

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

BEFORE

W.L. RITTER

J.F. FELTHAM

E.S. WHITE

UNITED STATES

v.

**David J. MURRAY
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200501175

Decided 11 January 2007

Sentence adjudged 19 May 2005. Military Judge: J.M. Schum.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial
convened by Commanding Officer, Marine Aircraft Group 24, 1st MAW,
MCBH, Kaneohe Bay, HI.

LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LCDR E. RUBIELLA, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his plea, of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The adjudged and approved sentence included confinement for 12 months, forfeiture of \$795.00 pay per month for 12 months, reduction to pay grade E-1, and a bad-conduct discharge.

We have carefully considered the record of trial, the appellant's sole assignment of error, and the Government's response. We find merit in the appellant's contention, and dismiss the sole charge and specification.

Illegal Search and Seizure of Computer

In his sole assignment of error, the appellant contends the military judge erred in denying the defense motion to suppress all evidence discovered as a result of Sergeant Fisk's search of the appellant's personal laptop computer. We agree.

Facts¹

The appellant was assigned as a technician in an aircraft systems work center consisting of several interconnecting mobile vans. He and one other Marine shared a work space in one of the mobile vans, at the far end. The appellant sometimes brought his personal laptop computer to work so that he could listen to music while working. He would leave his computer unattended during the work day while he was away from his work station, without any password protection. He always took his computer home with him at night. There was no command policy against bringing personal computers to work. In fact, the appellant's chief petty officer would occasionally bring his own personal laptop computer into work.

One day while the appellant was away from his work station, his work production supervisor, Sergeant (Sgt) Fisk, walked into the appellant's work space and heard the laptop computer playing music. Sgt Fisk believed that personal laptop computers should not be brought to work. Since there was no rule forbidding this practice, he decided to look in the computer's files to find something inappropriate stored there that he could use as a reason for telling the appellant to take it home. Sgt Fisk manipulated the computer screen until he found files other than the music playing function then in use. He began opening folders to see what other types of media could be played.

In a folder entitled "chillover," Sgt Fisk found a video that depicted a girl of about 5 years of age performing oral sex on an adult male. Sgt Fisk was aware that possessing child pornography was illegal, and therefore took custody of the appellant's laptop computer, leaving a detachable hard drive behind. After reporting what he had found to his supervisor,

¹ We find the military judge's essential findings of fact are not clearly erroneous and we adopt them except as follows:

(1) Findings #45 and #46 are reversed, because the advisement of rights and agreement to provide a statement occurred *after* the appellant signed a permissive authorization to search. Record at 145.

(2) We do not adopt Finding #48 because it is unsupported by the cited page and is not otherwise evident from the record.

(3) We note that there is no finding of fact numbered 49.

Sgt Fisk delivered the laptop computer to agents of the Naval Criminal Investigative Service (NCIS).

The appellant returned to his work station after running an errand and found his personal laptop computer missing. Within a couple of hours, the appellant was taken to the local NCIS office. There agents told him that they had his computer, that suspected child pornography had been found on it, and that he was suspected of possessing child pornography. The appellant signed a voluntary authorization to search his computer and any electronic storage media within his barracks room. He was then advised of his rights. He waived his rights and spoke with the agents, denying that he had any child pornography on his computer or any knowledge of how child pornography might have gotten on his computer. The appellant was not given cleansing warnings, either orally or in writing, at any point in this process. The appellant confessed to possessing child pornography later during this interview with NCIS agents.

At trial, the appellant filed a motion to suppress evidence on the ground that Sgt Fisk's search of his computer violated the Fourth Amendment of the United States Constitution. The military judge denied the motion and held that Sgt Fisk's actions did not constitute a search because the sergeant was not looking for evidence of a crime. The military judge further held that, based on the totality of the circumstances, the subsequent permissive search authorization and the appellant's confession were voluntarily given. After the military judge denied his suppression motion, the appellant entered a conditional plea of guilty, thus preserving this issue on appeal.

