

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

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**David L. SAVAGE
Hospital Corpsman Third Class (E-4), U.S. Navy**

NMCCA 200500494

Decided 20 August 2007

Sentence adjudged 9 January 2004. Military Judge: J.P. Colwell.
Staff Judge Advocate's Recommendation: Col J.F. Feltham, USMC.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commanding General, Marine Corps Air Station, Cherry
Point, NC.

CDR THOMAS FICHTER, JAGC, USN, Appellate Defense Counsel
Maj BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of carnal knowledge, one specification of receipt of child pornography, two specifications of committing indecent acts, and one specification of taking indecent liberties, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to confinement for 12 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully reviewed the record of trial, the appellant's four assignments of error,¹ and the Government's

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- I. THE MILITARY JUDGE ERRED BY FAILING TO SUPPRESS EVIDENCE OBTAINED IN A SEARCH OF APPELLANT'S OFF-BASE RESIDENCE.
 - II. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILTY OF CHARGES I AND II AND THE SPECIFICATIONS THEREUNDER.
 - III. THE SENTENCE IMPOSED BY THE MILITARY JUDGE WAS INAPPROPRIATELY

answer. We conclude that the 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) 66(c), UCMJ.

Failure to Suppress Evidence

The appellant asserts that the military judge erred by failing to suppress evidence obtained when agents of the Naval Criminal Investigative Service (NCIS) conducted a consent search of his off-base residence.

Facts

In January 2003, the appellant received an instant message on his home computer from E, a 13-year-old girl, while logged on to an African-American teen chat room. The appellant proceeded to correspond with E for several weeks over the Internet, and also spoke to her numerous times over the telephone. On 16 January 2003, E instant messaged the appellant and told him that she had been kicked out of her house. E then telephoned the appellant and gave him a phone number where she could be reached. The appellant told her that, if he could get her some money, he would help her get where she needed to go. The appellant then drove to Kinston, North Carolina and called the number E had given him from a payphone. E then gave him directions to pick her up at a certain location close to the apartment where she lived with her mother. The appellant picked her up and took her back to his home in Cherry Point, North Carolina where he resided with his two sons.

During the next several days, the appellant engaged in sexual intercourse with E on at least one occasion, digitally penetrated E on several occasions, and committed indecent acts upon her including fondling her breasts, touching her vagina and taking a picture of her with her shirt up and her breasts and bra exposed.

On 21 January 2003, the appellant returned E nearby to the apartment complex where she lived with her mother. The appellant stopped at a convenience store on his way out of town, and one of the employees at the store showed him a picture of E. The employee explained that E was her sister and that she had run away from home. The appellant told the employee that E had spent the last several days with him, and advised that he had just dropped her off close to the apartment complex where she lived. Shortly thereafter, a detective from the Kinston, North Carolina police department responded to the convenience store to speak with the appellant. The detective escorted the appellant to the

SEVERE.

- IV. THE APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING.

Kinston police station for questioning. During questioning, the appellant admitted that he had fondled E, but he was not arrested or charged. The Kinston police subsequently reported the matter to the Naval Criminal Investigative Service (NCIS) because the appellant was an active duty enlisted member.

The following morning, 22 January 2003, the appellant told his leading chief petty officer (LCPO), Chief Thompson, what had transpired between him and E, and that he had been questioned by a detective from the Kinston police department. They then both went to see Ensign James F. Alexander, the legal officer at the Naval Hospital Cherry Point. Ensign Alexander described the appellant as appearing distraught. Record at 24. The appellant proceeded to tell Ensign Alexander selected details regarding the several days he spent with E. He also told Ensign Alexander that he had been questioned by a detective from the Kinston police department.

Ensign Alexander listened to the appellant's version of events and then told the appellant that he might need to get a lawyer if some type of an investigation ensued. He did not represent himself as an attorney, and specifically told the appellant he was a representative of the government who would work in opposition to the appellant's interests if legal action was taken. He further directed the appellant to the Joint Law Center should he need to secure the services of an attorney. *Id.* at 29.

