

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRANDON T. HEIBERG
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000668
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 July 2010.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding General, Marine Corps Base,
Camp Smedley D. Butler, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col W.G. Perez,
USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: CAPT Paul Ervasti, USMC.

22 November 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MAKSYM, Senior Judge:

A military judge, sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of attempting to receive child pornography in violation of 18 U.S.C. § 2252A(a)(2), and one specification of accessing, with intent to view, child pornography, in violation of Articles 80 and 134, Uniform Code of Military Justice, 18 U.S.C. §§ 880 and 934. The military judge sentenced the appellant to eighteen months confinement, reduction to pay grade

E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it to be executed.¹

In his sole assignment of error, the appellant argues that the evidence presented by the Government at his court-martial is legally and factually insufficient to sustain a conviction for attempted receipt of child pornography. In particular, he asserts that the prosecution did not prove that he had formed the requisite specific intent. We disagree and conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to a substantial right of the appellant exists. Arts. 59(a) and 66(c), UCMJ.

Background

In May 2008, the appellant was at his parent's home in Washington using his personal desktop computer to search for and view pornography on the internet. Record at 377. The appellant used search terms that included "Lolita," "little angels," and "girls" in order to locate pornography. *Id.* at 402. At some point, the appellant accessed a website that contained pictures of child pornography as well as the words "Pedo Heaven" and "Dirty Nymphette". Record at 393. This website offered access, for a fee of \$79.99, to a separate password-protected section that contained additional child pornography. *Id.* The appellant, who had seen child pornography several times prior to May 2008, decided to enter his name, address, and debit card information in a most overt effort to access the contents of the website. *Id.* at 393; Prosecution Exhibit 13 at 6. The appellant did this notwithstanding his knowledge that the images on the website clearly constituted child pornography. Record at 394; PE 9 at 22. The appellant's debit card was declined, and for this reason alone, he did not gain access to the password-protected portion of the website. Record at 381.

The website the appellant viewed and attempted to enter was monitored by Immigration and Customs Enforcement (ICE) personnel. *Id.* at 119. ICE was able to collect the appellant's personal information, which led agents to his family's home in December 2008. *Id.* at 383; PE 13 at 10. The appellant, who had taken orders to Okinawa, Japan in August 2008, was first told of

¹ To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

the ICE investigation in December 2008 when, in response to an email from his parents, he called his parents and was told that the Naval Criminal Investigative Service (NCIS) would be contacting him. Record at 380; PE 13 at 11. NCIS interviewed the appellant on 7 March 2009 and 28 July 2009. PE 13; PE 9. During both interviews, the appellant admitted he had viewed child pornography in the past, visited a child pornography website in May 2008, and searched for and viewed child pornography at least twice subsequent to May 2008. PE 9 at 10; PE 13 at 11. The appellant gave NCIS permission to search his barracks room where they seized his laptop computer. Record at 387; PE 8. This laptop had been purchased by the appellant shortly after he arrived in Okinawa. The appellant stated that he had thrown away the computer he had used to view the child pornography website in May 2008. PE 9 at 19. A forensic examination of the appellant's laptop computer revealed several images of child pornography that had been accessed in February 2009. Record at 388; 397.

At trial, the appellant testified about his pornography viewing habits. He admitted to having searched for and viewed child pornography in May 2008, as well as having attempted to subscribe to that website. *Id.* at 393. He admitted to having viewed child pornography on several occasions prior to and after May 2008. *Id.* at 394. The appellant testified that he had ceased to use search terms that might lead to child pornography in December 2008. *Id.* at 397. The appellant testified that he did not download adult pornography. *Id.* at 376. Finally, the appellant testified that his past experience with pornography included clicking on photos in order to view them, waiting for pictures to load on his screen, and clicking on videos in order to play them. *Id.* at 393.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, this court reviews issues of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The elements of attempted receipt of child pornography are: (1) that the accused entered his debit card information in order to gain access to a website containing child pornography; (2) that the act was done with the specific intent to receive child pornography in violation of 18 U.S.C. § 2252A(a)(2); (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the offense of receipt of child pornography. Art. 80, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 4b. The appellant argues that he did not possess the necessary specific intent required to be convicted of attempting to receive child pornography pursuant to 18 U.S.C. § 2252A(a)(2).

Specific intent may be established by circumstantial evidence. *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998). However, "proof of the overt acts of the accused may not, by themselves, be bootstrapped up to also prove the specific intent required to prove an attempt offense." *United States v. Allen*, No. 894043, 1991 CMR LEXIS 645 at 3, unpublished op. (N.M.C.M.R. 1991) (citing *United States v. Polk*, 48 C.M.R. 993, 996 (A.F.C.M.R. 1974)), *aff'd*, 34 M.J. 228 (C.M.A. 1992). Thus, the Government must have presented evidence in this case that does more than establish that the appellant took an overt act towards accessing child pornography. Evidence that the appellant intended to access or view child pornography is not enough. There must be evidence, whether direct or circumstantial, that the appellant had the specific intent to receive that child pornography.

Essential to evaluating the specific intent to receive child pornography is the definition of "receive" itself. Although 18 U.S.C. § 2256 defines many of the terms in 18 U.S.C. § 2252A(a)(2), "receive" is not one of them. Consequently, we must look elsewhere for the meaning of the word.

