

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Nathan K. PROCTOR
Seaman Apprentice (E-2), U.S. Navy**

NMCCA 200601171

Decided 12 June 2007

Sentence adjudged 20 March 2006. Military Judge: L.T. Booker.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

CDR BREE ERMENTROUT, JAGC, USN, Appellate Defense Counsel
Maj BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of unauthorized absence, two specifications of insubordinate conduct, three specifications of indecent language, and two specifications under 18 U.S.C. § 2422(b) of attempting to entice a minor to engage in sexual acts, in violation of Articles 86, 91, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, and 934. The appellant was sentenced to confinement for 54 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, pursuant to the pretrial agreement, suspended all confinement in excess of three years for the period of confinement plus 12 months.

On appeal, the appellant raises four assignments of error. First, that the military judge erred by accepting the appellant's guilty pleas to Specifications 4 and 5 of Additional Charge II (AC II) because "the facts failed to establish

substantial preparation to attempt to engage in illegal sexual activity." Appellant's Brief of 23 Oct 2006 at 4-6. Second, that the military judge erred by accepting the appellant's guilty plea to Specification 5 of AC II because "the facts indicated possible entrapment." *Id.* at 6-7. Third, the appellant requests dismissal of Specifications 1 and 2 of AC II because "they are an unreasonable multiplication of charges" with Specifications 4 and 5 of AC II. *Id.* at 8-9. Finally, that the appellant's guilty plea to the sole specification under the Additional Additional Charge (AAC) is improvident because the military judge "failed to establish the factual basis" for the plea. *Id.* at 9-11.

We have considered the record of trial, the assignments of error,¹ and the Government's response. We conclude the findings of guilty with regard to the AAC and its sole specification must be set aside. We will take corrective action in our decretal paragraph. Otherwise we conclude the remaining findings and the 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 admitted the following facts during the providence inquiry and in a stipulation of fact. See Record at 44-65, 66-97; Prosecution Exhibit 1 at 2-6.

On 14 August 2005, the 19-year-old appellant used his Internet account "texassailor04" to send instant messages (IM's)² to "annee_gurl," whom he believed was a 12-year-old girl. In reality, "annee_gurl" was an adult female named Katherine Hall who worked for an organization that uses the Internet to expose child predators. The appellant's IM's to "annee_gurl" contained sexually explicit statements, indecent language, and enticements

¹ The assignments of error pertain to Specifications 1, 2, 4, and 5 under AC II and the AAC only. The appellant assigns no error to the sole specifications under Charge I (unauthorized absence) or Charge II (insubordinate conduct: disrespect), or to Specification 3 under AC II (indecent language).

² Instant messaging (IM'ing) is a form of written communication via the Internet, occurring in "chat rooms" where groups of people can communicate with each other at the same time. Chat rooms are organized by topics or themes, with various sub-categories. IM'ing is similar to e-mail but with the benefit of nearly immediate back-and-forth between participants resembling a stilted conversation. Once contact is made in a chat room, those wanting to communicate one-on-one can proceed to private rooms.

for her to meet him and engage in various forms of sexual contact to include sexual intercourse and sodomy. The appellant initiated contact with "annee_gurl" and discussed sexual activity with her even though she told him she was 12 years old. His IM conversation with her lasted approximately four hours. During this conversation the appellant attempted to persuade "annee_gurl" to meet him for sexual activity. While discussing plans to meet, the appellant stated he could not meet her the next day because his ship was getting underway but suggested meeting when he got back in two weeks. Had his ship not been getting underway, the appellant would have tried to meet her in person and convince her to perform sexual intercourse, sodomy, and/or indecent acts with him.

Over a two-month period from September to October 2005, the appellant sent similar IM's to "navybratt_420," whom he believed was a 14-year-old girl named Amanda. In reality, "navybratt_420" was an adult female named Patrice Sessoms, a Special Agent with the Naval Criminal Investigative Service (NCIS). The appellant's IM's to "navybratt_420" contained sexually explicit statements, indecent language, and enticements for her to meet him and engage in various forms of sexual contact to include sexual intercourse and sodomy. The appellant initiated contact with "navybratt_420" and discussed sexual activity with her even though she told him she was 14 years old. The appellant attempted to persuade "navybratt_420" to meet him at the Navy Lodge on Friday, 7 October 2005. He planned on meeting her on that date to have sexual intercourse. The appellant missed their rendezvous because he had to work late. He stated he wanted to meet her the next day but had duty. Afterward, the appellant sent "navybratt_420" an IM apologizing for not showing up on 7 October. But for working late and duty the appellant would have tried to meet her in person and convince her to perform sexual intercourse, sodomy, and/or indecent acts with him.

