

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DORIAN A. WILLIS
MACHINIST'S MATE FIREMAN (E-3), U.S. NAVY**

**NMCCA 200700886
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 3 August 2007.

Military Judge: CDR Lewis Booker, JAGC, USN.

Convening Authority: Commanding Officer, USS CARL VINSON
(CVN 70).

Staff Judge Advocate's Recommendation: LCDR J.A. Helton,
JAGC, USN.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: LCDR Guillermo J. Rojas, JAGC, USN; LT Justin
E. Dunlap, JAGC, USN.

27 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a special court-martial of receiving child pornography and in a separate specification of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a bad-conduct discharge, 10 months confinement, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises four assignments of error attacking, under various theories, the fact that he was found

separately guilty of both receipt and possession of child pornography.¹ We have examined the record of trial, the assignments of error, and the Government's response. We agree that the appellant's guilty plea to possession of child pornography lacked a sufficient factual basis to be provident. We will take appropriate action in our decretal paragraph. Following our action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Background

On or about 11 May 2006, the appellant used his private computer at his off-base residence to search for and view child pornography over the internet.² Specifically, the appellant entered the search term, "child pornography" into LimeWire and was presented with a list of file names. The appellant selected four or five files that he believed to contain child pornography and clicked on the file names. Clicking on each file name revealed one or more images on his computer screen. The appellant testified that at least some of the images depicted nude or semi-nude minors, some of elementary school age, engaging in lascivious conduct either alone or with other children or adults.

The appellant testified during his providence inquiry that, after clicking on and viewing a particular child pornography file, he would immediately delete the file from his computer. He took no action to save the files for future viewing. The appellant understood, however, that when he clicked on the individual file names to view the images, his computer would automatically save the image to a temporary internet file. He also understood that such temporary internet files were not entirely erased from his computer when he entered the delete command.

¹ I - The evidence was legally and factually insufficient to find the appellant guilty of possessing child pornography; II - The appellant's plea to possession of child pornography lacked a sufficient factual basis to be provident; III - The military judge committed plain error when he did not declare, *sua sponte*, that the offenses of receiving and possessing the same image of child pornography were multiplicitious; and IV - Charging the appellant with both receiving and possessing the same image of child pornography is an unreasonable multiplication of charges (UMC).

² The appellant's computer was equipped with "LimeWire," a peer-to-peer file sharing program which allows users to search and download files from other similarly equipped computers.

Multiplicity

The appellant was charged with violating two separate sections of 18 U.S.C. § 2252A.³ The appellant argues that he did not possess the contraband images because he did not "exercise dominion and control" over them. He simply received images, viewed, and then deleted them. Appellant's Brief and Assignment of Errors of 14 Jan 2008 at 4.

A providence inquiry into a guilty plea must include the appellant's admission of sufficient factual circumstances to objectively support the guilty plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). We will only reverse a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). In order for us to find an abuse of discretion and 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)).

A multiplicity analysis involving charged violations of several different statutes involves an examination of the elements of the charged offenses using what has come to be known as the "*Blockburger Test*." *United States v. Berheide*, 2004 U.S. Dist. LEXIS 10647 (W.D. Wis. June 9, 2004)(citing *United States v. Hatchett*, 245 F.3d 625 (7th Cir. 2001)(citing *Blockburger v. United States* 284 U.S. 299 (1932)), *vacated as to sentence*, 451 F.3d 538 (7th Cir. 205). Where an accused is charged with multiple violations of the same statute based upon a single act or transaction, as in the instant case, the Supreme Court has stated that the proper inquiry involves the determination of what Congress has made the allowable unit of prosecution. *United States v. Keen*, 104 F.3d 1111, 1118 (9th Cir. 1997)(citing *United States v. Universal C.I.T. Credit Corp*, 344 U.S. 218, 221 (1952)).

In identifying the appropriate unit of prosecution, a court must first look to the language of the statute itself. If the language of the statute is ambiguous, the court must next look to the statute's legislative history. If the legislative history does not resolve the issue, then the court must apply the rule of lenity, a rule of statutory construction which dictates that, in cases of ambiguity or doubt as to congressional intent, only one offense may be charged. *United States v. Song*, 934 F.2d 105, 108 (7th Cir. 1991)(citing to *Bell v. United States*, 349 U.S. 81, 83 (1955)).

