

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

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

UNITED STATES OF AMERICA

v.

**JOHN C. DAVID
UTILITIESMAN CONSTRUCTIONMAN (E-3), U.S. NAVY**

**NMCCA 201100065
GENERAL COURT-MARTIAL**

Sentence Adjudged: 3 November 2010.

Military Judge: CDR Donald King, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR M.C. Holifield,
JAGC, USN.

For Appellant: Maj Jeffrey Liebenguth, USMC; LT Jentso
Hwang, JAGC, USN.

For Appellee: Capt Robert Eckert, USMC.

30 August 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 military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of receiving child pornography and one specification of possessing a computer containing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge subsequently set aside the guilty finding as to the

specification alleging possession of child pornography and dismissed that specification. The appellant was sentenced to confinement for 24 months, reduction to pay grade E-1, total forfeitures, 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 has submitted one assignment of error: That the military judge abused his discretion in accepting the appellant's guilty pleas as provident. The appellant argues that numerous statements made by the military judge during the providence inquiry demonstrated he was unconvinced of the appellant's guilt as to a clause 2 offense under Article 134, UCMJ. The appellant asserts that the military judge erred in finding the appellant's conduct to be *per se* service discrediting through reliance on this court's decision in *United States v. Phillips*, 69 M.J. 642 (N.M.Ct.Crim.App. 2010), *rev'd.*, 70 M.J. 161 (C.A.A.F. 2011). We have examined the record of trial, the appellant's assignment of error, and the 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.

Background

On divers occasions, from 1 October 2008 through 30 September 2009, the appellant knowingly received child pornography that had been transmitted over the Internet. The appellant was charged under clause 1 and 2 of Article 134, UCMJ. During the trial, the military judge found the accused's plea not provident as to the clause 1 element of conduct prejudicial to good order and discipline. Record at 205. Therefore, the military judge struck the conduct prejudicial language from both specifications of the Article 134 charge. *Id.* at 211. However, the military judge still found that the clause 2 service discrediting element was satisfied for both specifications. *Id.*

During the providence inquiry for the first specification of receipt of child pornography, the appellant stated that he believed his conduct was service discrediting because it could cause others outside of the military to view the military negatively. Record at 179. However, the appellant also stated that he did not know whether anyone outside of the military had actual knowledge of his misconduct. *Id.* Regarding the second specification of receipt of child pornography, the appellant

first stated that he believed his conduct was service discrediting and that others who were outside of the military by the time of his court-martial knew of his conduct, but that he did not believe his conduct had lowered their opinion of the military. *Id.* at 189-90. Due to the appellant's statements, the military judge reopened the providence inquiry prior to ruling on findings. *Id.* at 207. The military judge found that there was little direct evidence to support the service discrediting element. *Id.* at 211. However, the military judge cited this court's decision in *Phillips* to find that the appellant's conduct in receiving child pornography was *per se* service discrediting. *Id.* at 211-12. Consequently, the military judge found the appellant's guilty pleas to be provident as to the service discrediting terminal elements.¹

Providence of the Plea

A. Procedural Background: *United States v. Phillips*

In *Phillips*, this court affirmed an appellant's conviction for wrongful possession of child pornography in violation of clause 2 of Article 134. We found that the possession of child pornography by a uniformed member of the Armed Forces was *per se* service discrediting. *Phillips*, 69 M.J. at 645. Upon review, the Court of Appeals for the Armed Forces (C.A.A.F.) reaffirmed the general proposition that the use of conclusive presumptions to establish whether any given conduct violates clause 1 or 2 of Article 134 is unconstitutional because it "conflict[s] with the presumption of innocence and invade[s] the province of the trier of fact." *Phillips*, 2011 CAAF LEXIS 521, at *7.

The C.A.A.F. explained that "[t]he focus of clause 2 is on the 'nature' of the conduct, whether the accused's conduct would tend to bring discredit on the armed forces if known by the public, not whether it was in fact so known." *Id.* at *10. Whether an accused's conduct is of a "nature" to be service discrediting "is a question that depends on the facts and circumstances of the conduct." *Id.* at *12. Furthermore, the fact that an accused's conduct may have been "wholly private" is not conclusory. *Id.* The C.A.A.F. decided that while the evidence presented at trial was legally sufficient to support

¹ The military judge stated that "even in the absence of direct evidence, that terminal element, in all three specifications, will survive." Record at 212. We view this comment as reflecting the judge's understanding of the law post-*Phillips* and not as a repudiation of his earlier comment that "[a]s to the service discrediting, there's little direct evidence as to that element as well." *Id.* at 211.

the conviction for child pornography, it was concerned that this court "conclusively presumed" that the appellant's misconduct was of a nature to bring discredit on the armed forces. *Id.* at *14. Consequently, the C.A.A.F. returned the case to the Judge Advocate General who remanded the case back to this court to perform a factual sufficiency review under our fact-finding powers as delineated in Article 66(c), UCMJ. *Id.* at *13.

B. Standard of Review

Article 66(c), UCMJ, requires a *de novo* review of the legal and factual sufficiency of each approved finding of guilt. *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 Government, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ. 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," this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. Art. 66(c), UCMJ. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. *Id.* In considering the record, it may weigh the evidence, judge the credibility of witnesses, and *determine controverted questions of fact*, recognizing that the trial court saw and heard the witnesses. *Id.* (emphasis added). This *de novo* power of review grants unto the Courts of Criminal Appeals the authority to "substitute its judgment" for that of the military judge. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

C. Analysis

The question this court faces is whether the appellant's responses during the providence inquiry are legally and factually sufficient to satisfy the service discrediting element of a clause 2 offense. After consideration of all the facts and

circumstances, and the C.A.A.F.'s recent decision in *Phillips*, we find that the evidence is both legally and factually sufficient to show that the appellant's conduct in receiving child pornography was of a nature that would tend to bring discredit on the armed forces if known by the public.

Although the appellant stated that others outside the military did not know of his conduct, the C.A.A.F.'s decision in *Phillips* makes clear that public knowledge of an accused's conduct is not required to satisfy the service discrediting element of clause 2. Furthermore, the appellant told the military judge that he believed his conduct was service discrediting because it could cause others to view the military negatively if they knew of his conduct. Record at 179, 189. The appellant's statement that certain individuals who knew of his conduct did not have a diminished view of the military is not conclusive. The appellant downloaded and viewed a number of child pornography videos and images for over a year. The images contained children as young as age six engaged in sexually explicit conduct, including child victims recognized by the National Center for Missing and Exploited Children (NCMEC). Record at 173; NCMEC Report, Prosecution Exhibit 7; Victim Impact Statement, Prosecution Exhibit 8. Additionally, the appellant admitted knowledge of the illicit content of the pornographic images and admitted to viewing the images on several occasions.

On the basis of the appellant's conduct, the evidence of child pornography stored on his computer, and the appellant's own statements that his conduct could cause others to view the military negatively, we conclude that the evidence is legally and factually sufficient to find beyond a reasonable doubt that the appellant's activity was of a nature to bring discredit upon the armed forces. Therefore, we hold that the service discrediting element of clause 2 was satisfied in this case, and that the appellant's guilty pleas for both specifications were provident.

Conclusion

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

For the Court

R.H. TROIDL

Clerk of Court