Discussion

We review a military judge's rulings on the admission or exclusion of evidence, including rulings on motions to suppress, for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We review a military judge's findings of fact under a clearly erroneous standard and his conclusions of law de novo. *Id.*

The military judge held that Sgt Fisk's manipulation of the files on the appellant's personal laptop computer constituted governmental action and that the appellant had a reasonable expectation of privacy in this computer. Appellate Exhibit XV at 5-6. The Government does not challenge these conclusions in its brief, and we agree with the military judge in these respects.

Simply put, Sgt Fisk had direct supervisory authority over the appellant and was acting pursuant to this authority when he viewed the laptop computer files. The computer was personal property, and the appellant used it as such, storing personal financial data such as billing accounts and account numbers. His testimony on the motion clearly evinced a subjective expectation of privacy in the computer. Furthermore, we agree with the military judge that our society recognizes as reasonable such an expectation of privacy in personally-owned computers.

Did Sgt Fisk's Actions Constitute a Search?

The military judge denied the appellant's suppression motion because he did not view Sgt Fisk's actions as a "search," which he defined as a quest for evidence of a crime. The military judge relied on Sgt Fisk's testimony that he acted quickly, did not consider the possibility that he might find evidence of a crime, and was only looking for some kind of adult pornography or other information that could be considered "inappropriate" to serve as an excuse for ordering the appellant not to bring his personal laptop to his work space. Thus, the military judge found that Sgt Fisk's conduct did not constitute a search based on the latter's subjective intent.

But this rationale does not take into account the broader definition of "search" taken by the United States Supreme Court in recent cases, such as *Soldal v. Cook County*, 506 U.S. 56, 69 (1992) and *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"), and later by our superior court in cases such as *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004). These cases define a Fourth Amendment "search" not in terms of the subjective intent of the government agent, but solely in terms of a government intrusion involving an individual's reasonable expectation of privacy. Under this rationale, Sgt Fisk's governmental intrusion into an area in which the appellant had a reasonable expectation of privacy was a search within the meaning of the Fourth Amendment.

We find the military judge's ruling was based on an erroneous view of the law, and that Sgt Fisk's actions constituted a search of the appellant's computer.

Was Sgt Fisk's Search Unreasonable?

We must now consider whether Sgt Fisk's search was unreasonable, and thus barred by the Fourth Amendment because it was not based on probable cause.

Except in certain carefully defined classes of cases, a search that invades a reasonable expectation of privacy, without proper consent, is unreasonable unless it has been authorized by proper authority based on probable cause. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court recognized two workplace exceptions to the probable cause requirement, namely: (1) a search for noninvestigatory, work-related purposes; and (2) an investigatory search involving matters of workplace misconduct. See also *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). In either situation, the search is evaluated using the standard of reasonableness based on all the surrounding facts and circumstances. *Id.*

We find that neither of the two recognized work place exceptions applies. As in *Long*, the Government fails to meet the first exception because it has not demonstrated that Sgt Fisk's search was "justified at its inception." First, Sgt Fisk testified that he was looking through the appellant's computer files to find something "inappropriate" to use as a basis for creating a new policy rule. Since many "inappropriate" files might not contain child pornography and still violate federal law or military regulations, there were many possible outcomes of the search that could result in criminal prosecution. For that reason, we view his stated purpose to be tantamount to a search for evidence of a crime.

Second, we find Sgt Fisk's work-related purpose for perusing through the appellant's computer files -- to find a basis for creating a new policy contrary to his superior's practices and applicable only to his own subordinates -- was an insufficient basis for governmental intrusion into an area in which society recognizes a reasonable expectation of privacy. To hold otherwise would render a servicemember's Fourth Amendment protections subject to the capricious whims of any supervisor.

As for the second workplace exception, Sgt Fisk's actions cannot be deemed an "investigatory search involving matters of workplace misconduct" because the appellant was not suspected of

workplace misconduct. Thus, there was no ongoing investigation into the appellant's activities at the time of Sgt Fisk's search.

We find Sgt Fisk's manipulation and viewing of the appellant's files in his personal laptop computer was an unreasonable search within the meaning of the Fourth Amendment. Sgt Fisk's subsequent seizure of the laptop was based on this search, was consequently unreasonable, and violated the Fourth Amendment as well.

