

**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.

**Robert L. JONES III
Construction Mechanic Second Class (E-5), U. S. Navy**

NMCCA 200600541

Decided 27 February 2007

Sentence adjudged 28 September 2005. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Europe, Naples, Italy.

CAPT ALBERTO MUNGUIA, JAGC, USNR, Appellate Defense Counsel
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of attempting to communicate indecent language to a minor, violating a lawful general order by improperly using Government computers, transferring obscene material over the Internet contrary to 18 U.S.C. § 1470, attempting to destroy evidence contrary to 18 U.S.C. § 2232, and attempting to persuade, induce, entice, or coerce a minor to engage in sexual activity contrary to 18 U.S.C. § 2422, in violation of Articles 80, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, and 934. The appellant was sentenced to confinement for three years and a dishonorable discharge.

The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 15 months for six months from the date of trial. In an act of clemency, the CA deferred and then waived automatic forfeitures for six months from the date of his

action. In a further act of clemency, the CA deferred and then suspended the automatic reduction in pay grade for six months from the date of his action, at which time it was remitted without further action.¹

We have considered the record of trial, the appellant's sole assignment of error claiming that his guilty pleas to transferring obscene material over the Internet, and attempting to persuade, induce, entice, or coerce a minor to engage in sexual activity (Specifications 1 and 3, respectively, of Charge III), were improvident because they result in the improper extraterritorial application of federal statutes, and the Government's answer. We find partial merit in the appellant's assignment of error and will take corrective action in our decretal paragraph. See Arts. 59(a) and 66(c), UCMJ.

Improvident Pleas

The appellant's conduct under Specifications 1 and 3 of Charge III was charged as violations of Article 134, UCMJ. "Conduct is punishable under Article 134 if it 'prejudices good order and discipline in the armed forces' (clause 1), if it is 'of a nature to bring discredit upon the armed forces' (clause 2), or if it is a crime or offense not capital (clause 3)." *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005)(quoting *United States v. O'Connor*, 58 M.J. 450, 452 (C.A.A.F. 2003)). The appellant's conduct was specifically charged as "clause 3" offenses. In the instant case, 18 U.S.C. §§ 1470 and 2422 served as the crimes or offenses not capital.

The appellant's conviction of Specification 1 under Charge III (violating 18 U.S.C. § 1470) is supported by his guilty plea and admission that he used his computer's "web cam" connected to the Internet to transfer, on divers occasions, obscene material from Souda Bay, Crete, Greece, to an undercover Naval Criminal Investigative Service special agent posing as "Stephanie," a person the appellant believed to be 14 years of age, in Naples, Italy. The appellant's conviction of Specification 3 under Charge III (violating 18 U.S.C. § 2422) is supported by his guilty plea and admission that he used the Internet to communicate with "Stephanie," a person he believed to be 14 years of age, and asked her to leave Naples, Italy, to come to Souda Bay, Crete, Greece, for the purpose of engaging in sexual intercourse with the appellant. For us to set aside the

¹ The CA's authority to suspend and remit automatic reduction in pay grade is contained in Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0152(c) (15 Mar 2004).

findings of guilty based upon the appellant's guilty pleas, the record of trial must show a substantial basis in law and fact for questioning those guilty pleas. *O'Connor*, 58 M.J. at 453 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

Here, the appellant argues, and the Government concedes, in light of our superior court's holdings in *Martinelli* and *United States v. Heisler*, 64 M.J. 82 (C.A.A.F. 2006)(summary disposition), the appellant's pleas to Specifications 1 and 3 of Charge III are improvident as improper extraterritorial applications of 18 U.S.C. §§ 1470 and 2422. We agree.²

Our determination that the appellant's pleas are improvident as to violations of 18 U.S.C. §§ 1470 and 2422 does not end our inquiry. Our superior court has recognized that an improvident plea to a clause 3 offense under Article 134, UCMJ, may be upheld as a provident plea to a lesser included offense under clauses 1 and 2 of that same Article. *United States v. Hays*, 62 M.J. 158, 167 (C.A.A.F. 2005); *O'Connor*, 58 M.J. at 454. We must determine whether the record supports our affirming a conviction of a lesser included offense.

"For a guilty plea to be provident, the accused must be convinced of, and be able to describe, all of the facts necessary to establish guilt." *O'Connor*, 58 M.J. at 453 (citing RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion). "In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Id.* (quoting *Jordan*, 57 M.J. at 238). The accused must demonstrate that he clearly understands the nature of the prohibited conduct. *Hays*, 62 M.J. at 167.