With regard to both "annee_gurl" and "navybratt_420" the appellant admitted his actions were "a substantial step and a direct movement toward the commission of the intended offenses," and "more than mere preparation." The appellant stated he would have committed these sexual acts with "annee_gurl" and "navybratt_420" even though they were 12 and 14 years old, respectively.

On 23 November 2005 at 0730, the appellant's Leading Petty Officer (LPO), Aviation Boatswain's Mate First Class (ABE1) Craig Powers, U.S. Navy, ordered the appellant to put on his

uniform. The appellant did not do so. Thereafter until 0830 ABE1 Powers repeatedly ordered the appellant to get into uniform but he still failed to comply. At approximately 0830, the appellant eventually put on a uniform, however, he put on a red T-shirt instead of the required white, and a civilian belt buckle. During his providence inquiry, he stated his white T-shirt and military belt buckle were inaccessible as they were in his off-base vehicle at the time.

Improvident Pleas

The appellant's first, second, and fourth assignments of error contend his guilty pleas before the court were improvident. A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). Pleas of guilty should not be set aside on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The appellant "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); see also RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The factual predicate for a guilty plea is sufficiently established if "'the factual circumstances as revealed by the accused himself objectively support that plea....'" *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)(quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). When a plea is first attacked on appeal, the evidence is viewed in the light most favorable to the Government. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989)(Cox, J., concurring).

The first assignment of error asserts the military judge erred because the facts articulated during the appellant's providence inquiry did not establish his "substantial preparation to attempt to engage in illegal sexual activity" with two minors as charged under Specification 4 and 5 under AC II.³ We disagree. The appellant stated he tried to persuade and coerce these minor girls to commit sexual acts with him and, regardless of their tender years, fully intended to carry out his plans to perform sexual intercourse, sodomy and/or indecent acts with them. He attempted to secure their agreement by promising to buy them clothing, expressing a desire to engage in

³ It is immaterial that the minor girls were fictional characters portrayed by adult women.

sexual acts with them, describing the sexual acts he hoped to perform on them, and making specific arrangements to meet them. The assertion that he "never took any substantial steps to persuade or entice" and therefore lacked the "resolve to commit [an] offense" is contrary to his admissions at trial and is not persuasive. Appellant's Brief at 5-6. But for the fact his military obligations were unavoidable, the appellant acknowledged he would have gone to the rendezvous and committed these intended offenses.

The second assignment of error argues the appellant's guilty plea to Specification 5 of AC II (attempt to entice minor "navybratt_420" to commit sexual acts) was improvident because the military judge erred by not inquiring into the possible defense of entrapment. The appellant did not raise this at trial either by motion, objection, or as a defense - affirmative or otherwise. It is therefore waived. See R.C.M. 801(g), 905(e), 910(j); see also MILITARY RULE OF EVIDENCE 311(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Moreover, the appellant frames this assignment of error as "possible entrapment," however, a military judge's acceptance of a guilty plea will not be overturned based on the "'mere possibility' of a defense." *Faircloth*, 45 M.J. at 174.

Even assuming, *arguendo*, the issue was not waived, the appellant fails to meet his initial burden of demonstrating that SA Sessoms originated the suggestion to commit the offense. See *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002); *United States v. Lubitz*, 40 M.J. 165, 167-68 (C.M.A. 1994). He fails to account for his admission that he initiated contact with "navybratt_420" on at least one occasion and continued communicating with her regarding sexual matters despite being told early on that she was only 14 years old. Furthermore, he had similar communications with "annee_gurl" months prior to his communications with "navybratt_420" which evidences an existing intent to commit the offenses charged. His own testimony dismisses the defense of entrapment. Additionally, the fact that the Government "afford[ed] the opportunit[y] or facilit[y] for the commission of the offense does not constitute entrapment." R.C.M. 916(g), Discussion; see also *United States v. Bell*, 38 M.J. 358, 360 (C.M.A. 1993). This assignment of error lacks merit.

As to Specifications 1, 2, 4, and 5 of AC II the military judge correctly informed the appellant of each of the elements and their accompanying definitions. In each instance, the appellant acknowledged that he understood and that the elements

were true. Further, we do not find that the appellant merely acquiesced to the military judge's questions concerning these specifications. The appellant provided a detailed stipulation of fact and filled in numerous details at various points during the providence inquiry such that we are satisfied he articulated a factual basis for each element of each offense and that he truly believed he was guilty of Specifications 1, 2, 4, and 5 under AC II. We find that there is no substantial basis in law or fact to question the appellant's pleas of guilty to these specifications. We find, therefore, that the military judge did not abuse his discretion by accepting the appellant's pleas of guilty to Specifications 1, 2, 4, and 5 of AC II.

