

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Daniel R. SULLIVAN
Private (E-1), U.S. Marine Corps**

NMCCA 200602356

Decided 18 July 2007

Sentence adjudged 31 May 2006. Military Judge: R.H. Kohlmann. Staff Judge Advocate's Recommendation: LtCol A.G. Peterson, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 2d Force Service Support Group, U.S. Marine Corps Forces, Atlantic, Camp Lejuene, NC.

CAPT DIANE KARR, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of sodomy of a child under the age of 12 years, and indecent acts on a child under the age of 16 years, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced to confinement for 45 years and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to the pretrial agreement, suspended confinement in excess of 20 years for the term of confinement served plus 12 months from the date of release, and waived automatic forfeitures for six months from the date of his action.

We have considered the record of trial, the appellant's three assignments of error claiming that: (1) the appellant's rights against double jeopardy were violated; (2) his sentence is

inappropriately severe;¹ and, (3) the staff judge advocate erred in his recommendation (SJAR) by omitting awards and incorrectly stating the appellant's pleas and the findings. We have also considered the Government's answer. We find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was previously convicted at a general court-martial in November 2005, in accordance with his pleas, of a single specification of possessing electronic digital media containing child pornography. Pursuant to a pretrial agreement, the Government withdrew and dismissed the remaining specifications, including an allegation that the appellant permitted his daughters to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a).

Shortly before the appellant's first general court-martial, but after the CA entered into the pretrial agreement, the Government discovered that an eight-millimeter (8mm) video seized from the appellant's home depicted the appellant sexually abusing his two-year-old daughter. That video resulted in new charges of sodomy, indecent acts, and permitting his daughter to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(b) being referred to a second general court-martial. At the second general court-martial, the appellant objected to being tried, arguing that jeopardy attached at his prior general court-martial, barring a subsequent trial for the current charges. The military judge agreed in part and dismissed the specification alleging a violation of 18 U.S.C. § 2251(b). The appellant then entered conditional guilty pleas to sodomy and indecent acts with his two-year-old daughter.

Double Jeopardy

For his first assignment of error, the appellant claims that the Double Jeopardy Clause and Due Process Clause of the 5th Amendment to the U.S. Constitution bar his prosecution for the charges he pled guilty to because: (1) the evidence of sodomy and indecent acts was contained in a video tape in the Government's possession at the time of his first court-martial; and, (2) the CA in the appellant's prior court-martial "agreed to dismiss with prejudice any charge relating to 'child sex abuse' based on the evidence in the possession of the Government." Therefore, he

¹ We find that the appellant's sentence is appropriate for this offender and his offenses. See *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

asserts, jeopardy attached to any "child sex abuse" depicted in the videotape. Appellant's Brief and Assignments of Error of 19 Jan 2007 at 9, 10. We disagree.

Double jeopardy is a constitutional question we review *de novo*. See *United States v. Collier*, 36 M.J. 501, 504 (A.F.C.M.R. 1992)(citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991)(voluntariness of confession) and *Miller v. Fenton*, 474 U.S. 104, 110 (1985)(voluntariness of confession)). We may accept the military judge's findings of fact where we find them to be supported by the record, or we may find facts for ourselves, or in combination with the military judge. Art. 66(c), UCMJ. The military judge issued 19 findings of fact. Appellate Exhibit XII. We find they are supported by the record and we adopt them as our own, along with additional facts found within the record of trial. There is no need to differentiate between the military judge's findings of fact and the additional facts we find in the record.

In his prior general court-martial, the appellant was charged with: (1) permitting his minor children to engage in sexually explicit conduct for the purpose of producing a visual depiction of child pornography in violation of 18 U.S.C. § 2251(a); (2) receiving and distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A); (3) possessing electronic digital media containing child pornography that had been transported in, or produced using materials that had been transported in, interstate or foreign commerce in violation of 18 U.S.C. § 2252A(a)(5)(B); and, (4) using a common carrier or interactive computer service to carry child pornography images in interstate commerce. AE II at 325-26. Pursuant to a pretrial agreement, the appellant pled guilty to the third specification, dealing with possession of electronic digital media containing child pornography. *Id.* at 335; AE III at 30-32. The remaining specifications were withdrawn and dismissed with prejudice, AE II at 370, in accordance with the pretrial agreement. AE III at 31.

At his second general court-martial, the appellant challenged the current charges as a violation of his rights against double jeopardy under the 5th Amendment to the U.S. Constitution and a violation of the terms of his pretrial agreement in his prior court-martial. AE III at 1-22. In response, the military judge dismissed the specification alleging a violation of 18 U.S.C. § 2251(b) by permitting the appellant's daughter to engage in sexually explicit behavior for the purpose of creating a visual depiction of that behavior. The appellant's argument before this court, therefore, is limited to the remaining specifications alleging sodomy of a child under the age of 12 years and indecent acts with a child under the age of 16 years.