A short time thereafter, Ensign Alexander received a call from NCIS Special Agent Tony Bain. Special Agent Bain was advised by the Kinston police that they had questioned the appellant regarding E, and wanted to speak with the appellant to determine if criminal activity had taken place. Special Agent Bain called Ensign Alexander to facilitate the transporting of the appellant from the Naval Hospital to NCIS headquarters for questioning.

Waiver of Rights

The appellant was subsequently transported to NCIS headquarters by Special Agent Bain and arrived at approximately 1430. The appellant was advised that he was suspected of having sexual intercourse with a female under the age of 18 years. The appellant waived his Article 31(b) rights at 1457. Prosecution Exhibit 3 at 8. Special Agent Bain then began to question the appellant while taking rough notes to reflect his answers. As the interrogation progressed, Special Agent Bain asked the appellant if he would be willing to consent to a search of his residence and vehicle. The appellant initially did not respond to this request. After the interrogation was completed, a statement was typed for the appellant to sign and date. However, before signing the statement, the appellant asked to place a call to Ensign Alexander.

Call to Ensign Alexander

The appellant paged Ensign Alexander at approximately 1807. Ensign Alexander returned the page, and was told by the appellant that Special Agent Bain was requesting to search his residence. Ensign Alexander asked the appellant if he was innocent. The appellant responded that he was. Ensign Alexander then told him that the best course of action was to cooperate; otherwise, the agents would attempt to get a search authorization. He also told the appellant to contact an attorney. Record at 30.

After speaking to Ensign Alexander, but before the appellant signed his typed statement, Special Agent Bain advised the appellant that if the contents of the statement were false the appellant could face further charges. The appellant, who previously insisted that he had only fondled E, then admitted that he had sexual intercourse with her. Special Agent Bain then spent the next three hours re-interviewing the appellant to ensure that the facts in his statement were accurate. During this three hour period, the appellant agreed to a permissive search authorization for his residence and vehicle.

Search of Residence and Vehicle

The search of the appellant's vehicle lasted 10 minutes from 2205 until 2215, and no evidence was collected by NCIS agents. The search of the appellant's residence lasted from 2230 until 2320, and the NCIS agents seized linens, compact disks, and the appellant's personal computer. A subsequent forensic examination of the computer's hard drive revealed that it contained child pornography.

Pretrial Motion

The appellant filed a pretrial motion to suppress all evidence resulting from the seizure of his personal computer. Appellate Exhibit VII at 1. The appellant argued that his consent was not voluntary, in part because he claimed he was following the advice of Ensign Alexander, who he believed was his attorney. The appellant asserted that his grant of consent to search his residence and computer was not voluntary but a result of acquiescence to Government coercion. *Id.*

The military judge denied the motion finding that the totality of the circumstances showed that the appellant's consent was voluntary, and that the search and seizure of his personal computer was lawful. He further found that even if the appellant's consent was not voluntary, the evidence would have been inevitably discovered because NCIS would have secured a warrant to search the appellant's residence. AE XIII.

We find that the military judge's findings of fact are supported by the record and are not clearly erroneous. We

therefore adopt them. We have reviewed his conclusions of law and find no error in his view of the law.

Law

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006)(quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). A military judge "abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). See also *McDonald*, 59 M.J. at 430. "In reviewing a ruling on a motion to suppress, we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

Consent Search

The Fourth Amendment protects the "'security of one's privacy against arbitrary intrusion by the police.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973)(quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)). A search of a residence conducted without a warrant based on probable cause is "'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions,'" one of which is a search conducted with a resident's consent. *Id.* at 219 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The prosecution has the burden of proving that consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543,548 (1968). We look to the totality of the circumstances to determine if consent was voluntarily given. *Schneckloth*, 412 U.S. at 248-49; MILITARY RULE OF EVIDENCE 314(e)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Consent "is a factual determination that will 'not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous.'" *United States v. Radvansky*, 45 M.J. 226, 229 (C.M.A. 1996)(quoting *United States v. Kozek*, 41 M.J. 60, 64 (C.M.A. 1994)). Here, it is clear from the totality of the circumstances that the appellant's consent was voluntary.

