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

Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

XAVIER I. MIRANDA-ZAPATA
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800865
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 July 2008.
Military Judge: LtCol Paul Ware, USMC.
Convening Authority: Commanding General, 3d Marine Division (-)(REIN), Marine Corps Base Hawaii, Kaneohe Bay, HI.
Staff Judge Advocate's Recommendation: LtCol W.H. Ferrell, III, USMC.
For Appellant: LT Brian Korn, JAGC, USN.
For Appellee: LCDR Frank Gatto, JAGC, USN; Capt Geoffrey S. Shows, USMC.

19 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BEAL, Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of conspiring to distribute morphine and receiving, possessing, and distributing child pornography, in violation of Articles 81 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 934. The approved sentence was confinement for six years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The appellant raises one assigned error, that the military judge committed plain error by not *sua sponte* declaring the

receipt of child pornography alleged in Specification 1 of Charge III to be multiplicious with the possession of child pornography alleged in Specification 2 of Charge III. Additionally, although not raised as an error, we have also taken notice that the sole specification under Charge I, the conspiracy charge, failed to allege an overt act done in furtherance of the conspiracy.

We have examined the record of trial, the assignment of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Multiplicity

Until recently, we recognized the rule that an unconditional guilty plea ordinarily *waives* any multiplicity issues unless the offenses are 'facially duplicative, that is, factually the same.'" *United States v. Craig*, 67 M.J. 742, 746 (N.M.Ct.Crim.App. 2009)(citing *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997), *rev. granted*, __ M.J. __, 2009 CAAF LEXIS 1295 (C.A.A.F. Nov. 19, 2009). Even more recently the Court of Appeals for the Armed forces held that an unconditional guilty plea waives multiplicity claims. *United States v. Campbell*, 68 M.J. 217 (C.A.A.F. 2009). However, in *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), our superior court differentiated *waiver* from *forfeiture* and indicated that multiplicity claims not raised at trial, but not expressly waived, are forfeited and are reviewed on appeal for plain error.

The appellant unconditionally pled guilty to both receipt and possession of child pornography pursuant to the terms of a pretrial agreement; however he did not expressly waive his right to relief on the grounds of multiplicity, nor did he agree to waive waiveable motions as part of the pretrial agreement. Record at 13; Appellate Exhibit IX. Accordingly, the appellant forfeited any claim of multiplicity absent a finding that Specifications 1 and 2 of Charge III are facially duplicative. If so, the issue is whether it was plain error for the military judge to not declare them so *sua sponte*.

A determination that charges are facially duplicative is made by reviewing the language of the specifications and the facts in the record pertaining to the charges. *United States v. Campbell*, 66 M.J. 578, 580 (N.M.Ct.Crim.App. 2008)(citing *United States v. Madigan*, 54 M.J. 518, 521 (N.M.Ct.Crim.App. 2000), *rev'd in part on other grounds*, 68 M.J. 217 (C.A.A.F. 2009). While we find that the child pornography at issue in each specification is in fact the same child pornography, we also find that the appellant's handling of the material, following his receipt of it, occurred in a manner that distinguished the receipt offense from the possession offense.

The specifications themselves do not factually distinguish the subject matter of the respective offenses: Specification 1 alleges the accused received unspecified "child pornography" throughout the month of July 2008;[1] Specification 2 alleges he possessed a total of 46 images and video files of child pornography on or about 1 August 2008.[2] However, the appellant's responses to the military judge's inquiry into both offenses indicate the same material was the subject of both specifications:

> MJ: Now, in Specification 2, it says that you. . . possessed 20 images of child pornography and 26 video files of child pornography around 1 August 2006? How did you get the pornography that you -- child pornography on 1 August 2006?
>
> ACC: That was the ones that I was acquiring in July.
>
> MJ: Did you just download one time in July 2006 all these files that you possessed in August 2006?
>
> ACC: No sir, I continue (sic) downloading throughout the time period.
>
> MJ: So in July 2006, you received some child pornography, and then we'll move on to August of 2006 and - - I really don't need to know how you got the other child pornography -- eventually, you ended up with 20 images of child pornography and 26 video files of child pornography?
>
> ACC: Yes, sir.

Record at 52-53. Notwithstanding the military judge's reference to "the other child pornography" it is abundantly clear from the record that the appellant was pleading guilty to possessing in August 2006 the same child pornography that he received in the month of July 2006.

We recently held that there must be a separate *actus reus* to distinguish the possession of child pornography as a separate offense from the receipt of child pornography. *Craig*, 67 M.J. at 747. The appellant's responses to the military judge's inquiry

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[1] Specification 1: In that Lance Corporal Xavier I. Miranda-Zapata, U.S. Marine Corps, on active duty, did at an unknown location, on or about July 2006, receive child pornography that has been transported through interstate commerce by use of the internet in violation of 18 U.S.C. § 2252A(a)(2).