During litigation of the appellant's motion to dismiss, the Government presented the testimony of a special agent of the Naval Criminal Investigative Service (NCIS), Record at 16-36, and the military justice officer, *id.* at 48-50. The NCIS agent

testified that she was involved in the original investigation and participated in the search of the appellant's home. During that search, NCIS seized electronic storage devices including a laptop computer, a Palm PDA, 74 compact discs and 53 computer disks, and several 8mm video tapes created with 1980's-era technology. NCIS sent the seized computer-related electronic storage media to a laboratory for analysis. That media contained 400 images of child pornography from which 41 known child victims were identified by the National Center for Missing or Exploited Children. The computer-related media and the images contained on that media served as the basis for Specification 3 under the Charge in the appellant's first general court-martial, alleging possession of electronic digital media containing child pornography, to which the appellant plead guilty. None of these images, however, involved either of the appellant's daughters.

NCIS did not send the seized 8mm video tapes to the laboratory because they were not computer-related media. On 27 October 2005, four days before the appellant's first general court-martial and nine days after the CA entered into the pretrial agreement, the NCIS agent viewed the 8mm videos for the first time. One of the videos showed a three-minute clip of the appellant rubbing his exposed penis on his two-year-old daughter's vagina, and the same daughter performing oral sodomy on the appellant to the point of the appellant's ejaculation. NCIS notified the office of the trial counsel in the appellant's first general court-martial on the same day. The Government informed the appellant's detailed defense counsel of the discovery the same day by electronic mail. The military justice officer also made this information known to the appellant's detailed defense counsel during a personal meeting on 27 October 2005, and made it clear to her that the Government would not withdraw from the existing pretrial agreement, but was going forward with new charges, based on the content of the 8mm video, in a separate court-martial. Prior to sentencing in the first general court-martial, the trial counsel and the appellant's detailed defense counsel announced that the appellant was in pretrial confinement for new charges, not for any charge that was referred to the first general court-martial.

The Double Jeopardy Clause of the U.S. Constitution is directed at the threat of multiple prosecutions or sentences for the same offense. It does not matter whether the accused was acquitted or convicted of that offense in the prior trial. *United States v. Leak*, 61 M.J. 234, 242 (C.A.A.F. 2005)(citations omitted). "The underlying idea . . . is that the State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity" *Green v. United States*, 355 U.S. 184, 187-88 (1957).

This concept is also applied to military personnel through Article 44(a), UCMJ, which provides: "No person may, without his

consent, be tried a second time for *the same offense*." (Emphasis added). RULE FOR COURTS-MARTIAL 907(b)(2)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) also provides: "A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if . . . [t]he accused has previously been tried by court-martial . . . for the same offense" (Emphasis added). See *United States v. Collins*, 41 M.J. 428, 429 (C.A.A.F. 1995).

Based upon the above authority, we need only determine whether jeopardy attached to a specific offense, and if it did, whether the appellant was twice tried for the same offense. First, we note, as did the military judge, that the appellant was not convicted, acquitted, or sentenced for the offenses that were withdrawn and dismissed at the first general court-martial. Therefore, jeopardy did not attach to the dismissed offenses because no evidence was presented on the issue of guilt or innocence of those offenses. See *United States v. Cook*, 12 M.J. 448, 453 (C.M.A. 1982)(holding that in a bench trial jeopardy attaches to an offense once evidence is presented)(citing *Serfass v. United States*, 420 U.S. 377, 388 (1975)). Jeopardy did attach, however, to the specification alleging possession of electronic digital media containing child pornography to which the appellant was found guilty and sentenced. Even if jeopardy had attached to the dismissed offenses, we would not find a double jeopardy violation. We will apply a double jeopardy analysis to all offenses charged in the appellant's first general court-martial.

In determining whether an appellant has twice been tried for the same offense, we apply the test announced in *Brown v. Ohio*, 432 U.S. 161 (1977), in which the Supreme Court adopted the *Blockburger*² "same elements" test, stating, in part, "[i]f two offenses are the same under [the *Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions."³ *Id.* at 166. Before resolving the double jeopardy issue, however, we need to address allegations contained in the appellant's brief that would color this court's resolution of the appellant's due process claim, if those allegations were supported by the record.

² *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

³ The *Brown* court also stated that "successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown*, 432 U.S. at 166 (citing, in part, *In re Nielsen*, 131 U.S. 176 (1889)). *Brown* was followed in *Grady v. Corbin*, 495 U.S. 508 (1990). In *United States v. Dixon*, 509 U.S. 688 (1993), however, the Supreme Court overruled *Grady*, finding the "relitigation" test announced in *Brown* to be the "purest dictum," and that test, as followed in *Grady* (referred to as the "same conduct" test) was abandoned in favor of using only the *Blockburger* test to resolve double jeopardy issues.

