

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

**Before
J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TYLER M. STRADER
AVIATION ELECTRICIAN'S MATE AIRMAN (E-3), U.S. NAVY**

**NMCCA 200600385
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 01 April 2004.

Military Judge: LCDR Ronald Johnson, JAGC, USN.

Convening Authority: Commanding Officer, Helicopter Combat Support Squadron THREE, San Diego, CA.

For Appellant: LCDR Brian M. Bouffard, JAGC, USN; LT William Stoebner, JAGC, USN.

For Appellee: LT Justin Dunlap, JAGC, USN.

03 April 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification each of attempted possession and attempted receipt of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.¹ The convening authority approved the adjudged sentence of reduction to pay grade E-1, confinement for 90 days, forfeiture of \$795.00 pay per month for three months, and a bad-conduct discharge.

¹ The appellant was charged with violating 18 U.S.C. §2252A(a)(5)(B) and (a)(2)(B), as assimilated under clause 3 of Article 134, UMCJ.

Before entering his pleas, the appellant moved to suppress evidence found by the Government during what he alleges was the illegal search of his barracks room and evidence he maintains is derivative of this search. The military judge granted the motion in part, and denied it in part. The appellant then entered conditional pleas of guilty, reserving his right to appeal the military judge's adverse ruling, pursuant to RULE FOR COURTS-MARTIAL 910(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

The appellant now raises three assignments of error, claiming that: (1) the military judge erred when he denied a portion of the defense motion to suppress; (2) unreasonable post-trial delay materially prejudiced his right to speedy appellate review of his court-martial; and (3) the record of trial is incomplete because it does not include the appellant's clemency submission or proof of service of the legal officer's recommendation.

We have examined the record of trial, the appellant's assignments of error, and the Government's response. We conclude 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 following facts are taken from the military judge's ruling on the appellant's motion to suppress. Having reviewed the record, we find that "the military judge's findings of fact are well within the range of the evidence permitted under the clearly-erroneous standard." *United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001). Finding that they are not clearly erroneous, we adopt the military judge's findings of fact as our own. See *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996) (holding that when reviewing a military judge's ruling on a motion to suppress, the evidence is considered in the light most favorable to the prevailing party).

The appellant shared a two-person barracks room with another Sailor, Aviation Electrician's Mate Airman Apprentice (AEAA) L. Their room was one of four that shared a common lounge area. The appellant owned a personal computer that he kept on his desk. He told his roommate not to use the computer, and made it clear that he did not want anyone else using it.

On 9 May 2003, the appellant went to work and left his computer on, but with an active screensaver visible. Neither the computer nor its files were password protected.

Later that day, AEAA L met a 19-year-old woman, Jessica, who was visiting a Sailor that lived in one of the adjoining rooms. After talking to her for a few minutes, AEAA L invited Jessica into his room to see the appellant's collection of "Hello Kitty" dolls. AEAA L told Jessica the appellant spent large amounts of

time on his computer, and did not let anyone else use it. After she accidentally bumped the appellant's desk, causing the computer to return from standby, Jessica began to browse the computer out of curiosity. AEAA L then asked her to see what was on the appellant's computer. Jessica opened files on the appellant's hard drive, one of which was entitled "Avril." That folder contained what Jessica and AEAA L believed to be child pornography. Jessica scrolled through every image file with a ".jpg" suffix in the folder, noting that it contained approximately 260 images of child pornography.

Jessica and AEAA L then summoned two other Sailors to show them what they had discovered on the appellant's computer. After looking at some of the images of child pornography, one of the Sailors called security. Jessica closed the "Avril" folder, and either turned the screensaver back on, or left the computer, which returned to standby mode.