[2] Specification 2: In that Lance Corporal Xavier I. Miranda-Zapata, U.S. Marine Corps, on active duty, did at Marine Corps Base Hawaii, Kaneohe Bay, Hawaii, on or about 1 August 2006, knowingly possess, on land owned by the Government of the United States, twenty (20) images and twenty-six (26) video files of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(a) including: PC4.jpeg, PC8.jpg, PC18.jpg, PC21.jpg, One 6 Full Baby J Compilation.mpg, Pedo-Hussyfan pthc r@ygold babyshivid andina #2.mpg, One 9 Double team by 10 15 full.mpg

regarding his handling of the material clearly indicate a separate *actus reus* from the receipt of it:

> MJ: Well, where did you store images on your computer?
>
> ACC: On two hard drives, the internal hard drive and the external that was attached to it.
>
> MJ: So you had an external hard drive to store data?
>
> ACC: Yes, Sir.
>
> MJ: And you moved these 46 images, and you either have them on your hard drive or on the external hard drive?
>
> ACC: That is correct sir.
>
> MJ: Did you name folders for these images?
>
> ACC: No, sir.
>
> MJ: Did you know they were on there or did you think you had deleted them off?
>
> ACC: I knew they were on there, sir.
>
> MJ: Had you gone back to view these images before?
>
> ACC: Yes, sir.
>
> MJ: Did you want to maintain control over these images?
>
> ACC: Yes, sir.

Record at 58-59. The appellant's moving the material to a separate hard drive and going back to view it differentiates his conduct from the receipt and storage of the material on his internal hard drive. Accordingly, we find that the specifications are not factually the same, thus the military judge's failure to *sua sponte* declare them multiplicious was not error. There being no error to begin with, there is no plain error. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

Failure to Allege an Overt Act

During the providence inquiry, the military judge correctly noted that the specification under Charge I failed to allege the second element of conspiracy, i.e., an overt act.

> MJ: [T]he Specification within the Charge doesn't allege the overt act. It just alleged what the conspiracy was, and that's an element that normally needs to be included in there. I read the stipulation

> of fact and it gave me an overt act and you told me what happened, but we --
>
> Defense, you didn't file a motion saying they failed to state any offense. Were you put on notice as to the overt acts that were alleged under the Specification?
>
> CC: Yes, sir.
>
> MJ: And, Mr. Partington, what overt acts were you put on notice that he committed in furtherance of this conspiracy?
>
> CC: Distribution – the actual distribution of morphine, Your Honor.

Record at 22-23. The military judge explained to the appellant that proof of the intended offense is not required, "but in this particular manner in which the Government charges it and you believe the overt act was, an actual distribution did occur." *Id.* at 23. To which the accused indicated his understanding. *Id.*

Following the military judge's exhaustive inquiry into the facts underlying the specification, he revisited the issue of the missing element with the CC:

> MJ: . . . I mentioned earlier with regard to Charge I and its Specification missing one of the element[s]. The key element is the overt act alleged.
>
> Defense, you represented to me that you weren't misled and you understood that there was an overt act. Did you understand that the Specification was missing an element at the time you advised your client to enter a plea?
>
> CC: Yes, Your Honor. But, we realized if we brought it to the Government's attention, they would merely correct it.
>
> MJ: And so you were waiving specifically a motion to dismiss to that charge for failing to state an offense?
>
> CC: I was rather, kind of, hoping it would be an appellate issue. But if it's necessary, we will waive it, Your Honor.
>
> MJ: I am asking you: Are you waiving the motion to Charge I and its Specification because it fails to state an offense?
>
> CC: Yes, Your Honor.

Id. at 38. Notwithstanding the military judge's attempts to extract a waiver of this issue, failure to state an offense cannot be waived.[3] RULE FOR COURTS-MARTIAL 907(b)(1)(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Nonetheless, while the specification fails to expressly allege the second element of the offense, the appellant acknowledged that he was informed of what the overt act in this case was: actual distribution.

A conviction will not be reversed on the basis of defects in the specification when the specification is not so defective that it "cannot within reason be construed to charge a crime" and the accused does not challenge the specification at trial, pleads guilty to the intended offense, has a pretrial agreement, satisfactorily completes the providence inquiry, and suffers no prejudice. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986)(internal quotation marks omitted). Based on this record, we are confident that the rationale in *Watkins* applies to this case. The appellant was clearly charged with the offense of conspiracy under Article 81, UCMJ, which requires (1) an agreement with another party to engage in a criminal act and (2) some overt act in furtherance of the agreement. As the defense indicated on the record, they were informed that the overt act in this case was actual distribution. The military judge correctly explained the elements of the intended offense to the appellant who indicated he understood all of the elements and provided the military judge a factual basis to find him guilty. Furthermore the appellant entered into a stipulation of fact that supported both elements of the offense and also had a pretrial agreement.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge MITCHELL and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

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[3] We feel we must comment on the manner in which the military judge handled this obvious error. Once the military judge identified the omission, the proper approach would have been to identify the deficiency to the parties, inquire of the defense if they still desired to plead guilty to the intended offense, and, if so, ascertain if the defense would object to a major change in the specification. We have considered whether the course of action taken by the military judge reflects actual or implied bias on his part and have concluded that it does not. *See United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008).