In her brief to this court, appellate defense counsel claims that the appellant asserted in his trial brief, submitted at his second general court-martial, that the CA in his first general court-martial "agreed to dismiss with prejudice any charge related to 'child sex abuse' based on the evidence in the possession of the government." Appellant's Brief at 10. By way of a footnote, appellate defense counsel incorporates that specific argument into her brief. *Id.* If the appellant's claim is factually true, the appellant is entitled to enforce the prior pretrial agreement as a matter of due process, resulting in dismissal of the remaining allegations of sodomy and indecent acts before his second general court-martial, because evidence of those "child sex abuse" acts were in the Government's possession at the time of the prior general court-martial. *See United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)(holding that an appellant is entitled to strict compliance of the material terms in his pretrial agreement as a matter of due process)(quoting *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)).

We agree with the Government, however, that there is absolutely no support in the records of trial from the appellant's first or second general courts-martial to support the appellant's factual claim. We do not find any reference to an agreement between the appellant and the CA in which the CA "agreed to dismiss with prejudice any charge related to 'child sex abuse' based on the evidence in the possession of the government." That agreement certainly does not appear in the pretrial agreement. *See* AE III at 30-35. If such an agreement existed, it was outside the four corners of the pretrial agreement in the first general court-martial. The appellant and counsel for both sides, however, affirmatively stated on the record that there were no agreements with the CA other than the written pretrial agreement. AE II at 369. Because there is no support for the factual allegation that the CA "agreed to dismiss with prejudice any charge related to 'child sex abuse' based on the evidence in the possession of the government," we reject the appellant's due process argument as wholly without merit.⁴ We now return to the appellant's double jeopardy argument, and apply the test announced in *Brown v. Ohio*.

As for the *Blockburger* test, we need not spend much time comparing the elements of: (1) permitting his minor children to

⁴ We are mindful that ordinarily all known offenses should be charged at one court-martial. *See* R.C.M. 601(e)(2) Discussion. R.C.M. 601(e)(2), however, provides that the convening authority retains full "discretion" whether or not to join "two or more offenses" charged against an accused "to the same court-martial for trial." In addition, discussions contained in the Manual for Courts-Martial "are supplementary materials, do not constitute the official views of the Department of Defense, do not constitute rules, are not binding on any authority, and failure to comply with matter contained in them does not, of itself, constitute error." *United States v. Spenny*, 22 M.J. 844, 846 (C.M.R. 1986)(citing Discussion to paragraph 4, Part I, Preamble, MCM 1984).

engage in sexually explicit conduct for the purpose of producing a visual depiction of child pornography in violation of 18 U.S.C. § 2251(b); (2) receiving and distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A); (3) possessing electronic digital media containing child pornography that had been transported in, or produced using materials that had been transported in, interstate or foreign commerce in violation of 18 U.S.C. § 2252A(a)(5)(B); and, (4) using a common carrier or interactive computer service to carry child pornography images in interstate commerce from the first general court-martial, with the current charges of sodomy with a child under 12 years, and indecent acts with a child under 16 years. Each offense requires proof of one or more different elements and none are the lesser included offense of another. See *Blockburger*, 284 U.S. at 304. Therefore, we do not find a violation of the appellant's protection against twice being tried for the same offense, under the U.S. Constitution, Article 44(a), UCMJ, or R.C.M. 907(b)(2)(C).

Staff Judge Advocate's Recommendation

For his third assignment of error, the appellant claims, for the first time on appeal, that he suffered material prejudice because the SJAR omits awards⁵ and misstates his pleas and findings. Appellant's Brief at 21-25. We disagree.

The appellant's comments on the SJAR did not address either allegation of error now raised. Request for Clemency and Correction to the Staff Judge Advocate Recommendation of 23 Aug 2006. SJAR errors, not addressed below, are waived absent plain error. R.C.M. 1106(f); see *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)(citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). We conduct a *de novo* review to determine if plain error exists. *Kho*, 54 M.J. at 65.

To prevail under a plain error analysis, the appellant must show that: (1) there was an error; (2) that the error was plain or obvious; and, (3) that the error materially prejudiced the appellant's substantial rights. *Id.*; see *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998). To meet his burden of showing plain error, the appellant must make "some colorable showing of possible prejudice" as a threshold for further review. *Kho*, 54 M.J. at 65 (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). This threshold is low, but there must be some showing of possible prejudice in terms of how the omission potentially affected the appellant's opportunity for clemency. *Scalo*, 60 M.J. at 437.

