

**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.

**ADAM G. HALL
MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201000671
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 August 2010.

Military Judge: CDR Thomas Fichter, JAGC, USN.

Convening Authority: Commander, Naval Air Force Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR Frank T. Katz,
JAGC, USN.

For Appellant: Philip D. Cave, Esq.; Capt Michael Berry,
USMC.

For Appellee: Maj William Kirby, USMC.

6 December 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.**

PER CURIAM:

A panel of members sitting as a general court-martial, convicted the appellant, contrary to his plea, of violating a lawful general regulation by wrongfully viewing sexually oriented material on his government computer in violation of

Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.¹ The members sentenced the appellant to reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the findings and sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant asserts the following five assignments of error:² 1) that he was improperly denied a new Article 32 hearing; 2) that he was improperly denied a continuance; 3) that he was improperly denied expert assistance; 4) that the Government failed to prove Charge I and its sole specification beyond a reasonable doubt; and 5) that his sentence was inappropriately severe.

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

Request for a New Article 32 Hearing

The appellant asserts that the military judge improperly denied his request for a new Article 32 hearing. At trial, he asserted that the investigating officer (IO) was disqualified due to her *ex parte* communications with the trial counsel and because the Government failed to produce evidence that was requested by the appellant prior to the Article 32 hearing. We evaluate a military judge's ruling on a motion for appropriate relief concerning Article 32 defects for an abuse of discretion. *United States v. Von Bergen*, 67 M.J. 290, 293 (C.A.A.F. 2009).

Generally, investigating officers are held to the same standards as military judges on questions of impartiality. *United States v. Reynolds*, 24 M.J. 261, 263 (C.M.A. 1987). After reviewing the evidence, which consisted of a recording from the Article 32 hearing and emails between trial counsel and the IO, the military judge found no impropriety in the IO's selection or in her communications with trial counsel as they

¹ The members acquitted the appellant of knowing receipt and possession of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934.

² These errors were briefed by civilian counsel, but each assigned error stated that it was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Although not raised by the appellant, we note several procedural errors that require brief comment.

were "ministerial" in nature. Record at 91-92. We agree. Our review of the record indicates no impropriety in the IO's selection or in her communications with the trial counsel.

Prior to the Article 32 hearing, civilian defense counsel requested a CD/DVD copy of the examination by the Government's forensic computer expert ("FTK Findings CD/DVD"). Appellate Exhibit XIV at 11-12. At the motion hearing, the Government conceded that it did not provide a copy until after the Article 32 hearing, but maintained that it complied with the discovery request because the evidence was available for defense inspection both at the examiner's office at the Naval Criminal Investigative Service as well as at trial counsel's office. Record at 82-84; AE III at 17. In his ruling, the military judge agreed with the Government and our review of the record brings us to the same conclusion. Furthermore, we are unable to discern any prejudice to the appellant as a copy of the FTK Findings CD/DVD was ultimately delivered to the defense after the Article 32 hearing.

On both claimed errors, we find that the military judge's findings and conclusions are supported by the evidence; we therefore conclude that he did not abuse his discretion in denying the appellant's motion for a new Article 32 hearing.

Denial of Continuance Request

Three days before trial, civilian defense counsel requested a two-week continuance, citing a need to interview the Government's forensic computer expert and additional time to prepare in light of his home having been recently burglarized. Record at 101-06. The military judge denied the request, but did recess trial early on the first day to allow civilian counsel sufficient time to meet with the Government's expert witness. *Id.* at 381-86. When trial resumed the following day, civilian counsel indicated the defense was ready to proceed and made no further request for delay. *Id.* at 391-93.

We review the denial of a continuance for abuse of discretion. *United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004). "Only an unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay will result in reversal." *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (internal quotation marks omitted). Applying the twelve factors identified in *United States v. Miller*, 47 M.J.

352, 358 (C.A.A.F. 1997), we find no abuse of discretion in the military judge's ruling.