During the providence inquiry for the specifications alleging violations of 18 U.S.C. §§ 1470 and 2422, the military judge specifically discussed with the appellant the possibility that these federal statutes might not have extraterritorial application under clause 3 of Article 134, UCMJ. He then explained that they might be a violation of either clause 1 or 2 of Article 134, UCMJ. When discussing each specification, the

² For the same reasons articulated by our superior court in *Martinelli* and *United States v. Reeves*, 62 M.J. 88, 92 (C.A.A.F. 2005), we find that 18 U.S.C. § 1470 was not intended by Congress to apply extraterritorially. Our superior court has previously held that 18 U.S.C. § 2242 did not apply extraterritorially. See *Heisler*, 64 M.J. at 88.

military judge asked the appellant if he believed his conduct was prejudicial to good order and discipline and whether those same acts were also service discrediting. Regarding each specification, the appellant admitted his conduct was both prejudicial to good order and discipline and service discrediting. Record at 90-91, 112. His answers and statements were not primarily the result of the military judge's "use of conclusions and leading questions that merely extract[ed] from an accused 'yes' and 'no' responses" *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004)(citing *Jordan*, 57 M.J. at 238; *United States v. Sweet*, 42 M.J. 183, 185 (C.M.A. 1995)). Instead, the appellant spoke freely so that a factual basis was clearly established in the record. His answers and statements demonstrated that he unquestionably understood the nature of the prohibited conduct. See *Hays*, 62 M.J. at 167. The record shows that the appellant was convinced of the facts predicate to a conviction under both clause 1 and 2 of Article 134, UCMJ, and that there was a sufficient factual basis to support guilty pleas to the lesser included offenses for Specifications 1 and 3 under Charge III. See R.C.M. 910(e).

Under these circumstances, we conclude that the record reflects an appropriate discussion of the character of the conduct at issue as both prejudicial to good order and discipline and service discrediting, and demonstrates that the accused clearly understood the nature of the prohibited conduct as being a violation of both clause 1 and 2 of Article 134, UCMJ. Accordingly, we will take corrective action in our decretal paragraph by amending Specifications 1 and 3 under Charge III. Our action does not alter the essential nature of the offenses, and there is no prejudice as to the sentence. Sentence reassessment, therefore, is not required. See *Hays*, 62 M.J. at 168-69 (citing *United States v. Augustine*, 53 M.J. 95, 96 (C.A.A.F. 2000); *United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004)(affirming the sentence)).

Conclusion

Specification 1 under Charge III is amended to read as follows:

In that Construction Mechanic Second Class Robert L. Jones III, U.S. Navy, U.S. Naval Support Activity, Souda Bay, Crete, Greece, on active duty, did, at or near U.S. Naval Support Activity, Souda Bay, Crete, Greece, on divers occasions, from on or about 14 September 2004, to on or about 27 October 2004,

knowingly use his computer's "web cam" to transfer obscene material over the Internet, to wit: live video of himself naked and masturbating his erect penis to the point of ejaculation, to Stephen Dreiss, a Naval Criminal Investigative Service undercover special agent, whom the said Construction Mechanic Second Class Robert L. Jones III believed to be "Stephanie," a female 14 years of age, and that the said Construction Mechanic Second Class Robert L. Jones III knew at the time of the divers transfers the nature and content of the matter transferred.

Specification 2 under Charge III is amended to read as follows:

In that Construction Mechanic Second Class Robert L. Jones III, U.S. Navy, U.S. Naval Support Activity, Souda Bay, Crete, Greece, on active duty, did, at or near U.S. Naval Support Activity, Souda Bay, Crete, Greece, on divers occasions, from on or about 14 September 2004 to on or about 27 October 2004, wrongfully and knowingly attempt to persuade, induce, entice, or coerce "Stephanie," someone he thought was a female 14 years of age, who was, in fact, Stephen Dreiss, a Naval Criminal Investigative Service undercover special agent, to travel from Naples, Italy, to Crete, Greece, for the purpose of engaging in sexual activity with the said Construction Mechanic Second Class Robert L. Jones III.

The findings, as amended, and the sentence as approved below are affirmed. We direct that the supplemental court-martial order reflect this court's action.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court