

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SHAWN P. KEETON
AIRMAN (E-3), U.S. NAVY**

**NMCCA 200602471
GENERAL COURT-MARTIAL**

Sentence Adjudged: 30 August 2006.

Military Judge: CDR Lewis T. Booker, Jr., JAGC, USN.

Convening Authority: Commander, Navy Region, Mid-Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC,
USN.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: LCDR Guillermo J. Rojas, JAGC, USN; LT Justin
Dunlap, JAGC, USN.

27 November 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

A military judge sitting as a general court-martial, convicted the appellant, consistent with his pleas, of violating a lawful order by using government computers to view child pornography and of knowingly possessing child pornography as defined under 18 U.S.C. § 2252A(a)(5), on *divers occasions*, in violation of Articles 92 and 134, Uniform Code of Military Justice. The appellant was sentenced to confinement for 11 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

In his sole assignment of error, the appellant contends that his plea to possessing child pornography on *divers occasions* was improvident because the appellant only acknowledged downloading

child pornography on a single occasion. After considering the record of trial, the appellant's assignment of error, and the Government's response, we agree with the appellant. We will take appropriate action in our decretal paragraph. Following our action, we conclude that the findings and the sentence, as modified, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

During the providence inquiry, the appellant admitted using a government computer onboard the USS SHREVEPORT (LPD 12) to view a pornographic website. Later, the appellant accessed the same website from his home computer and downloaded images of child pornography; saving them first to his hard drive and then to a compact disk (CD). The appellant took the CD aboard the USS SHREVEPORT, where he viewed the images three to four times a week for the next year. Record at 29-47.

The specification under Charge II alleges possession of child pornography on *divers occasions*. Initially, the military judge was troubled by the *divers occasions* language because the appellant stated that he downloaded images from the internet to the hard drive of his home computer and then saved the exact same images again to a CD within a single half-hour session on his computer. Record at 39-46. The military judge ultimately determined, however, that the *divers occasions* language was supported because the appellant saved the same images to both his hard drive and to the CD.¹ *Id.* We disagree.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)(citations omitted). A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law and fact for questioning the plea. *United States v. Carr*, 65 M.J. 39, 40-41 (C.A.A.F. 2007)(citations omitted).

The appellant cites *United States v. Simmons*, No. 200400955, 2005 CCA LEXIS 218, unpublished op. (N.M.Ct.Crim.App. 11 July 2005) and *United States v. Dees*, ACM 34841, 2002 CCA LEXIS 317, unpublished op. (A.F.Ct.Crim.App. 13 December 2002), *aff'd in part and reversed in part*, 63 M.J. 251 (C.A.A.F. 2006) to support his claim that saving the same pornographic images to two different media (hard drive and CD) did not constitute multiple possessions of the images. Appellant's Brief of 6 Feb 2007 at 9.

In *Simmons*, this court concluded that *divers occasions* did not exist where the appellant possessed images of child pornography on his home computer, then transported the computer aboard Camp Lejeune. *Simmons*, 205 CCA LEXIS 218 at 10-11. Our decision was premised on the fact that the appellant did not

¹ The appellant's stipulation of fact reflects the same essential facts. Prosecution Exhibit 1.

acquire additional images of child pornography at any point after the initial download. *Id.*

In *Dees*, the United States Air Force Court of Criminal Appeals decided that the appellant's plea was improvident where he admitted downloading five to ten images of child pornography onto the hard drive of a government computer. *Dees*, 2002 CCA LEXIS 317 at 12. The court's rationale focused on the fact that there was only one "continuous and exclusive possession of the disk in question." *Id.*

While neither of these cases involved multiple media containing the same pornographic images, we nonetheless recognize that there is ambiguity in the specification. The specification alleges that the appellant possessed child pornography. This generalized assertion impliedly focuses both us and the appellant on his possession of the images themselves. There is no evidence that the appellant possessed more or different images on his home computer than on the CD. While 18 U.S.C. § 2252A(a)(5) clearly prohibits possession of each media containing child pornography, the specification at bar never asserts this as a basis for the charge.

To resolve the ambiguity, we examined the military judge's providence inquiry questions. We note that when the military judge set out the elements of the offense at the beginning of the providence inquiry, he only referenced the appellant's possession of the CD aboard a vessel. No mention was made of the appellant's home computer or its hard drive. Record at 20-21. Any uncertainty in the findings caused by the "divers occasions" language should be resolved in favor of the appellant. *See generally United States v. Walters*, 58 M.J. 391, 396 (C.A.A.F. 2003). We find, therefore, that the appellant's providence inquiry did not support a finding that he possessed child pornography on more than one occasion.

We specifically do not reach the question of whether 18 U.S.C. § 2252A(a)(5) would, if properly charged, support prosecution for multiple possessions of the same pornographic images based on possession of multiple media containing identical images.

Conclusion

As to the Specification of Charge II, the specification is affirmed except for the words "on divers occasions." The finding of guilty to the excepted words is set aside. The findings of guilty of the specification of Charge II, as excepted, and the remaining findings of guilty are affirmed.

As a result of our action on the findings, we reassessed the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434 (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). We are satisfied that, absent the excepted language, the sentence would not have been any less than that adjudged by the military judge and approved by the convening authority. The approved sentence is affirmed.

Senior Judge GEISER and Judge KELLY concur

For the Court

R.H. TROIDL
Clerk of Court