

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

**Before
L.T. BOOKER, J.K. CARBERRY, D.R. LUTZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW A. BRUNGART
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000659
GENERAL COURT-MARTIAL**

Sentence Adjudged: 9 August 2010.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding General, III Marine Expeditionary Force, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col P.J. Betz, Jr., USMC.

For Appellant: LCDR Brian Mizer, JAGC, USN.

For Appellee: LT Kevin Shea, JAGC, USN.

28 April 2011

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, consistent with his pleas, of attempting to possess child pornography. The convening authority approved the sentence of confinement for 12 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge from the U.S. Marine Corps.

Before us, the appellant now alleges that his plea was improvident and the specification to which he pleaded guilty, which was laid under Article 134, Uniform Code of Military

Justice, 10 U.S.C. § 934, should be dismissed because it is preempted by Article 80, UCMJ. For the reasons set out below, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Discussion

The appellant committed his offense at or near Camp Schwab, on the island of Okinawa, Japan. He admitted during the providence inquiry before the military judge, *see United States v. Care*, 40 C.M.R. 247, 250-51 (C.M.A. 1969), that he entered search terms into a peer-to-peer file sharing program that he hoped would allow him to possess images of sexually explicit conduct involving persons under the age of 18 on his personal computer. It turns out that, while the file names that he highlighted for possession suggested that they were associated with such material, in fact the files contained adult pornography.

Had the appellant committed his offense in an area where the Child Pornography Prevention Act (CPPA), Chapter 110 of title 18, United States Code, clearly applied, *see generally United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005), it would have been proper to allege a "clause 3" violation of Article 134 for commission of a non-capital crime or offense, specifically, attempting to possess child pornography. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 60a(3). *See* 18 U.S.C. § 2252(b); 18 U.S.C. § 2252A(b) (punishing both conspiracies and attempts to violate the statute). In such a case, the elements would have been those of the substantive criminal code provision. MCM ¶ 60c(6)(a). The maximum punishment would have been that set out in the substantive criminal code. *RULE FOR COURTS-MARTIAL 1003(c)(1)(B)(ii), MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.).

As the court held in *Martinelli*, however, an extraterritorial violation of the CPPA is not an offense "under" or "punishable by" the Code. 62 M.J. at 62. Possession of child pornography is not prohibited by any enumerated offense under the Code, nor is a prosecution that does not fit within the language of clause 3 of the General Article aimed at an offense "punishable by" the Code. *See* Article 80(a) and (b), UCMJ. It follows that a prosecution will not lie under Article 80 for the offense that the appellant is alleged to have committed, namely, attempted possession outside the United States of child pornography. It was therefore necessary to develop an "alternative theory" of liability for the acts of the appellant. *See United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008).

Article 134 is not intended to furnish a general vehicle for punishing all neglects and disorders, especially when Congress has specifically provided a means for prosecution. That Congress did not endow the CPPA with clear extraterritorial effect is

evidence that Congress did not intend that set of statutes to occupy the field. As a prosecution is not possible under Article 80, the "preemption doctrine" articulated in Article 134 does not prohibit development of the alternate theory which the appellant accepted as the basis for his guilty plea. See *United States v. McGuinness*, 35 M.J. 149, 151-52 (C.M.A. 1992) (citing *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978)).

Conclusion

Our discussion above answers the appellant's challenge to the providence of his plea. A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion, and an erroneous view of the law can constitute such an abuse. *E.g.*, *United States v. Conliffe*, 67 M.J. 127, 131 (C.A.A.F. 2009). There is a sufficient factual basis for the appellant's guilty plea and the military judge did not hold an erroneous view of the law.

We have not addressed the appellant's second assignment of error, an invitation to overrule a decision of the Court of Military Appeals, *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979), regarding the interplay among Articles 80 and 134 and the preemption doctrine. The appellant has given us no legal or factual justification for extending our reach to overrule a decision of a court of superior jurisdiction, and we decline to do so.

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court