⁵ The appellant does not tell us which award he claims to have that was omitted. The awards referenced in the SJAR are not the same as those noted in the appellant's service record admitted as Prosecution Exhibit 3 at 17, and are not the same as those that the trial defense counsel stated the appellant was entitled to wear and was wearing at trial. See Record at 4.

1. Incorrect pleas and findings

As to the appellant's pleas and findings, he pled guilty to the sole specifications under Charges I and II on 31 May 2006. Record at 70, 72. Specification 2 under Charge II was dismissed by the military judge prior to the appellant's pleas, on 12 May 2006. *Id.* at 70; AE XII at 10. The appellant entered his pretrial agreement on 15 May 2006, agreeing to plead guilty to the two remaining specifications. AE VI at 2, 3. The CA signed the pretrial agreement on 16 May 2006.

The SJAR and the general court-martial order both state that the appellant pled guilty to and was found guilty of Specification 2 under Charge II, alleging production of child pornography. The appellant did not plead guilty to that specification and was not found guilty of that specification - it was dismissed by the military judge before the pretrial agreement was entered. Any representation to the CA that the appellant was convicted of such a horrendous offense creates a colorable showing of possible prejudice, requiring additional plain error analysis.

Although the SJAR and the general court-martial order contain erroneous information concerning the appellant's pleas, we do not find any prejudice to the appellant. The CA was aware that the appellant agreed to plead guilty to the remaining offenses of sodomy and indecent acts in the pretrial agreement, and the CA considered the results of trial which correctly stated the appellant's pleas and the findings, including that the military judge dismissed Specification 2 under Charge II. Undated Report of Results of Trial; *see* Convening Authority's Action of 19 Sep 2006. Under these circumstances, the appellant was not prejudiced. The appellant is, however, entitled to have his official records correctly reflect the results of his general court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)(citing *United States v. Diaz*, 40 M.J. 335, 345 (C.M.A. 1994)). We will order corrective action in our decretal paragraph.

2. Missing awards

As to the omitted awards, the appellant never tells us which awards he is referring to and leaves it to this court to make that determination. Comparing the appellant's service record against the SJAR, we note that the appellant received five meritorious masts; however, the SJAR lists only one. Otherwise, the SJAR properly reflects the awards listed in the appellant's service record. The trial defense counsel, however, announced on the record that the appellant was also entitled to wear the Navy-Marine Corps Achievement Medal and four Marine Corps Good Conduct Medals. Record at 4. Neither the SJAR nor the appellant's service record reflect the Navy-Marine Corps Achievement Medal or the fourth Marine Corps Good Conduct Medal. The appellant does

not explain how these facts prejudiced him, and we do not find prejudice for two reasons.

First, the CA considered the record of trial before taking his action. Convening Authority's Action of 19 Sep 2006. The record of trial contains the trial defense counsel's claim that the appellant is entitled to wear the Navy-Marine Corps Achievement Medal and that he has four Good Conduct Medals. Defense Exhibit B from the appellant's prior court-martial, entitled "Individual Awards Report" is attached to the current record of trial as AE II at 497. That exhibit contains reference to five meritorious masts and three Marine Corps Good Conduct medals, but is silent as to a Navy-Marine Corps Achievement Medal. Therefore, the CA was aware that the appellant at least claimed to have these awards, even though some were not supported by official records. Defense Exhibit C, also admitted at the appellant's first general court-martial, states that the appellant was nominated for an end-of-tour Navy-Marine Corps Achievement Medal for his services as chief cook at First Recruit Training Battalion, Recruit Training Regiment, Parris Island, South Carolina, for the period 9 July 1999 to 15 March 2001. AE II at 505-07. We are, therefore, not certain that the appellant was actually awarded the Navy-Marine Corps Achievement Medal. Nor are we convinced that the appellant was awarded a fourth Good Conduct Medal. At his first general court-martial, the appellant, on 1 November 2005, stated that he was in his fourth enlistment, having come on active duty in October 1992. *Id.* at 346.

Second, the awards at issue are not personal decorations for valor, heroism, or service in combat, and their omission in the SJAR was "neither material nor likely to have misled the convening authority concerning the nature of the appellant's service." *United States v. Serrata*, 34 M.J. 693, 694 (N.M.C.M.R. 1991).

Under these circumstances, we are not convinced that the failure to list the awards in the SJAR was error at all, let alone plain or obvious error. We further conclude that even if there was error, it was waived by not addressing it below, because there is no colorable showing of possible prejudice, and, therefore, no plain error.

Conclusion

The findings, and the sentence as approved by the CA, are affirmed. The supplemental court-martial order shall properly reflect the dismissal of Specification 2 under Charge II.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court