Analysis Regarding the Consent Search

The totality of the circumstances clearly establishes that the appellant's consent was freely and voluntarily given. In our analysis, we have considered the appellant's age, intelligence, experience, length of military service, the environment in which he gave his statement, and his knowledge of his right to refuse consent in reaching this decision. *United States v. McMahon*, 58 M.J. 362, 366 (C.A.A.F. 2003).

The appellant was 38 years old, possessed a GED as well as an emergency medical technician certification, and had served in

the Navy for over six years. His performance evaluations indicate that he possessed excellent reading and writing skills. He was offered numerous opportunities and advised numerous times to secure an attorney, but chose not to. The appellant was advised of his rights by Special Agent Bain both prior to giving his written statement and before he signed the permissive consent to search form which also stated he had a right to refuse. The environment during the questioning of appellant by Special Agent Bain was neither coercive nor custodial, as the appellant was allowed freedom of movement and the opportunity to take breaks. The appellant was allowed to call Ensign Alexander while with Special Agent Bain prior to consenting to a search of his residence and vehicle. These factors support the conclusion that the appellant possessed the requisite intelligence to knowingly and intelligently consent to a voluntary search of his residence and vehicle. Record at 53, 56.

The appellant's claim that he believed Ensign Alexander was his attorney is also without merit. The appellant testified at the motion hearing that he knew that Ensign Alexander worked for the command. *Id.* at 45. Ensign Alexander testified that he did not tell the appellant he was an attorney, did not say he would represent the appellant in court, and told him he would be in direct opposition to him if the case were to proceed. *Id.* at 29. Ensign Alexander also advised the appellant that he would need to get an attorney if an investigation regarding E ensued, and mentioned the Joint Law Center as the place where he could be assigned an attorney. *Id.* We find the appellant's claims that he believed Ensign Alexander was his attorney and that he was only following his advice in consenting or acquiescing to the search of his residence and vehicle are not supported by the facts of record.

Scope of the Search

The appellant also asserts, for the first time on appeal, that even if his consent to search was lawful, the subsequent search and seizure of his computer exceeded the scope of his consent. The trial defense counsel clearly articulated during the suppression hearing that he was challenging only the voluntariness of the consent, and not the scope of the search. The following colloquy occurred while litigating the pretrial motion:

MJ: Nor are you challenging the scope of the search that was involved?

DC: I would have to say that the defense is saying that the consent was not voluntary; therefore

MJ: That's a different issue than the scope of the search. The way I interpret your motion is that you are focused entirely - the issue you have raised before the court is the consent or the nature of the consent in this search.

DC: The nature of the motion is the voluntariness of the consent; yes, sir. I guess the way the defense responded to your question, the test for this is a totality of the circumstances and scope may be a factor that is considered. But the ultimate issue the defense has put forth is the voluntariness of that consent.

MJ: Okay. So if the court finds that there is consent, then you are not raising an issue regarding the scope of what was actually searched.

DC: No, sir.

Record at 28.

We find that, since this issue was not raised, it is therefore waived absent plain error. See MIL. R. EVID. 103(d). An appellant is estopped from raising an issue on appeal which he did not raise at trial, unless estoppel would result in a miscarriage of justice. *United States v. Flowers*, 23 M.J. 647, 648 (N.M.C.M.R. 1986), *aff'd*, 26 M.J. 463 (C.M.A. 1988). This rule applies if the appellant objects to the admissibility of evidence on one ground at trial and subsequently attempts to litigate its admissibility on other grounds raised for the first time on appeal. *Id.* However, even if we do not invoke waiver, we still find that the scope of the search did not exceed the consent.

The appellant claims that NCIS agents did not act reasonably because they failed to follow the plain language of the consent to search form which stated that the investigation involved evidence concerning sexual intercourse with a female under the age of 18. Appellant's Brief at 10. We note that the expressed object of the search generally defines the scope of the consent. *McMahon*, 58 M.J. at 366. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness- what would the typical reasonable person have understood by the exchange between the officer and the suspect. *United States v. Greene*, 56 M.J. 817, 822 (N.M.Ct.Crim.App. 2002)(quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). Since the appellant did not argue at trial that the search exceeded the scope of his consent, we review the matter for plain error. MIL. R. EVID. 103(d); see *United States v. Riley*, 47 M.J. 276, 278 (C.A.A.F. 1997).

