

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRIAN L. BRENEMAN
ELECTRONICS TECHNICIAN SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200800111
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 January 2003.
Military Judge: CAPT Carole J. Gaasch, JAGC, USN.
Convening Authority: Commanding Officer, USS JUNEAU (LPD 10).
For Appellant: LT Heather Cassidy, JAGC, USN.
For Appellee: Maj Tai Le, USMC.

30 September 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of two specifications of violating a lawful general regulation, of receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2), and of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5), in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to confinement for five months, forfeiture of \$500.00 pay per month for a period of five months, reduction to pay grade E-1, and a bad-conduct discharge. With the exception of the reduction in rate, the convening authority (CA) approved the sentence as adjudged.

The appellant raises four assignments of error on appeal. First, he asserts that the finding of guilty to Specification 1 of Charge II (receiving child pornography) must be set aside because the 18 U.S.C. § 2252A(a)(2) does not apply extraterritorially. Second, the appellant asserts that his plea to Specification 1 of Charge I (wrongfully using Government communication and computer systems to view or download images of pornography) was improvident because there was insufficient evidence that the communication system the appellant used was Government owned. Third, the appellant avers that he was denied due process when over five years elapsed between his court-martial and the docketing of his case with this court. Finally, the appellant argues that he was prejudiced when the legal officer failed to prepare a recommendation for the CA in response to the appellant's allegations of legal error.

We have examined the record of trial, the assignments of error, and the Government's response. We find the appellant's first assignment of error meritorious and will take appropriate action in our decretal paragraph with respect to findings and sentence reassessment. Following our corrective action, the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Extraterritorial Application of 10 U.S.C. § 2252A(a)(2)

Between January 2000 and January 2002, the appellant was stationed onboard the USS JUNEAU (LPD 10), homeported in Sasebo, Japan. At trial, the appellant pled guilty, *inter alia*, to Specification 1 of Charge II and admitted that he unlawfully used computers at the United Service Organization (USO) facility onboard Naval Station, Sasebo, Japan, to access internet pornography to include child pornography. Record at 51-52. The appellant further admitted downloading pornographic images of children to 29 personally-owned computer disks which he transported back to his ship for later viewing.

On appeal, the appellant asserts that 18 U.S.C. § 2252A(a)(2) has no extraterritorial reach, and we are forced to concede that his argument is correct under the prevailing case law. *See United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). We respectfully take this opportunity, however, to point out that the military courts are resolving this issue in a manner not generally accepted by other courts of the United States, and we respectfully suggest that it may be time to consider bringing military practice in line with the majority of the Courts of Appeals and the plain language of the statute. Pending such consideration, however, we are constrained to set aside and dismiss with prejudice the finding of guilty to Specification 1 of Charge II. We will reassess the sentence in our decretal paragraph.

Improvident Plea

At trial, the appellant pled guilty, *inter alia*, to Specification 1 of Charge I (violating Department of Defense (DOD) Regulation 5500.7-R (Joint Ethics Regulation)(JER)) by wrongfully using "a U.S. Government communication and computer system...[to] view and download images of pornography." Charge Sheet. During his providence inquiry, the appellant specifically acknowledged that on a number of occasions during the charged period, he used computers at the United Service Organization (USO) facility onboard Naval Station, Sasebo, Japan, to view and download child pornography onto personal diskettes. Record 42-47.

On appeal, the appellant claims that there was "insufficient evidence in the record to support the fact that Appellant used a government-owned communication system." Appellant's Brief of 15 May 2008 at 16. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F. 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). We find no such basis.

During his providence inquiry, the appellant stated that he believed the computers at the Sasebo Naval Station USO facility, while privately owned, were nonetheless connected to the internet through telephone lines paid for by the federal government. The JER provision in question specifically addresses communications systems paid for by the U.S. Government.¹ Contrary to the appellant's claim on appeal that his belief was "illogical" or "misguided,"² we find nothing inherently improbable about the appellant's belief that the U.S. Government paid for telephone lines onboard a U.S. Naval Station. That the U.S. Government might potentially have been reimbursed by the USO is of no consequence. The appellant's election to plead guilty relieved the Government of its obligation to offer evidence to factually substantiate the Government's ownership of the communications system. This assignment of error is without merit.

Post-Trial Delay

The post-trial delay in the appellant's case does not rise to the level of a due process violation. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *United States v. Toohey*, 60

¹ 2-301 of the JER provides that *Federal Government communication systems and equipment (including Government owned telephones, facsimile machines, electronic mail, internet systems, and commercial systems when use is paid for by the Federal Government) shall be for official use and authorized purposes only.*

² Appellant's Brief at 18.

M.J. 100, 102). While the over five-year delay between sentencing and docketing is unreasonable, the appellant's five months of confinement would certainly have been completed prior to completion of even the most energetic and proactive post-trial processing. In view of our holding in this case, the appellant's speculative assertion that he might have been prejudiced had this case been returned for re-sentencing is moot. See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). We further find that the length of the delay in this case does not affect the findings and sentence that should be approved under Article 66(c), UCMJ. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc)(citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)).

Conclusion

The appellant's remaining assignment of error is without merit.³ The finding of guilty to Specification 1 of Charge II is set aside and dismissed with prejudice. The remaining findings are affirmed. In view of our corrective action on findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). The appellant pled guilty to using Government computers and communication systems to download, view, and possess multiple images of child pornography. In view of this serious misconduct and considering evidence properly admitted during the presentencing hearing, we are confident that the minimum sentence for the remaining offenses would have included at least five months confinement, forfeiture of \$500.00 pay per month for a period of five months and a bad-conduct discharge. See *United States v. Buber*, 62 M.J. 476, 478-79 (C.A.A.F. 2006); *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). The approved sentence is therefore affirmed.

Judge KELLY and Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court

³ RULE FOR COURTS-MARTIAL 1106(d)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), provides that the legal recommendation need only address legal errors asserted by the appellant when such recommendation is prepared by a staff judge advocate. The lack of such an analysis in a recommendation prepared by a legal officer does not violate this rule.