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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY R. FERGUSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201000405
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 April 2010.
Military Judge: LtCol Robert Ward, USMC.
Convening Authority: Commanding General, U.S. Marine Corps Forces, Special Operations Command, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol T.S. Stephens, Jr., USMC.
For Appellant: LT Michael Hanzel, JAGC, USN.
For Appellee: LT Kevin Shea, JAGC, USN.

7 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.

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of attempting to distribute child pornography, unauthorized absence, sexual intercourse with a child over the age of 12 but under the age of 16, and possession of child pornography, violations of Articles 80, 86, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 886, 920, and 934. The military judge sentenced the appellant to confinement for nine years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. In accordance with a pretrial agreement,

the convening authority suspended all confinement in excess of six years.

The appellant avers that his plea was not provident to the offense of attempting to distribute child pornography because he did not specifically intend to distribute child pornography.[1] After careful examination of the record 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.

Factual Background

The appellant was charged, *inter alia,* with attempting "to knowingly and wrongfully distribute images and video files of child pornography, which conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces."[2]

The record reveals that the appellant used the peer-to-peer file sharing network LimeWire[3] to download files containing child pornography onto his personal computer. The LimeWire program allows its users to share files with other LimeWire users across the Internet, but only if the user chooses to "share" his or her files. LimeWire allows the user's shared files to be discoverable to other users by allowing any LimeWire user to perform a keyword search of the descriptive fields of the shared files. The appellant admitted during providency to choosing to maintain his LimeWire settings in a "share" status.

There is no dispute that the appellant possessed child pornography on his computer, which he personally downloaded from the internet, or that he changed his LimeWire settings in order to allow file sharing. The appellant freely admitted that he consciously chose to maintain his LimeWire settings at a "share" status. He acknowledged that this choice to "share" his files permitted other users of LimeWire to potentially download child pornography from the appellant's computer if the searcher wished to delve into the appellant's child pornography files. These facts are corroborated in the stipulation of fact which the appellant agreed accurately described what he did.[4]

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[1] Appellant's Brief of 21 Sep 2010 at 1.

[2] Charge Sheet, Additional Charge I.

[3] "LimeWire" is a peer-to-peer file sharing network produced by Lime Wire, LLC. Throughout military and federal jurisprudence LimeWire is often referred to as "limewire", "Limewire", "lime wire" "Lime wire" or "Lime Wire"; but, for the sake of consistency, we shall refer to it by the name "LimeWire."

[4] The stipulation of fact states, in pertinent part:

> 10. The accused possessed images and videos of child pornography on his personal laptop computer. The accused downloaded these

During the providence inquiry, the military judge asked the following relevant questions and received the following answers from the appellant:

> MJ: So first of all, did you have a specific intent to distribute child pornography?
> ACC: I specifically changed my Internet options to allow sharing. So I therefore did, sir.
>
> . . . .
>
> MJ: Okay. Tell me – walk me through that. What did you do as far as changing permissions?
> ACC: Under the impression that I would get better Internet reception, I changed, under the Internet options, file sharing on [sic].
>
> MJ: For this folder [that contained child pornography]
> ACC: For my entire computer, sir.
>
> MJ: Okay. And that included this folder that we were just talking about?
> ACC: Yes, sir.[5]

The default setting on LimeWire does not allow file sharing. The appellant had to, and did affirmatively alter, the "properties" of LimeWire on his computer in order to permit file sharing. The appellant explained to the military judge that he understood at the time he made this change others would be allowed access to the "shared" child pornography files contained on his computer:

> MJ: And what did you think you were doing? What did you think was going to happen as a result of this?
> ACC: All my files would be able to be shared and viewed by others, sir.

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images through a peer to peer program named [LimeWire]. Once search results were returned, the accused viewed and selected the images of child pornography that he wanted and downloaded them to his computer. The accused admits that all of the children in the images and videos are under the age of 18 and are engaged in sexual acts.

11. The accused understands that he stored some of the images and video files of child pornography in his shared folder within the [LimeWire] program. The accused decided to allow other users of [LimeWire] to have access to all files contained in his shared folder. The accused admits that anyone searching for child pornography could have downloaded the images and video files of child pornography in his shared folder. The accused understands that by allowing others to have access to his [LimeWire] shared folder, no other action needed to be taken on his part to allow third parties to download files from his shared folder."

[5] Record at 115.

. . . .