When the first two security officers arrived, they took statements from AEAA L and Jessica. AEAA L told them that he and Jessica had seen images of child pornography on the appellant's computer. The officers then secured the appellant's barracks room, and called their watch commander and field supervisor, Sergeant Worthington. When he arrived, Sergeant Worthington asked AEAA L and Jessica to show him what they had seen. Jessica, AEAA L, and the officers entered the barracks room and Sergeant Worthington asked Jessica how she knew what she had seen was child pornography. She replied that she would show him, opened the "Avril" folder, and scrolled through 23 of the images of child pornography that she and AEAA L had viewed earlier.

After looking at the images, Sergeant Worthington contacted the Naval Criminal Investigative Service (NCIS) Duty Agent, who advised him to seize the appellant's computer as it was in "plain view," but not to apprehend the appellant because NCIS would conduct a criminal investigation of him later. The officers then seized the appellant's computer tower, keyboard, monitor, and peripheral equipment. Later that day, NCIS took custody of these items.

On 30 May 2003, NCIS asked the Regional Computer Forensics Laboratory (RCFL) to search and analyze the appellant's computer hard drive. The RCFL found that the computer contained 551 separate files which had images of suspected child pornography, including some images of child pornography that had not been viewed by AEAA L, Jessica, or any of the officers on 9 May 2003.

On 7 July 2003, 59 days after the Government's seizure of the appellant's computer, NCIS Special Agent Jacob Nocon interrogated the appellant, but did not tell him about the RCFL report. Special Agent Nocon advised the appellant that he was suspected of indecent acts with a minor, a charge unrelated to the search and seizure of his computer, and informed the appellant of his Article 31(b), UCMJ, rights using a "Military

Suspect's Acknowledgment and Cleansing Waiver of Rights" form. The appellant voluntarily waived his rights and agreed to make a statement.

Special Agent Nocon began the interrogation by asking the appellant, "Why do you believe you are here?" Without further prompting, the appellant confessed to knowingly downloading child pornography from the Internet between April 2002 and May 2003.

After the appellant signed a written confession, NCIS agents asked him for consent to search his body for DNA samples and to search his barracks room. The appellant provided written consent on a "Permissive Authorization for Search and Seizure Form" that explained his "constitutional right to refuse to permit the search in the absence of a warrant." The consent form also explained that, by signing it, the appellant was giving his permission for the agents to remove and retain any evidence they found.

During the search of his barracks room, the appellant told Special Agent Nocon to take seven of his computer disks because some of them contained child pornography. The agent seized the disks and submitted them to the RCFL for analysis. The RCFL examination determined that one of the disks contained suspected child pornography.

Ruling on the Motion to Suppress

The military judge partially granted, and partially denied, the appellant's motion to suppress all evidence obtained during, or subsequently resulting from, the search of his barracks room. He found that the officers' search of the appellant's computer was lawful, since security entered the barracks room lawfully. Appellate Exhibit IX at 10. He also found that the officers had probable cause to believe the computer contained evidence of a crime. Accordingly, the military judge determined that the computer was properly seized under the "plain view doctrine," and, therefore, the seizure did not violate the Fourth Amendment.² AE IX at 13-14. However, the military judge found that "the Government exceeded the scope of the private search" by AEAA L and Jessica when the RCFL searched the appellant's computer for Internet web-sites visited, chat messages, e-mail, and other files. AE IX at 18. He suppressed this evidence, along with all reports or information related directly to it.

The military judge also found that the portion of the RCFL hard drive search that revealed images of child pornography on the appellant's hard drive did not exceed the earlier private search. Therefore, he ruled those images were admissible. AE IX at 18.

² Whether the RCFL's search of the seized computer was proper was not considered in determining whether the seizure of the computer was proper.

Finally, the military judge denied the appellant's motion to suppress his confession and the images of child pornography contained on the floppy disk that were seized during the consent search of his barracks room. AE IX at 18.

Discussion

In his first assignment of error, the appellant contends that the military judge erred in denying, in part, his motion to suppress all evidence obtained during or eventually resulting from the search of his barracks room. He argues that the seizure of his computer without a warrant or search authorization was invalid, and that all evidence flowing from the invalid seizure was inadmissible.