³ Specification 1 of the Charge alleged that the appellant "knowingly receive[d] child pornography that had been transported in interstate or foreign commerce in violation of 18 U.S.C. § 2252A(a)(2)(A). Specification 2 of the Charge alleged that the appellant "knowingly possess[ed] child pornography that had been transported in interstate or foreign commerce...in violation of 18 U.S.C. § 2252A(a)(5)(B).

18 U.S.C. 2252(a) makes it a crime to "knowingly ship or transport" in "interstate commerce" "any visual depiction" of a minor engaging in sexually explicit conduct. Use of the word "any" can mean one or more than one depiction. In view of this, federal courts have held that the unit of prosecution in such cases is determined by whether separate and distinct acts made punishable by law have been committed. Thus, the "unit of prosecution" for a crime under this statute is the *actus reus* or the physical conduct of the appellant. *United States v. Reedy*, 304 F.3d 358 (5th Cir. 2002).

The appellant does not contest the providence of his guilty plea to Specification 1 of the Charge alleging that he knowingly *received* child pornography in violation of 18 U.S.C. § 2252 (a)(2)(A). At issue is whether the fact that his computer automatically saved copies of the contraband images in a temporary internet file constituted the additional offense of *possessing* the contraband images.

There is ample federal case law that downloading contraband images to a computer constitutes proof of "control" within the meaning of 18 U.S.C. 2252(a). *United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006). We note, however, that cases involving "control" over the contraband images based solely on the fact that an appellant's computer automatically saved the images in a temporary internet file without any affirmative action by the accused also at least tacitly require that the accused have the computer savvy necessary to access and thereby "control" the images remaining on his computer after he affirmatively attempted to delete them. While we find no military case law directly on this point, there is some federal circuit guidance.

In *United States v. Kuchinski*, 469 F.3d 853, 863 (9th Cir. 2006), the court held that where a "defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images." To do so turns abysmal ignorance into knowledge... dominion and control."⁴

In the instant case, the appellant testified during his providence inquiry that he wasn't sure whether files obtained via LimeWire "come across as temporary files." When pressed by the military judge to state whether the files obtained went into a "temporary file" or were "physically installed" on the machine, the appellant simply stated that they "automatically went into a file on the computer." Record at 49. The appellant further

⁴ See *United States v. Hughes*, 62 M.J. 621 (C.G.Ct.Crim.App. 2005). (Although not addressing the appellant's computer savvy, *per se*, the appellant's conviction was overturned in this case when the appellant was found to have been unaware he had downloaded child pornography at the time he did so and for some time thereafter).

denied moving or naming any of the files under discussion, simply noting that he deleted the files "the best [he] knew how." *Id.* at 51. There was no testimony during the providence inquiry indicating that the appellant possessed the level of computer sophistication to access files once he affirmatively attempted to delete them from his computer.

In view of this, we are not convinced that the appellant's guilty plea to Specification 2 under the Charge included a sufficient factual basis that he had the computer savvy necessary to justify a presumption of continuing access and control of the file images once he attempted to delete them. We, therefore, find a substantial basis in law and fact to question the appellant's plea to this specification.

Conclusion

The finding of guilty to Specification 2 under the Charge is set aside and Specification 2 is dismissed.⁵ The findings of guilty to the Charge and remaining specification are affirmed. As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434, 438 (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).

In this regard, we observe that the appellant elected trial by military judge alone and that the remaining offense of receiving child pornography is regrettably all too common in military courts-martial. These circumstances permit us greater confidence in our ability to reassess the sentence accurately following our action on the findings. We further note that the maximum sentence following our action on the findings remains the jurisdictional maximum of a special court-martial. Thus, the sentencing landscape and the appellant's maximum punishment exposure are fundamentally unchanged. We are, therefore, satisfied that the sentence for the charge and remaining specification would have been at least the same as that adjudged

⁵ In view of our action, the appellant's remaining assignments of error are moot.

by the military judge and approved by the convening authority.
The approved sentence is affirmed.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court