Absent a statutory definition, three sources of guidance are used: (1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance gleaned from any parallel UCMJ provisions. *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009). The

legal definition of "receive" is "to take into possession and control; accept custody of; collect." *Black's Law Dictionary* 1268 (6th ed. 1990). A person has received child pornography when they exercise "dominion and control over it." *United States v. Olander*, 572 F.3d 764, 767 (9th Cir. 2009) (quoting *United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006)), cert. denied, 130 S.Ct. 1113 (2010). Although "receive" is not defined in the Manual for Courts-Martial, the word "possess" is integral to the definition of "receive." See e.g., *Olander* at 769. Additionally, several courts have held that 18 U.S.C. § 2252A(a)(5)(b), which criminalizes possessing child pornography, is a lesser included offense to 18 U.S.C. § 2252A(a)(2), receiving child pornography. *United States v. Miller*, 527 F.3d 54, 72 (3rd Cir. 2008); (*United States v. Davenport*, 519 F.3d 940, 945 (9th Cir. 2008); *United States v. Kuchinski*, 469 F.3d 853, 859 (9th Cir. 2006). "Possess", is, in part, defined in the Explanation to Article 112a, UCMJ, as "to exercise control of something." MCM, Part IV, ¶ 37c(2).

It is clear that downloading child pornography and deliberately saving the file to a computer's memory constitutes receipt. *United States v. Madigan*, 54 M.J. 518, 521 (N.M.Ct.Crim.App. 2000). A conviction for receipt of child pornography can be based on evidence that a defendant intentionally sought out and viewed child pornography. *United States v. Pruitt*, 638 F.3d 763, 767 (11th Cir. 2011), cert. denied, ___ U.S. ___, 2011 U.S. LEXIS 5468 (Oct. 3, 2011). However, other courts, including the Court of Appeals for the Armed Forces, have held that clicking on and viewing images of child pornography, without any knowledge that those images are being saved on the computer and without any ability to access those files, does not constitute receipt. *United States v. Navrestad*, 66 M.J. 262, 268 (C.A.A.F. 2008); *Kuchinski*, 469 F.3d at 863.²

The underlying concern voiced within cases that have overturned convictions for receipt of child pornography under 18 U.S.C. § 2252A(a)(2), like *Navrestad* and *Kuchinski*, is reserved for that internet user who "find[s] himself ensared in a child

² Although *Navrestad* addresses possession of child pornography under 18 U.S.C. § 2252A(a)(5)(b) and *Kuchinski* addresses both possession and receipt of child pornography under 18 U.S.C. § 2252A(a)(5)(b) and 18 U.S.C. § 2252A(a)(2), respectively, the similarity between "receipt" and "possession" as legal terms renders any discussion of one applicable to the discussion of the other, understanding, of course, that as a lesser included offense, it may be possible to commit the crime of possession of child pornography without actually receiving child pornography. See e.g., *United States v. Davenport*, 519 F.3d 940, 944 (9th Cir. 2008).

pornography case unwittingly, by virtue of files that were copied to temporary storage and never knowingly received." *United States v. Winkler*, 639 F.3d 692, 698 (5th Cir. 2011). That concern is what separates cases like *Navrestad* and *Kuchinski* from cases like *Madigan*, *Pruitt*, and the appellant's case. Whether evidenced by a person's knowledge of computer systems, a pattern of searching for child pornography, or intentional deletion of child pornography files, knowing receipt of child pornography is a question that is "highly fact specific" and not tethered to where files were found on a computer. *Winkler*, 639 F.3d at 699.

The appellant's intentional efforts to obtain commercial subscriber-level access to (application to join) a child pornography website is clearly the overt act required to prove attempted receipt of child pornography. The appellant's past experience with child pornography, his intentional search for child pornography, his recognition of child pornography on a website and subsequent failure to immediately close that website, along with his admitted curiosity towards child pornography all provide circumstantial evidence of specific intent to receive child pornography. The appellant's pornography viewing habits also tend to show that he intended to, at the very least, click on images to enlarge them on his personal computer screen as well as play videos. The appellant was in the habit of allowing images to load on his screen while he viewed them. Although the appellant denied specifically downloading images, his credibility was undermined by his inability to explain two images of child pornography downloaded to his computer in February 2009, the presence of which contradicted his testimony that he stopped utilizing search terms that might return child pornography in December 2008. Finally, the \$79.99 the appellant was willing to pay for access to the child pornography website indicates that the appellant intended more than a fleeting glimpse at the site's illegal contents.

Taken as a whole, this evidence establishes that the appellant intentionally searched for, found, and intended to receive images and videos of child pornography over which he would have had the requisite "dominion and control." The appellant is not that innocent soul who "unwittingly" views child pornography or who is "ensnared" in a child pornography case. *Winkler*, 639 F.3d at 698. Although certainly not a computer expert, the appellant was not suffering from "abysmal ignorance" or a "less than valetudinarian grasp" of computer technology. *Kuchinski*, 469 F.3d at 863. Rather, the appellant

intentionally sought out child pornography and manifested intent to bring up that child pornography, whether pictures or videos, on his computer screen.

Viewing the evidence in the light most favorable to the Government and drawing every reasonable inference from the record in favor of the prosecution, as we must, we conclude that a reasonable fact-finder could have found all the elements of attempted receipt of child pornography beyond any reasonable doubt. Moreover, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond any reasonable doubt.

Conclusion

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

Judge PERLAK and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court