Under his fourth assignment of error the appellant contends his guilty plea to the AAC (disobeying order from petty officer) was improvident because the facts were insufficient to support his willful disobedience. Appellant's Brief at 9-11. We agree. The appellant repeatedly failed to comply with orders to put on a uniform and then, more than one hour later, put on an unauthorized one. We note, however, that the appellant's responses during his providence inquiry indicated he did not have a proper uniform available at the time ABEL Powers ordered him to put one on. It appears the uniform items were in the appellant's vehicle off-base.

Although the appellant agreed with the military judge that he could have complied with the order, there was no inquiry into how the appellant might have complied given the unavailability of his uniform items.⁴ "Failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation" of Article 91, UCMJ. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 14c(2)(f). Since it appears it was physically impossible for the appellant to access his proper uniform at the time the order was given we cannot find that his failure to obey was willful. Even taken in the light most favorable to the Government, the facts in the record do not support a conviction for disobeying the order as charged under the sole specification of the AAC.

Unreasonable Multiplication of Charges

The appellant's third assignment of error contends that Specifications 1 and 2 of AC II (indecent language) are an unreasonable multiplication of charges, respectively, with Specifications 4 and 5 of AC II (attempt to entice an individual

⁴ We cannot speculate whether the appellant could have borrowed or otherwise obtained the necessary uniform items.

under the age of 16 to engage in sexual activity). Appellant's Brief at 8-9. We disagree.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). While multiplicity is based on the constitutional and statutory prohibitions against double jeopardy, the doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.*

We apply five non-exclusive factors in evaluating a claim of unreasonable multiplication of charges:

- (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
- (2) Is each charge and specification aimed at distinctly separate criminal acts?
- (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
- (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
- (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition); *accord Quiroz*, 55 M.J. at 339 ("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers"). "These factors must be balanced, with no single factor necessarily governing the result." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Furthermore, in deciding issues of unreasonable multiplication of charges, we also consider R.C.M. 307(c)(4), Discussion, which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Applying these factors to the appellant's case, we find that there has not been an unreasonable multiplication of charges.

We note that the appellant did not object at trial. Although this significantly weakens his argument on appeal, that single factor is not dispositive of the issue.

Although involving the same IM's, Specifications 1 and 2 under AC II as compared to Specifications 4 and 5 of AC II address distinctly separate crimes and involve different victims. *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989). The former specifications concerned the appellant's communications of indecent language whereas the latter concerned his attempt to use a means of interstate commerce to entice minors to engage in illegal sexual activity.

Under Specifications 1 and 2 of AC II, the appellant's conduct violated Article 134, UCMJ, designed to protect individuals from being subjected to grossly offensive language. His conduct under Specifications 1 and 2 of AC II victimized the individuals with whom he communicated.⁵ The appellant's conduct under Specifications 4 and 5 of AC II violated 18 U.S.C. § 2422(b), enacted to discourage use of the Internet for immoral purposes. His violation of 18 U.S.C. § 2422(b) victimized society and all those that use the Internet. The appellant's misconduct for each was a distinctly separate criminal act. *Id.* The fact the appellant used the indecent language charged as part of his attempt to entice these minors to engage in sexual acts with him is not enough by itself to find that they are the same criminal acts. Each of these offenses stands on its own and does not rely on the other.

Specifications 1, 2, 4, and 5 under AC II do not misrepresent or exaggerate the appellant's criminality and they do not unreasonably increase the appellant's punitive exposure. Each was a discrete act, separately punishable. *United States v. Neblock*, 45 M.J. 191, 197-98 (C.A.A.F. 1996). Finally, there is no evidence of prosecutorial overreaching or abuse in the drafting of the specifications or charges at issue. Consequently, after applying the *Quiroz* factors we do not find that the cited specifications constitute an unreasonable multiplication of charges.

Conclusion

The approved findings of guilty as to the AAC and its sole specification are set aside. We have reassessed the sentence and find that the sentence received by the appellant would not

⁵ It is immaterial that the minor girls were fictional characters portrayed by adult women.

have been any lighter even if he had not been charged with that offense. See *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We further find that the sentence is appropriate for this offender and the remaining offenses. See *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). Accordingly, we affirm the remaining findings of guilty and the approved sentence.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court