Here, AR W told the barracks authorities that he saw child pornography, but not the content of the images. Greater specificity of what was observed in each case was not necessary, because possession of child pornography, like "dope," is illegal regardless of its form. The lack of specificity goes to the reliability of the source.

The police in *McArthur* had an opportunity to speak with the reporting source long enough to make a rough assessment of her reliability. Reliability is not an issue with AR W. He was an active duty service member reporting his knowledge of child pornography to a first class petty officer who was responsible for maintaining discipline in the barracks where the offense occurred. Because he observed a violation of the UCMJ, AR W had a duty to report that personal observation. See U.S. Navy

Regulations Art. 1137 (1990). His report of child pornography was, therefore, subject to repercussions under the UCMJ for false official statements. See Art. 107, UCMJ.

Information received from identifiable service members is entitled to a level of reliability not ordinarily granted to information provided by non-service members. Our superior court has stated:

We have previously recognized the unique "truth-telling effect" of an identified servicemember's giving information in the presence of a superior officer. *United States v. Land*, 10 M.J. 103, 105, 107 (C.M.A. 1980). This same salutary effect is present when the authority is a military police officer. *United States v. Harris*, *supra* 403 U.S. at 593 [] (Harlan, J., dissenting); *United States v. Davis*, [] 617 F.2d 677, 693 (D.C. Cir. 1979). Simply put, there is a degree of accountability in a military environment that is unparalleled in civilian society. *United States v. Schneider*, 14 M.J. 189, 192-93 (C.M.A. 1982); *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980); see *Schlesinger v. Councilman*, 420 U.S. 738, 757 [] (1975).

United States v. Tipton, 16 M.J. 283, 287 (C.M.A. 1983). The fact that AE1 C was not a commissioned officer as in *Land*, or a military police officer as in *Tipton*, *Harris*, and *Davis*, does not diminish the reliability of AR W's report. AR W "was in a poor position to fabricate with impunity." *Id.*

The information given by AR W was just as detailed as the information provided in *McArthur*, and it was provided by someone with greater reliability, thus making the information more trustworthy. We conclude that if probable cause existed in *McArthur*, then probable cause existed to believe that the appellant was committing a crime and that evidence of that crime existed in his computer located in his barracks room. Probable cause supported the seizure of the appellant's personal property located in his barracks room as long as the intrusion met the *McArthur* test for reasonableness. That test looks at (1) whether there was probable cause; (2) the exigency of the situation; (3) whether the Government made reasonable efforts to balance its needs with the appellant's reasonable expectation of privacy; and, (4) the length of the intrusion compared to how long it would take to reasonably obtain a warrant. *McArthur*, 531 U.S. at 331-32 (citations omitted).

The analysis in *McArthur* supports a conclusion that locking the appellant out of his barracks room was reasonable, and therefore lawful. First, the Government, as determined above, had probable cause to believe that the appellant's laptop computer, located in his barracks room, contained evidence of a crime and contraband - images of child pornography. Second, the Government could reasonably conclude that unless the barracks room was secured, the appellant could return and remove his laptop computer, thereby denying them access to the evidence. Third, the Government made reasonable efforts to balance its need to preserve evidence for use in the prosecution of a serious crime with the appellant's reasonable expectation of privacy in his computer and his barracks room. The appellant's barracks room was not searched and he was not apprehended. The Government left the appellant's room and his belongings intact until proper authorization to search was obtained. Fourth, the Government locked the appellant out of his room for a short period of time, from sometime after 1200 until the search began at 1540. This time period was less than reasonably necessary to obtain search authorization because the appellant consented to the search sometime between 1445 and 1540, thereby saving the Government the time it would take to obtain search authorization from the appropriate official.⁶ Given the limited nature of the intrusion and the Governmental interest at stake, this brief seizure of the appellant's barracks room and his personal property therein was reasonable, and therefore lawful.

The military judge reached the correct conclusion, but we believe for the wrong reason. We need not reach the issue of whether he abused his discretion, because any error did not materially prejudice the substantial rights of the appellant. See Art. 59(a), UCMJ. This assignment of error does not have merit.

Conclusion

The approved findings, as conditionally modified, and the sentence as approved below are affirmed. The conditional dismissal of Specification 1 under the Charge shall ripen to a full dismissal when direct review becomes final pursuant to Article 71(c), UCMJ. See *United States v. Britton*, 47 M.J. 195, 204 (C.A.A.F. 1997)(Effron, J., concurring). The appellant's motion for oral argument of 5 July 2006 is denied.

⁶ Because the appellant granted search authorization shortly after NCIS arrived on the scene, there was no obligation on NCIS' part to obtain further authorization.

We note that the General Court-Martial Order of 29 October 2003 does not reflect the conditional dismissal of Specification 1 under the Charge. The supplemental court-martial order shall reflect the military judge's conditional dismissal of that specification, and this court's direction that it ripen to a full dismissal when direct review becomes final.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court