

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

BEFORE

J.W. ROLPH

J.D. HARTY

R.G. KELLY

UNITED STATES

v.

**Michael W. NORMAN
Lieutenant (O-3), U.S. Navy**

NMCCA 200700042

Decided 8 August 2007

Sentence adjudged 13 October 2006. Military Judge: L.T. Booker. Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel
LT LARS C. JOHNSON, JAGC, USN, Appellate Government Counsel
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ROLPH, Chief Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, in accordance with his pleas, of two specifications of attempting to persuade or entice minors under the age of 16 to engage in sexual activity in violation of 18 U.S.C. § 2422(b), as alleged under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a dismissal, confinement for 1 year, forfeiture of all pay and allowances, and a fine of \$10,000. As the appellant's pretrial agreement had no impact upon the sentence awarded, the convening authority (CA) approved the sentence as adjudged.

In his single assignment of error, the appellant alleges that the \$10,000 fine he was awarded in addition to total forfeiture of all pay and allowances is inappropriately severe, and violates the "Excessive Fines" clause of the Eighth Amendment to the Constitution. See Appellant's Brief and Assignment of Error dated 13 Mar 2007 at 1.

We have examined the record of trial, the appellant's brief and assignment of error, and the Government's answer. We agree that corrective action in regard to the sentence is required, but for reasons other than those raised by the appellant. After taking corrective action in our decretal paragraph, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Factual Background

At the time of his offenses, the appellant was an active-duty naval officer assigned to the Naval Coastal Warfare Squadron FOUR in Portsmouth, VA. He was also married. The stipulation of fact submitted in support of his guilty pleas, along with the providence inquiry conducted by the military judge, established that, in May 2006, the appellant began communicating via Internet "chat rooms" with individuals he believed were 14-year-old girls. See Prosecution Exhibit 1 at 1-5. Using Yahoo! instant messaging services, and the screen name "spectre_z", the appellant struck up online conversations with two separate individuals, one using the screen name "long_redhaired_barbie" and the other using the screen name "meredithva92." In both online conversations, the appellant admitted believing he was "chatting" with 14-year-old females, that he steered both conversations toward graphic sexual activity, and that he made detailed arrangements to meet both females at separate times for the purpose of engaging in sexual activity, and ultimately traveled to the prearranged locations for such meetings. PE 1 at 2-5. In fact, the appellant's chat partners were not 14-year-old girls at all, but adults posing as 14-year-old girls and monitoring the Internet for improper solicitations of minor females. One of these individuals was detective Eddie Depena of the Norfolk, VA police department. The appellant was arrested on 23 July 2006 by Detective Depena when he traveled to a prearranged rendezvous site -- a McDonalds Restaurant in Virginia Beach, VA - to meet with "meredithva92" for the purpose of engaging in sex with her.

Inappropriately Severe Sentence

The appellant initially complains that the \$10,000 fine that he received as a part of his sentence, and which was approved by the CA, is inappropriately severe in light of the offenses he committed and the balance of his sentence, which also included a dismissal, one year of confinement, and forfeiture of all pay and allowances. Though acknowledging clearly established precedent that states that it is not unlawful to award a fine in cases where no unjust enrichment has taken place, *see United States v. Stebbins*, 61 M.J. 366, 372 (C.A.A.F. 2005), the appellant nevertheless argues that his lack of any personal enrichment from the offenses, along with the absence of actual harm to any minor female, renders his sentence inappropriate under Article 66(c), UCMJ.

Our sentence appropriateness determination under Article 66(c), UCMJ, requires thoughtful judicial analysis by this court of the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important determination, we give individual consideration to the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959). Without showing deference to the military judge who awarded the sentence, we independently determine the appropriateness of the sentence under the circumstances of each case. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We do not, however, award clemency, as that is the exclusive prerogative of the convening authority. *Id.* at 383; *Healy*, 26 M.J. at 396. Though we believe the sentence in this case to be appropriate, we find that the appellant was never clearly placed on notice that his pecuniary exposure at this general court-martial could exceed total forfeiture of pay and allowances, and that an ambiguity in his pretrial agreement necessitates our disapproval of the fine adjudged. See *United States v. Williams*, 18 M.J. 186 (C.M.A. 1984); *United States v. Whitekiller*, 8 M.J. 772 (N.C.M.R. 1979), *reconsidered*, 8 M.J. 620 (N.C.M.R. 1979).¹

