

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES M. PLEVYAK
ELECTRICIAN'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200900347
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 February 2009.
Military Judge: CAPT David Bailey, JAGC, USN.
Convening Authority: Commander, Submarine Group TWO, Naval
Submarine Base New London, Groton, CT.
Staff Judge Advocate's Recommendation: LCDR J.L. Marsh,
JAGC, USN.
For Appellant: LT Dillon Ambrose, JAGC, USN; LT Michael
Torrissi, JAGC, USN.
For Appellee: Capt Jonathan Nelson, USMC; LT Timothy
Delgado, JAGC, USN.

13 July 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 general court-martial convicted the appellant, contrary to his pleas, of two specifications of possessing child pornography and two specifications of receiving child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence included confinement for 18 months, reduction to pay grade E-1 and a bad-conduct discharge.

The appellant assigns three errors. First, he argues that the military judge erred by not dismissing one of the two specifications alleging possession, and by not dismissing one of the two specifications alleging receipt, as unreasonably multiplied charges. Second, he alleges that the military judge committed plain error by failing to find, *sua sponte*, that the specifications alleging receipt of child pornography were multiplicious with the specifications alleging possession of the same contraband. Finally, he argues that his convictions for receipt and possession of child pornography are both legally and factually insufficient because the Government did not present evidence that he did so knowingly.

After examining the record of trial and the pleadings of the parties, we conclude that the evidence of the appellant doing more than knowingly receive child pornography to be factually insufficient to support a separate conviction for knowing possession of the child pornography that was not incidental to his receipt of it. Accordingly, we do not reach a decision as to the appellant's multiplicity assignment of error. We also find the two specifications of receipt of child pornography to represent an unreasonable multiplication of charges. We will take appropriate action as to these findings in our decretal paragraph. The remaining findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was suspected of the charged offenses after a shipmate, the subject of a separate investigation for child pornography, told law enforcement officials that the appellant showed him child pornography. The appellant consented to a search of his computer and the ensuing forensic analysis revealed a number of child pornography images and videos located in a system file. Additionally, the analysis indicated evidence that the appellant used search terms typically associated with child pornography on the peer-to-peer file sharing program, Limewire. The appellant was charged with two specifications alleging possession of child pornography: Specification 1 alleged the possession was conduct prejudicial to good order and discipline and service discrediting under clauses 1 and 2 of Article 134, UCMJ; Specification 2 alleged the possession of the same material was a violation of 18 U.S.C. § 2252A(a)(5) under clause 3 of Article 134. The appellant was also charged with two specifications alleging receipt of child pornography: Specification 3 alleged the conduct was prejudicial to good order and discipline and service discrediting under clauses 1 & 2 of Article 134, UCMJ; Specification 4 alleged the receipt of the same material was a violation of 18 U.S.C. § 2252A(a)(2) under clause 3 of Article 134. The military judge found the appellant guilty of all 4 specifications but, pursuant to a defense motion, consolidated both the possession specifications and the receipt

specifications into one specification each for sentencing purposes.

Analysis

A. Legal and Factual Sufficiency

As to the appellant's argument that the evidence is legally and factually insufficient to sustain his convictions for receipt of child pornography, we disagree. However, in this record we find that the evidence of any *actus reus* committed by the appellant, beyond that of his possession incidental to his receipt of the contraband as alleged in Specifications 3 and 4, leaves us in doubt that the appellant actually did anything more than knowingly receive this contraband. We therefore set aside the findings of guilty to Specifications 1 and 2.

We review questions of legal sufficiency *de novo*. *United States v. Chatfield*, 67 M.J. 432, 441 (C.A.A.F. 2009). In considering a legal sufficiency challenge, the test is whether, taking the evidence in the light most favorable to the prosecution, "a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *Id.* (citing *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006)). When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

We are convinced that a reasonable fact-finder, viewing the evidence in the light most favorable to the prosecution, could have found all the essential elements, including the scienter element, beyond a reasonable doubt. At trial, evidence was adduced on the element of knowledge in a number of ways. The appellant admitted that he used Limewire to download 10-25 adult pornography files at a time, two to three times per week, from March of 2007 until May of 2008. Record at 338-39. During these download sessions, the appellant admitted intentionally using search terms which, according to the government lead agent on this case and computer forensics examiners from both sides, are heavily associated with child pornography. *Id.* at 41, 185-86, 271, 330-32. The defense computer forensics expert testified, in fact, that approximately 20 percent of the images in the appellant's thumbs.db folder were child pornography. *Id.* at 268. When the defense conducted a simulation on Limewire using the same search terms that the appellant admitted to using, he said 40 percent of the resulting files were child pornography. *Id.* The length of time that the appellant used Limewire, the search terms he used on this program, the number of child pornography files they produced and the names clearly visible in these files, when considered together, all show evidence of the appellant's *mens rea*. Although the appellant denied paying attention to any of his file titles because he claimed that images were occasionally mislabeled on Limewire, he admitted to paying

attention to titles when it suited him, such as explaining why he knew about search terms used exclusively to find child pornography. *Id.* at 349, 352.

Applying the well-known test for factual sufficiency, as set forth in *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), this court must make its own determination as to whether or not we are convinced of the appellant's guilt beyond a reasonable doubt "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses." *Id.* Having carefully reviewed the record, we are also convinced beyond a reasonable doubt of the appellant's guilt.

B. Unreasonable Multiplication of Charges

In regard to the appellant's first assigned error, the Government concedes that relief is warranted under an unreasonable multiplication of charges theory. We note that alternative charging of the type done here is not, in and of itself, a problem. Charging in the alternative for contingencies of proof or other reasons is a common and accepted practice. However, in several recent unpublished opinions by this court on this issue we have dismissed the alternative findings pursuant to *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). While the military judge's consolidation action obviated any potential sentencing prejudice to the appellant arising from the Government's alternate charging strategy, the appellant was nonetheless prejudiced by the fact that he was found guilty of two separate specifications for the receipt of the same child pornography. Accordingly, we set aside Specification 3 (alleging a violation of clauses 1 & 2 of Art. 134, UCMJ).

C. Sentence Reassessment

Having set aside the findings as to Specifications 1-3 of the Charge, we reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the sentencing landscape has not substantially changed and that even if the error had not occurred, the military judge would have adjudged a sentence no less than that adjudged and approved by the convening authority in this case.

Conclusion

The findings of guilty to Specification 4 and to the Charge are affirmed. The findings of guilty to Specifications 1, 2 and

3 of the Charge are set aside and those specifications are dismissed. The approved sentence is affirmed.

For the Court

R.H. TROIDL
Clerk of Court