Consent Search and Appellant's Confession

The Government contends, and the military judge further found, that even if Sgt Fisk's actions constituted an illegal search, the later search conducted by the NCIS and the appellant's confession were the products of voluntary consent. We disagree.

Evidence obtained from exploitation of some prior illegality is excludable as evidence. *United States v. Kesteloot*, 8 M.J. 209, 210 (C.M.A. 1980); *United States v. Waller*, 3 M.J. 32, 34 (C.M.A. 1977). But "[e]vidence obtained from a source independent of the illegally obtained evidence . . . and evidence having only an attenuated connection with the illegal evidence" is properly admissible. *Kesteloot*, 8 M.J. at 210.

As refined by the United States Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963), the "fruit of the poisonous tree" doctrine does not exclude evidence simply because it would not have come to light but for the illegal actions of the Government. Rather, the key issue is whether the evidence sought to be suppressed was found "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488. This analysis is valid both for evidence obtained by a search and to a confession obtained after evidence has been illegally obtained. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); *United States v. Murphy*, 39 M.J. 486, 488 (C.M.A. 1994). Factors to be considered in assessing whether a consent to search or a confession were obtained by exploitation of illegal conduct include: (1) the temporal proximity of the illegal conduct and the evidence obtained, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the Government misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

Where the Government relies on consent to justify the lawfulness of a search, it has the burden to prove the consent was freely and voluntarily given. *United States v. Radvansky*, 45 M.J. 226, 229 (C.A.A.F. 1996). Consent must be shown by clear and convincing evidence. MILITARY RULE OF EVIDENCE 314(e)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). A military judge's determination that a person voluntarily consented to a search is a factual determination that will "not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous." *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994). The voluntariness of consent is determined by the totality of the circumstances. MIL. R. EVID. 314(e)(4).

Likewise, the voluntariness of a confession must be shown by clear and convincing evidence and is determined based on the totality of the circumstances. MIL. R. EVID. 304(a)(3); *Murphy*, 39 M.J. at 488-89.

The appellant consented to the NCIS agents' search of his computer and hard drive only after: (1) he was taken to their office under orders; (2) he was told that the NCIS had custody of his personal property; and (3) he was told that child pornography had already been found on his computer. Record at 134-37. This occurred within two hours of the unreasonable search and seizure of the appellant's computer. No cleansing warnings were given. Although the military judge concluded that the appellant believed that by consenting to the search he would appear cooperative and that the NCIS would not find any incriminating evidence,² we view the evidence as demonstrating that he consented to the search only because he knew that NCIS agents already had his computer, had found child pornography on it, and could get a warrant if he refused his consent to search. Record at 34-35. Moreover, we find that Sgt Fisk's search and seizure of the appellant's computer directly led to the NCIS agents' questioning of the appellant, and gave them the leverage they used to obtain his consent to search.

After considering the factors set forth in *Brown* for determining whether the appellant's consent was obtained by exploitation of illegal conduct, we find no attenuating

² The military judge concluded that "most if not all" of the child pornography discovered was stored on an external hard drive rather than the laptop computer, and that the hard drive had been left in the appellant's work space by Sgt Fisk. Appellate Exhibit XV at 7. We do not find the record clear as to whether child pornography was found on the laptop computer or just on the hard drive. Nevertheless, the hard drive came into NCIS custody, and the record strongly suggests that this was due either to Sgt Fisk's actions or to the appellant's consent authorization.

circumstances that could have lessened the taint of the derivative evidence. The time between the illegal conduct and the appellant's confession and consent to search was *de minimus*. There were no intervening circumstances to lessen the taint of Sgt Fisk's illegal search and seizure. Finally, Sgt Fisk's reasons for searching the appellant's computer were clearly contrary to the purpose of the Fourth Amendment.

We find the military judge erred in holding that the appellant voluntarily confessed and authorized the NCIS search of his personal property. Thus, both the confession and the evidence obtained as a result of the search of the appellant's property were inadmissible at trial. The sole charge and specification are therefore set aside and dismissed without prejudice. All rights, privileges, and property of which the appellant was deprived by virtue of the execution of any portion of the sentence will be restored.

Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court