Though the appellant acknowledges on the record of this general court-martial his understanding that his maximum punishment might include "forfeiture of all pay and allowances" and "a fine," Record at 13, 14-15, nowhere does he acknowledge full understanding that he might be caused to suffer both in combination, and in an amount exceeding total forfeitures. Also, in his pretrial agreement, confusion is clearly generated in the sentence limiting portion of the agreement in regard to this matter as it reads in paragraph 3, "**Forfeiture or Fines:** May be approved as adjudged." Appellate Exhibit II at ¶ 3 (italics added). In our opinion, the "or" language creates a clear ambiguity in regard to whether the convening authority was at liberty to approve both forfeitures and a fine when awarded in combination, or whether the parties contemplated that one or the other could be approved, but not both.² Traditionally, if it was contemplated that both could be approved, the word "and" would be used. Unfortunately, the military judge did not discuss this ambiguity with the appellant so as to provide a clear indication of the appellant's understanding of the term.

¹ We have carefully considered the appellant's claim that his fine violates the "Excessive Fines" clause of the 8th Amendment and find it to be without merit. *United States v. Bajakajian*, 524 U.S. 321 (1998); *Stebbins*, 61 M.J. at 372-374; *United States v. Reed*, 54 M.J. 37, 44-45 (C.A.A.F. 2000).

² We do not believe that this ambiguity impacts the providence of the appellant's pleas of guilty. *Whitekiller*, 8 M.J. at 620-21. This is especially true in light of our remedial action.

We addressed a problem similar to this in *Whitekiller*. In *Whitekiller*, the military judge, sitting as a general court-martial, failed to advise the accused that both a fine and total forfeitures could be imposed against him, resulting in a pecuniary loss in excess of total forfeitures. Additionally, in reviewing the terms of the accused's pretrial agreement, the trial judge told Airman Whitekiller that there were four parts to the possible sentence he might be awarded, including "the money part, forfeitures and fines." 8 M.J. at 773. The pretrial agreement in *Whitekiller* -- as in the appellant's case -- stated in paragraph 3: "Forfeiture *or* fine (amount and duration) as adjudged." *Id.* at 774 (*italics added*). In relation to this language we ruled:

The wording of the pretrial agreement and the advice given by the military judge creates an ambiguity in regard to a fine. Did the accused think he could receive forfeitures and a fine or did he think he would receive a fine or forfeitures but not both? This ambiguity must be resolved in favor of the appellant.

Id. (citing *United States v. Eymmer*, 1 M.J. 990 (N.C.M.R. 1976)); see also *United States v. Flecha*, No. 200300564, 2003 CCA LEXIS 208 (N.M.Ct.Crim.App. 26 Aug 2003). Due to this ambiguity, we disapproved the \$5,000 fine that had been awarded to Airman Whitekiller, approving only the remaining sentence, including total forfeitures. *Id.* On reconsideration, we affirmed our view that "before both total forfeitures and a fine can be approved the appellant must have been advised during the providence inquiry that his pecuniary loss could exceed the total forfeitures." *Whitekiller*, 8 M.J. at 621. We now add to this admonition the additional caveat that pretrial agreement terms addressing this issue must be unambiguous in advising the accused that both forfeitures *and* fines awarded may be approved as adjudged, especially when the accused's pecuniary exposure may exceed total forfeiture of pay and allowances.

Unlike *Whitekiller*, the military judge in this case did in fact tell the appellant that the maximum punishment in his case included, *inter alia*, "total forfeitures, a fine, and to be dismissed from the naval service."³ Record at 15. However, the appellant was never advised by the judge that his pecuniary liability could exceed total forfeitures - that is, that a fine could be awarded ***in addition to*** total forfeitures. The absence of this advice renders the ambiguity in paragraph 3 of the appellant's pretrial agreement especially troubling and, in our opinion, irresolvable from the record of trial. We must disapprove the adjudged fine.

³ The maximum confinement authorized was ultimately determined to be 60 years.

Conclusion

The findings of guilty and that part of the sentence extending to a dismissal, total forfeitures, and 1 year of confinement are affirmed.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court