

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

**Before
J.A. MAKSYM, J.R. PERLAK, P.H. MCCONNELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSHUA C. PIERCE
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000353
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 February 2010.

Military Judge: Col Daniel J. Daugherty, USMC.

Convening Authority: Commanding Officer, Marine Aviation Logistics Squadron 29, Marine Aircraft Group 29, 2d Marine Aircraft Wing, U.S. Marine Corps Forces Command, Jacksonville, NC.

Staff Judge Advocate's Recommendation: Col D.J. Leece, USMC.

For Appellant: Capt Peter Griesch, USMCR.

For Appellee: Mr. Brian K. Keller, Esq.

9 September 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge, sitting as a special court-martial convicted the appellant, consistent with his pleas, of attempting to communicate indecent language to a child under sixteen and attempting to transfer obscene matter over the internet to a child under sixteen, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. § 880 and 934. The approved sentence included a reprimand, reduction to pay grade E-1, and a bad-conduct discharge.

The case is before us without assignment of error. We have carefully considered the record of trial and conclude that the specification in support of the Article 134 offense requires modification. We take corrective action below. Following that action, we conclude the modified findings and reassessed 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.

Attempting to Transfer Obscene Matter

Both offenses occurred over the Internet while the appellant was deployed to Iraq and involved a civilian law enforcement officer in the United States, whom the appellant believed to be a girl under the age of sixteen named Ashley.

The specification in support of the Article 134 offense, involving an attempt to transfer obscene matter to a child under sixteen, was charged in such a manner as to implicate Clauses 1, 2 and 3 theories of culpability. The state of the providence inquiry fully supports a provident plea on a theory of service discrediting conduct. We affirm the finding on that basis. Accordingly, we need not determine whether the plea is provident under a Clause 1 theory.

The providence inquiry also purports to support a theory under Clause 3, of a non-capital crime, specifically 18 U.S.C. § 1470. However, such a theory of liability cannot be reconciled with the statutory and extraterritorial analysis of the Court of Appeals for the Armed Forces in *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). Applying the *Martinelli* analysis, and consistent with this court's opinion in *United States v. Jones*, No. 200600541, 2007 CCA LEXIS 57, unpublished op. (N.M.Ct.Crim. App. 27 Feb 2007), we find that 18 U.S.C. § 1470 bears no clear Congressional intent to apply extraterritorially. As such, the appellant's actions, occurring while deployed to Al Asad, Iraq, fall outside the jurisdictional ambit of the statute and cannot be providently pled to under a Clause 3 theory of culpability. We find no resulting prejudice to the appellant. The military judge specifically addressed the implications of pleading guilty based on the differing theories with the appellant, including the eventuality that if the Clause 3 theory was for some reason set aside, he would remain convicted of the offense if he were provident under other theories. Record at 28-29. Such is the case.

The finding of guilty to the Article 80 offense is affirmed. The finding of guilty to the Article 134 offense is likewise affirmed, excepting the words, "in violation of Title 18 U.S.C. § 1470," and, "prejudicial to good order and discipline or."

Sentence Reassessment

Because of our action on the findings, we will reassess the sentence in accordance with 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, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). A "dramatic change in the penalty landscape gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003) (internal quotation marks omitted)).

In reassessing the sentence, we find that there has not been a dramatic change in the penalty landscape. Noting that the facts are precisely the same, with two clauses raising alternative theories of culpability removed from the specification, we are confident that the military judge would have imposed, and the convening authority would have approved, the sentence actually imposed and approved.

Conclusion

As modified and reassessed herein, the findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court