

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

**Before
R.E. VINCENT, E.C. PRICE, J.A. MAKSYM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW J. WOOD
MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200700576
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 January 2007.
Military Judge: CDR Lewis Booker, Jr., JAGC, USN.
Convening Authority: Commander, Naval Air Force, U.S. Atlantic Fleet, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR C.D. Jung, JAGC, USN.
For Appellant: Capt Anthony Burgos, USMC.
For Appellee: Maj James Weirick, USMC.

21 October 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of attempted possession of child pornography, and one specification of possession of child pornography in violation of Articles 80 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The specifications were pled under clause 3 of Article 134, UCMJ, charging conduct violative of federal child pornography laws in 18 U.S.C. § 2252A. The appellant was sentenced to a dishonorable discharge, confinement for 25 months, and reduction to pay grade E-1. Under the terms of the pretrial agreement, all confinement in excess of 18 months was suspended for two years and, unless sooner vacated, remitted.

The convening authority approved the sentence as adjudged but, as a matter of clemency, waived automatic forfeitures in excess of \$500.00 pay per month in favor of the appellant's spouse.

This matter was originally submitted on its merits after which we specified two issues for the parties to address.¹ We have examined the record of trial and the briefs submitted by the appellant and the Government as to the specified issues. For the reasons articulated below, we conclude that the appellant's convictions for attempted possession of child pornography and possession of child pornography must be set aside.

Background

The appellant entered pleas, with exceptions and substitutions, to a violation of clause 3, Article 134, UCMJ, and 18 U.S.C. § 2252A(a)(5)(A), admitting his knowing possession of child pornography "in the special maritime and territorial jurisdiction of the United States."² Record at 12. The appellant's guilty pleas were, therefore, based on a theory that his command, USS CARL VINSON (CVN 70) was, during the pertinent timeframe, located within the special maritime and territorial jurisdiction of the United States.³

¹ This Court specified two issues:

I. WHETHER THE APPELLANT'S GUILTY PLEAS TO CHARGE I AND ITS SOLE SPECIFICATION AND SPECIFICATION 2 OF CHARGE III, ATTEMPT TO POSSESS CHILD PORNOGRAPHY WHILE ONBOARD USS CARL VINSON (CVN 70), IN VIOLATION OF ARTICLE 134, UCMJ, CLAUSE 3 (18 U.S.C. § 2252(A)(5)(a)), ARE PROVIDENT, WHERE THE PROVIDENCE INQUIRY DOES NOT ADEQUATELY ESTABLISH THAT USS CARL VINSON (CVN 70) WAS WITHIN THE ADMIRALTY AND MARITIME JURISDICITON OF THE UNITED STATES AND OUT OF THE JURISDICTION OF ANY PARTICULAR STATE AT THE TIME OF THE OFFENSES? SEE 18 U.S.C. § 7(1).

II. IF THE FIRST SPECIFIED ISSUE IS ANSWERED IN THE NEGATIVE, THEN, IN LIGHT OF *UNITED STATES V. MEDINA*, [66 M.J. 21 (C.A.A.F. 2008)], CAN THIS COURT AMEND CHARGE I AND ITS SOLE SPECIFICATION AND SPECIFICATION 2 OF CHARGE III FROM VIOLATIONS OF ARTICLE 134, UCMJ, CLAUSE 3, TO VIOLATIONS OF EITHER ARTICLE 134 CLAUSE 1 (PREJUDICIAL TO GOOD ORDER AND DISCIPLINE), OR CLAUSE 2 (SERVICE DISCREDITING CONDUCT), WHERE THE APPELLANT ENTERED INTO A STIPULATION OF FACT ADMITTING HIS CONDUCT WAS BOTH PREJUDICIAL TO GOOD ORDER AND DISCIPLINE AND SERVICE DISCREDITING (SEE PROSECUTION EXHIBIT 1, ¶ 12 AT 4-5), BUT THE MILITARY JUDGE DID NOT ASK THE APPELLANT ANY QUESTIONS DURING THE PROVIDENCE INQUIRY RELATING TO WHETHER HIS CONDUCT WAS PREJUDICIAL TO GOOD ORDER AND DISCIPLINE AND/OR SERVICE DISCREDITING?

