

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

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ALEXANDER L. HOCKEMEYER
BOATSWAIN'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200800077
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 October 2007.

Military Judge: CAPT James Redford, JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: CDR S.L. Hladon,
JAGC, USN.

For Appellant: LT Dillon Ambrose, JAGC, USN.

For Appellee: CAPT Frederic Matthews, JAGC, USN; Capt
Geoffrey Shows, USMC.

30 September 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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, pursuant to his pleas, of four specifications of attempted indecent language, indecent exposure, and possession of child pornography, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. He was sentenced to confinement for 36 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the

convening authority suspended confinement in excess of two years for the period of confinement served plus 12 months thereafter.

After carefully considering the record of trial, the appellant's two assignments of error,¹ the Government's answer, and the appellant's reply, we conclude the appellant's plea to indecent exposure was improvident, and will dismiss that charge, and the sole specification thereunder, in our decretal paragraph.² After taking corrective action, we conclude the remaining findings and the reassessed 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.

I. Factual Background

The appellant corresponded online with "lilraven0103" (hereafter "Raven") through instant messenger. Prosecution Exhibit 1. He believed "Raven" was a 13-15-year-old girl. "Raven" was actually an undercover special agent from the Naval Criminal Investigative Service (NCIS) posing as a 13-year-old girl. PE 1 at 2. The appellant sent "Raven" a live video, with his webcam, in which he displayed his erect penis. PE 1 at 4.

The following exchange took place between the appellant and "Raven" prior to the appellant's exposure of his penis:

"Raven:" can I see you on cam
ACC: and maybe I could show u a few things of me
"Raven:" pleeeeee
. . . .
ACC: u alone?
"Raven:" yeah why
ACC: want to make sure cuz I may show u more then
just my face
"Raven:" oh yeah . . . just me
ACC: so u won't mind if I show u more of me?
"Raven:" its up to you
. . . .
ACC: u ready to see this?
"Raven:" yeah
. . . .
ACC: u like?
ACC: u like my ****?

¹ I. THE MILITARY JUDGE ABUSED HIS DISCRETION IN FINDING THE APPELLANT'S PLEA OF GUILTY TO CHARGE II (INDECENT EXPOSURE) PROVIDENT.

II. APPELLANT RECEIVED AN INAPPROPRIATELY SEVERE SENTENCE OR A DISPARATE SENTENCE FROM OTHER MEMBERS OF THE CONVENING AUTHORITY'S COMMAND WHO FACED SIMILAR CHARGES. (This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431, 435 (C.M.A. 1982)).

² We have also carefully considered the appellant's second assignment of error and consider it to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1971).

"Raven:" wow that is big
"Raven:" never seen one before

PE 8 at 1-2.

A. Principles of Law

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion, and his determinations regarding questions of law arising from the guilty plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008). We apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea. *Id.* at 322. A guilty plea is provident only if the facts elicited make out each element of the charged offense. *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007)(citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).

The elements of indecent exposure are:

- (1) That the accused exposed a certain part of he accused's body to *public view* in an indecent manner;
- (2) That the exposure was willful and wrongful; and
- (3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.³

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 88b (emphasis added).

The appellant concedes exposing his penis was a willful act, but asserts that it was neither indecent or in the public view because it occurred between consenting adults.⁴ Our superior court defined the "public view" element of indecent exposure in *United States v. Graham*, 56 M.J. 266 (C.A.A.F. 2002). Two different types of indecent exposure exist: 1) exposure in a public place, and 2) "nonpublic" exposure which may occur in a "privately-owned home." *Id.* at 268. In *Graham*, our superior court dealt with "nonpublic" exposure, as we do here. *Id.* In *Graham*, the accused invited a 15-year-old babysitter into his bedroom while clothed in only a bath towel, and then allowed his

³ Paragraph 88, Article 134, Indecent Exposure, was replaced by paragraph 45(n), Article 120, in the National Defense Authorization Act for Fiscal Year 2006. MCM, App. 23, at A23-15. (2008 ed.).