The permissive authorization for search and seizure (PASS) form signed by the appellant permitted NCIS agents to remove and retain any property or papers found during the search which were desired for investigative purposes. PE 3 at 12. The appellant's computer was seized for investigative purposes because the appellant admitted in his confession that he corresponded with E by instant messaging while on his computer. He further admitted that he corresponded with her numerous times over the course of several weeks. This correspondence would corroborate aspects of the confession the appellant gave to NCIS. See MIL. R. EVID.

305(g); see also *United States v. Rounds*, 30 M.J. 76, 79 (C.M.A. 1990). The evidence sought was most likely to be found on the computer's hard drive. A reasonable person would have expected the appellant's computer to be seized and later examined for evidence.

We also note that the appellant's consent to search was not limited in terms of the time, place or property, and he did not withdraw his consent while the search was taking place. MIL. R. EVID. 314(e)(3); see *United States v. Stoecker*, 17 M.J. 158, 162 (C.M.A. 1984). We find that the seizure of the computer for forensic examination of its hard drive and files did not exceed the scope of the appellant's consent.

Insufficient Evidence to Support Guilty Findings in Charges I and II

We find that the appellant's second assignment of error regarding insufficient evidence to support Specification 2 of Charge I (carnal knowledge) and Specification 1 of Charge II (receipt of child pornography) is without merit.

Charge I, Specification 2

The appellant was found guilty of carnal knowledge with E on 20 January 2003. We find that the evidence is both factually and legally sufficient, and we are convinced of the appellant's guilt beyond a reasonable doubt. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements were proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witness, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The offense of carnal knowledge requires (1) an act of sexual intercourse with a certain person; (2) not the spouse of the accused; (3) under the age of sixteen. The appellant admitted in his statement to NCIS that he engaged in sexual intercourse with E. E was not the wife of the appellant. As to the third element, the appellant, at trial and on appeal, asserts a mistake of fact defense regarding E's age. RULE FOR COURTS-MARTIAL 917(j)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). However, the appellant's mistake of fact as to the age of E "must have been reasonable under all the circumstances." R.C.M. 916(j)(1). E testified that she told the appellant she was "15 or 16", and when he responded that she looked "16 or 17" she indicated "I might look that old but I'm not." Record at 142. *Id.* We find the appellant's claim of ignorance as to E's age unworthy of belief.

Charge II, Specification 1

The appellant asserts that the evidence is insufficient to show that he knowingly received child pornography on his home computer on divers occasions. PE 4, a stipulation of fact signed by the appellant, details multiple images of minors engaged in sexually explicit conduct found on the appellant's computer. Dan Maggard, a computer forensics examiner from the Department of Defense Computer Forensics Library, testified that he found 221 images relating to the possible exploitation of children on the appellant's hard drive with 164 of those images recovered from a temporary internet folder. Record at 238. We find that it is both implausible and inconceivable that the appellant did not knowingly receive pornographic images on his home computer given the evidence presented at trial, and find the appellant's claim to be unworthy of belief and lacking merit.

Inappropriately Severe Sentence

The appellant contends that his sentence is inappropriately severe for a one-time serious lapse of judgment. Appellant's Brief of 12 Oct 2006 at 14. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 383 (C.A.A.F. 2005); *Healy*, 26 M.J. 395; *Snelling*, 14 M.J. at 268. We are not in the business of granting clemency as that is a prerogative reserved to the convening authority. *Healy*, 26 M.J. at 395.

Post-Trial Delay

The appellant claims he was denied speedy post-trial processing because of the lengthy time period it took to docket his case with this court. We disagree.

In light of *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we will assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. After doing so, we conclude that any error caused by post-trial processing delay is harmless beyond a reasonable doubt. That delay also does not affect the findings and the sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

Accordingly, the findings and the sentence as approved below are affirmed.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court