² The appellant's plea specifically excepted the jurisdictional language set forth in the specification from elsewhere in the statute, to wit: [child pornography] that had been transported in interstate or foreign commerce, or "that had been produced using materials that had been transported in interstate or foreign commerce. 18 U.S.C. §§ 2252A(a)(2) and (a)(5)(B).

³ 18 U.S.C. § 7, reads in part:

The term special maritime and territorial jurisdiction of the United States, as used in this title, includes:

The military judge and counsel participated in the providence inquiry based upon the appellant's pleas to a clause 3 violation. In contrast, the stipulation of fact admitted by the Government without objection, articulates culpability under a theory of conduct prejudicial to good order and discipline, and of a nature to bring discredit upon the Armed Forces in violation of clauses 1 and 2 of Article 134, UCMJ. Prosecution Exhibit 1 at 5.

Discussion

Faced with contrary theories of culpability at trial, this court must determine if any of the offenses to which the accused plead guilty can survive jurisdictional review under the special maritime and territorial exception of 18 U.S.C. § 7 articulated above. We conclude they do not.

As to Charge I, the attempted possession of child pornography and Specification 2 of Charge III, possession of child pornography, the military judge properly advised the appellant of the requirement that the incident take place within the special maritime jurisdiction of the United States. Record at 25. Seemingly, the military judge reached the conclusion that the sovereign status of a commissioned warship axiomatically satisfies the jurisdictional mandate of 18 U.S.C. § 7. *Id.* at 26, 32-33. In their rather peremptory responses to the first of our specified issues, the parties seem to concur with this analysis. However, the record shows only that during the alleged criminal acts, USS CARL VINSON (CVN 70) was located either at Newport News Shipyard, a private enterprise over which the United States does not exercise exclusive jurisdiction, or at Naval Station Norfolk. The record is devoid of any evidence or of any judicially noticed material that establishes the waters at or

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- (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
 - (2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
 - (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building.

near the piers at Naval Station Norfolk are under the exclusive jurisdiction of the United States.⁴ We hold that there is an insufficient factual basis upon which we may conclude that the jurisdictional requirement was met. Absent such a basis, the findings of guilty to the specifications and charges cannot be affirmed as provident. We next look for a remedy.

In *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces reversed a decision of the U.S. Army Court of Criminal Appeals that affirmed a conviction under clause 2 of Article 134, UCMJ, where the original conviction under clause 3 of Article 134, UCMJ, was untenable due to jurisdictional issues. *See also United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). The court determined that where an appellant is not advised "during the plea inquiry that in addition to pleading guilty to the incorporated offenses under 18 U.S.C. §§ 2251 and 2252A, he was by implication also pleading guilty to Article 134(2) UCMJ, offenses not charged or otherwise included in the specification as drafted," the conviction must be set aside. *Medina*, 66 M.J. at 27. Of note, the court imposed this restriction in a case where the appellant had conceded during the providence hearing that his conduct was service discrediting, the military judge having "gratuitously" added service discrediting language from clause 2 of Article 134, UCMJ, as an element to the clause 3 offense. *Id.* at 23-24.

In the case before us, the military judge made no reference to clauses 1 or 2 of Article 134 as part of his colloquy with the appellant. This is, no doubt, because the appellant's plea addressed clause 3 misconduct. In any event, in view of the holding in *Medina*, such an inquiry would not have provided this case with a safe harbor. "[A]n accused must also know under what clause he is pleading guilty." *Medina*, 66 M.J. at 28. We are thus precluded from amending the clause 3 offenses to violations of either clause 1 or 2 of Article 134, UCMJ.

⁴ *See United States v. Bevans*, 16 U.S. 336, 386-91 (1818). *Cf. United States v. Carter*, 84 F. 622 (C.C.D.N.Y. 1897)(Exclusive jurisdiction over lands could be ceded by a state to the federal government. Commission of a crime on United States battleship moored at Cob Dock in New York was within "exclusive jurisdiction of federal court, where territory had been ceded to the United States by the state").

Conclusion

Accordingly, we set aside the findings and sentence. The record is returned to the Judge Advocate General for remand to an appropriate convening authority who may order a rehearing.

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court