⁴ The appellant also asserts that the military judge erred in failing to address the defense of entrapment. Our decision herein makes this assertion moot.

bath towel to drop to the floor exposing his penis. *Id.* at 267. This exposure was ruled legally sufficient to satisfy the "public view" element, despite occurring in the privacy of the accused's bedroom, clearly a nonpublic place. *Id.* at 266. Our superior court reasoned that the accused willfully exposed himself to a 15-year-old girl who was completely unrelated to and uninvolved with him, and who neither invited nor consented to his conduct. *Id.* at 267. Thus, she was "an unsuspecting and uninterested member of the general population [who] had no choice but to see him naked." *Id.* at 268.

B. Analysis

Here, the appellant exposed himself while in his home via a private online video transmission between a sender and recipient. Thus, appellant's exposure was "nonpublic". The record is devoid of any facts demonstrating that this transmission was either observed by a third party, or capable of being observed by a third party:⁵

MJ: Where was your -- you were in your room? You were in the privacy of your room when you did this?

ACC: Yes, sir.

MJ: So, only "raven," looking at the web cam saw you expose yourself. Is that right?

ACC: Yes, sir.

MJ: There weren't any roommates, or other people, in the area where you were?

ACC: No, sir.

Record at 57-58.

Our superior court precedent, in reliance on state court decisions, makes it clear that the focus of indecent exposure is on the victim, and not the location of the crime. *Graham*, 56 M.J. 268. "Public view" means "in view of the public," and in that context, "public" is a noun referring to any member of the public who views the indecent exposure. *See People v. Legel*, 321 N.E.2d 164, 168 (Ill. App. Ct. 1974)(exposure in dining room viewed from outside the home was public indecency, where "public place" requirement was defined by statute "as any place where the conduct may reasonably be expected to be viewed by others"); *Greene v. State* 381 S.E.2d 310, 311 (Ga. Ct. App. 1989)(exposure to teenage babysitter in bedroom was public indecency, where "public place" requirement was defined by statute "as any place where conduct involved may reasonably be expected to be viewed by people other than . . . family or household"). Thus, indecent exposure can be committed in the privacy of one's bedroom and not just in a public setting.

⁵ Nor is there any indication in the record that a purported private online video transmission could be viewed by other computers through which the images travel.

In the instant case, "Raven" was a member of the public who viewed the appellant's exposure. However, unlike *Graham* where the babysitter was clearly an unsuspecting and uninterested target of the accused's lurid display, here, it is not as clear that "Raven" was an unsuspecting or uninterested victim. In fact, "Raven," the purported victim of the exposure, was an NCIS agent attempting to snare online predators. The appellant and "Raven" engaged in several conversations online each of which became progressively more sexual in nature. PE 5, 6, 7, 8. During the 26 July 2006 chat, the appellant gave several indications that he wanted to show "Raven" more of him, and "Raven" tacitly assented, at one point stating "u said u could show me a few things. . . I said like what[?]" PE 8 at 1. Further, after viewing the exposure "Raven" responded "wow that is big," "never seen one before." *Id.* at 2. The gist of the chats indicates that "Raven" was neither "unsuspecting" nor "uninterested." *Graham*, 56 M.J. at 268.

Since the record shows *only* that "Raven" viewed the appellant, and since "Raven" was neither "unsuspecting" nor "uninterested," we conclude there is not an adequate factual basis to support the appellant's plea to indecent exposure. Thus, we find that the military judge abused his discretion in accepting the plea. Accordingly, for reasons of judicial economy, we will set aside the guilty findings to, and dismiss, this charge and specification.

II. Sentence Reassessment

Having dismissed the charge of indecent exposure, we must reassess the appellant's sentence applying the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). After carefully considering the entire record, we are satisfied that, absent prejudicial error necessitating the sentence reassessment, the sentence would have been at least as severe as confinement for 30 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. Finally, we note that our corrective action does not create a dramatic change in the sentencing landscape of the appellant's court-martial. *See United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006).

III. Conclusion

The findings of guilty to Charge II and the sole specification thereunder are set aside, and Charge II and its specification are dismissed. The remaining findings of guilty are affirmed. So much of the approved sentence as extends to confinement for 30 months, reduction to pay grade E-1, forfeiture of all pay and allowances and a bad-conduct discharge is affirmed.

Senior Judge VINCENT and Senior Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge WHITE participated in this decision prior to detaching from the court.