We review a military judge's denial of a motion to suppress for an abuse of discretion under a "clearly erroneous" standard. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007); *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed *de novo*." *Rader*, 65 M.J. at 32.

1. Private Search of the Appellant's Computer

Having reviewed the evidence regarding AEAA L and Jessica's examination of the appellant's computer, we agree with the military judge that although AEAA L and Jessica deliberately invaded the appellant's privacy in his computer, their actions were a purely private search which, therefore, did not violate the Fourth Amendment. *See Reister*, 44 M.J. at 415. Neither AEAA L nor Jessica became agents of the Government, as they were motivated solely by curiosity. Government officials did not instigate, know of, or acquiesce in their private search. *Id.*

2. Police Examination of the Appellant's Computer in his Barracks Room and Subsequent RCFL Search of Computer

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Because a private search frustrates such an expectation . . . an ensuing police intrusion that stays within the limits of the private search is not a search for *Fourth Amendment* purposes. . . . Thus, in a private search case, the legality of later governmental intrusions "must be tested by the degree to which they exceeded the scope of the private search."

United States v. Miller, 152 F.3d 813, 815 (8th Cir. 1998)(citations omitted)(quoting *Jacobsen*, 466 U.S. at 115).

The military judge found that the police "examination or intrusion into the [appellant's] computer hard drive did not

exceed either the scope or product" of the earlier private search by Jessica and AEAA L. AE IX at 12. The military judge noted that the security examination of the appellant's computer was limited to viewing images that had previously been opened and viewed by AEAA L and Jessica. Therefore, he concluded that the officers' viewing of these same images was not a search within the meaning of the Fourth Amendment. We agree. The officers' examination of the appellant's computer in his barracks room did not exceed the scope of the earlier private search nor did it violate the Fourth Amendment. We also agree with the military judge's determination that the extraction and seizure of the child pornography images by the RCFL did not exceed the earlier private party search, but that the web-sites, chat logs, and e-mail retrieved from the computer during the RCFL search exceeded the scope of the private search and should be suppressed. AE IX at 18.

The military judge held that the seizure of the appellant's computer was authorized by the "plain view" doctrine, and did not violate the Fourth Amendment. AE IX at 13-14. We agree. Law enforcement officials can seize objects which are in "plain view" if they "have probable cause to believe the item is contraband or evidence of a crime." *United States v. Fogg*, 52 M.J. 144, 149 (1999)(emphasis added). The officers had probable cause to believe that the computer, although not a contraband item *per se*, contained "contraband or evidence of a crime" because they received statements from Jessica and AEAA L about the pornographic pictures of children they had seen when browsing the contents of the computer, and the officers then viewed the images themselves.

3. The Appellant's Confession and Consent Search of his Barracks Room

The military judge denied the appellant's motion to suppress his confession as well as the evidence seized during the consent search of his barracks room, finding that the appellant was provided with Article 31(b), UCMJ, warnings, as well as a "cleansing warning" by NCIS, and that he voluntarily waived his rights.³ AE IX at 6, 18. He held that the appellant was not pressured into confessing, or consenting to the search, because he was unaware of the RCFL examination results and the NCIS agents did not mention them during the interrogation.⁴ AE IX at 17. We find that the military judge was correct in holding that the appellant's confession and consent to search were free and voluntary acts and were not influenced by the RCFL search because

³ The military judge noted that the consent form the appellant signed allowing NCIS to search his barracks room specifically informed the appellant that he had the right to refuse to grant the search in the absence of a warrant.

⁴ The appellant claimed during trial that he "was pretty sure [RCFL] searched [the computer]." Record at 254. The appellant never demonstrated he had actual knowledge a search was conducted. We disregard his hunch that there was Government coercion.

the appellant had no actual knowledge of the search or its results.