Denial of Expert Assistance

Prior to trial, the appellant requested the appointment of a forensic expert consultant to provide a comprehensive examination of the appellant's "psychological and sexual functioning." AE XV at 3. At the motion session, both trial and defense counsel focused on whether the expert consultant could offer relevant testimony at trial and potentially in sentencing. Record at 84-87. In denying the request, the military judge framed his ruling in terms of admissibility under MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Id.* at 92-95. We review a military judge's decision to deny expert assistance for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

Assuming without deciding that the military judge erred by relying upon MIL. R. EVID. 702,³ we find no discernible prejudice. The members acquitted the appellant of all specifications related to child pornography leaving only a guilty finding for viewing sexually oriented material on a government computer. The principal concern behind the defense request was an effort to dispel potential issues surrounding convicted child sex offenders and to rebut a potential Government argument that the appellant was a pedophile or a sexual predator. Record at 86; AE XV at 2-5. Our review of the record reveals no attempt by the Government to introduce any such evidence or related inference. Therefore, even if the military judge erred by relying upon an incorrect view of the law, we find no prejudice.

Factual Sufficiency

Article 66, UCMJ, requires a court of criminal appeals to conduct a *de novo* review of the factual and legal sufficiency of each conviction. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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 the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). When making these

³ While the concepts of expert assistance and expert testimony are related, they are grounded on separate principles and require separate analyses. See *United States v. Langston*, 32 M.J. 894, 896 (A.F.C.M.R. 1991).

determinations, we are mindful that reasonable doubt does not mean the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000).

After conducting a *de novo* review of the record, and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt to Charge I and its sole specification. The evidence clearly established that the appellant, while using a government computer system, searched for sexually suggestive images on the Internet approximately fifteen to twenty times, using such search terms as "pre-teen girls panties", "non-nude little girls," and "nude little girls."⁴ Therefore, the evidence is sufficient to sustain the conviction on the specification challenged by the appellant.

Sentence Appropriateness

The appellant last argues that the sentence he received, specifically the punitive discharge, was inappropriately severe and suggests that the members may have inappropriately punished him, in part, for the offenses of which he was acquitted. We disagree. We find no evidence in the record to suggest that the members, in direct contravention of the military judge's explicit instructions,⁵ selected a punishment based on the offenses for which they acquitted the appellant. Having reviewed the record *de novo*,⁶ and giving this appellant individualized consideration,⁷ we find that the sentence of reduction to pay grade E-1 and a bad-conduct discharge was appropriate.

Lack of Forum Election and Entry of Pleas

Although not raised by the appellant, we note several procedural errors at trial. First, the appellant was tried by a panel of members with enlisted representation, but he never

⁴ Prosecution Exhibit 2 at 2. In addition, the Government's forensic expert testified to recovering images of adult pornography from the appellant's shipboard computer. Record at 472-73.

⁵ The military judge instructed the members that they must select a sentence "only for the offense of which [the appellant] has been found guilty." Record at 794; see AE LXIV at 1.

⁶ *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

⁷ *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

formally requested enlisted members either orally in court or in writing. See RULE FOR COURTS-MARTIAL 903(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). At his arraignment, after being advised of his forum rights, the appellant reserved formal election. Record at 11. Three days before trial, civilian counsel confirmed to the court, in the appellant's presence, that the forum would be members with enlisted representation. *Id.* at 211. Trial then proceeded without objection before a panel of officer and enlisted members.

Under the facts of this case, we find that the appellant was tried by a panel of his choosing even though his personal election was not captured on the record. *United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005). Moreover, we find that this lack of a formal election is a procedural vice jurisdictional error which we test for prejudice under Article 59(a), UCMJ. *Id.* Here we find none. It is abundantly clear from the record that this forum was that which the appellant desired.

We also note that the appellant never formally entered pleas on the record. At arraignment, he reserved entry of pleas. Record at 17. At a subsequent Article 39(a), UCMJ, pretrial session, the military judge inquired if pleas had formally been entered, to which civilian counsel responded "I don't remember but it is going to be a (sic) not guilty to all charges and specifications." *Id.* at 211. Finally, at the onset of trial, the military judge advised the panel that the appellant had previously entered pleas of not guilty to all charges and specifications. *Id.* at 236. Under the facts of this case, we find the lack of formal entry of pleas to be a procedural error with no prejudice to the appellant. *United States v. Taft*, 44 C.M.R. 122 (C.M.A. 1971); *United States v. Velez*, No. 9400959, 1996 CCA LEXIS 422, at 17-18, unpublished op. (N.M.Ct.Crim.App. 1996), *aff'd*, 48 M.J. 220 (C.A.A.F. 1998).

Conclusion

Having examined the record of trial, the appellant's assignments of error, and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial

rights of the appellant was committed. Arts. 59(a) and 66(c),
UCMJ. The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court