In his brief, the appellant argues that when law enforcement officers initially reviewed the images Jessica and AEAA L found while they were still in the appellant's barracks room "they were in fact conducting a second search without going through the proper procedure to secure a warrant." Supplemental Brief for the Appellant of 16 Nov 2006 at 16. The appellant then goes on to argue that his confession and search consent should be excluded because they are the "fruit of the poisonous tree" created by the illegal search and seizure of his computer. We disagree. We have already found that the officer's search and seizure of the appellant's computer was proper. It is, therefore, not a trigger for the application of an exclusionary rule analysis. See *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963).

We also reject the appellant's argument that merely knowing his computer had been seized was sufficient to taint both his confession and his subsequent consent to the search of his barracks room. We find nothing in the agents' conduct to suggest that they tried to surprise, frighten, intimidate, or confuse the appellant.⁵ We also note that the agents seized the computer disks from the appellant's room after the appellant told the agents they should take the disks because some of them contained child pornography. Therefore, we find that the appellant's consent to the search of his barracks room was given freely, and not as a result of the Government's exploitation or illegal conduct. Accordingly, we also find that the subsequent RCFL search and analysis of the computer disks seized from the appellant's barracks room was proper in light of his valid consent to the search of the room.

We decline to grant relief on the appellant's first assignment of error.

Post-Trial Delay

In his second assignment of error, the appellant alleges he was denied speedy post-trial review of his court-martial because it took a total of 742 days from the day he was sentenced until his appeal was docketed with this court. We note with concern

⁵ In particular, we do not consider the NCIS agents advising the appellant that he was suspected of indecent acts with a minor as an attempt to coerce him into consenting to the search of his room. In addition to confessing to the offenses pertaining to child pornography, we note that the appellant also confessed to committing indecent acts with two different minors. Therefore, we find that the agents had a legitimate basis upon which to question him about indecent acts, and that they did not advise him that he was suspected of these offenses for the purpose of surprising, frightening, intimidating, or confusing him.

that nearly 18 months elapsed from the date the convening authority acted on the case to the date it was docketed.

Nevertheless, assuming, without deciding, that the appellant was denied the due process right to speedy post-trial review, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). The appellant has not demonstrated any harm due to the delay and we will neither infer any, nor provide windfall relief. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). We are aware of our authority to grant relief under Article 66, UCMJ, but choose not to exercise it in this case. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006); *Toohy v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*).

Omission of the Appellant's Clemency Petition and the Legal Officer's Recommendation from the Record of Trial

In his third assignment of error, the appellant asks that we set aside the findings and sentence or, in the alternative, set aside the convening authority's action and remand the case for proper post-trial processing, because the record of trial does not contain his clemency submission to the convening authority and proof of service of the legal officer's recommendation (LOR). We decline to do so.

A complete record of proceedings and testimony is required to be prepared in every case where a court martial results in a punitive discharge. R.C.M. 1104(a)(2)(B). This includes any matter filed by the accused under R.C.M. 1105, the post-trial recommendation of the staff judge advocate or legal officer, and proof of service of such upon the defense counsel in accordance with R.C.M. 1106(f)(1). R.C.M. 1103(b)(2)(D).

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981); *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); and *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.*

Here, the convening authority's action states that a copy of the legal officer's recommendation was served on the appellant's defense counsel on 4 August 2004, and that the defense counsel submitted a request for clemency on 16 August 2004. The convening authority's action further states that the convening authority specifically considered the letter of clemency submitted by the appellant's defense counsel when taking his action. Therefore, we find the missing items were considered by

the convening authority prior to taking action. Their absence from the record now is an insubstantial omission that does not impede our responsibilities for review under Article 66, UCMJ, nor does it materially prejudice the appellant's substantial rights. Despite the alleged deficiencies, we find that this record of trial fulfills the requirements of Article 54, UCMJ, and decline to grant relief on this assignment of error.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge O'TOOLE and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court