MJ: Did you change the properties to share this folder knowing that would allow access to these images of child pornography?
ACC: Yes, sir.[6]

. . . .

MJ: Did you understand that what you were doing was going to allow access to others?
ACC: Yes, sir.

MJ: Why did you do it then?
ACC: I thought it would give me better Internet receptions, sir.[7]

After further questioning by the military judge, it became apparent that the appellant's attempt to gain better "internet reception" was, in fact, an attempt to increase the speed at which he could download files.[8] The appellant then explained that although he was aware that others could download files from his computer, his intent in changing his settings was to increase the speed at which he could download files using LimeWire.[9] The appellant, nonetheless, claimed that he did not want others to download child pornography from his computer:

ACC: I was aware that people could download files from my computer, sir.

MJ: Were you attempting – were you trying to make that happen? In other words, were you wanting other people to access your files?
ACC: No, sir.

MJ: Because all I am hearing is that you only did this for the purpose to get better download speed or connection?
ACC: Yes, sir.[10]

Due to the inconsistency between the appellant's stipulation of fact and the appellant's responses during the providence inquiry, the military judge then advised the appellant to "think

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[6] *Id.* at 116.

[7] *Id.* at 118.

[8] Id. at 119.

[9] A Government witness confirmed that the LimeWire program does reward users who change their settings to allow sharing by increasing the speed at which they can download files using the program. *Id.* at 208, 215.

[10] *Id.* at 119.

about it and talk to [his] counsel" before continuing with the inquiry.[11] After a 25-minute recess, the providence inquiry continued:

> MJ: . . . [W]hy did – why did you change the permissions [on the LimeWire settings to allow sharing] as opposed to just leaving it the way it was set up by default?
> ACC: To allow others to download and receive the images and videos on my computer.
>
> MJ: Now previously you were telling me that you thought it might help improve the connection, be it download speed or whatever the case may be. Are you sure that this was also part of your desires to allow other people to see the contents of that folder?
> ACC: Yes, sir.
>
> MJ: Any doubt in your mind that was one of your reasons for doing this?
> ACC: No, sir—yes, I understood that is how LimeWire works that if you changed the file settings to open, it allows other people to view what is on your network.
>
> . . . .
>
> MJ: And your changing of the properties on the folder, did you do that, at least in part, so that other LimeWire users can access the content of that folder?
> ACC: Yes, sir.[12]
>
> . . . .
>
> MJ: Was one of your reasons for doing that [changing the properties of the folder to allow it to be shared] so that other LimeWire users can access the files in your folder?
> ACC: Yes, sir.
>
> . . . .
>
> MJ: So you didn't—did you actually think at the time that others would be able to see those images of child pornography?
> ACC: Yes, sir.[13]

The plea allocution continued and the military judge accepted the appellant's pleas of guilty, including to the

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[11] *Id.*

[12] *Id.* at 120-21.

[13] *Id.* at 130.

offense of attempting to distribute child pornography, after the appellant admitted that he intended to distribute child pornography.[14]

Discussion

The question before us is whether the appellant's plea to attempting to distribute was provident. The appellant argues that his providence inquiry provided an insufficient basis for the military judge to accept his plea of guilty.

A military judge may only accept a guilty plea if the appellant articulates a factual basis for his plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006). A guilty plea may be not accepted if the accused sets up a matter that is inconsistent with the plea or is otherwise improvident. Art. 45, UCMJ. We will reject a guilty plea on appeal only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). In determining whether a guilty plea is provident, we considered the appellant's responses during the providence inquiry, the stipulation of fact, as well as inferences drawn therefrom. *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007)(citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)). *See also United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995)(quoting *United States v. Sweet*, 38 M.J. 583, 587 (N.M.Ct.Crim.App. 1993)(en banc)(holding a military judge can also use a stipulation of fact in conjunction with the accused's verbal admissions to determine whether the accused is provident to the alleged crime)). A legally and factually sound providence inquiry must establish that the accused admits and believes he is guilty of his crimes, and provide a developed factual predicate, in declaratory fashion, that objectively supports, and is consistent with, the guilty plea. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion; *see also United States v. Simmons*, 63 M.J. 89, 92 (C.A.A.F. 2006); *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004). We review the military judge's decision to accept the appellant's guilty pleas to an offense for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F.

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[14] The military judge asked and the appellant answered:

> MJ: Do you believe that your—your attempts would have been successful, but for the fact that perhaps no one actually looked in your folder?
> ACC: Yes, sir.
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> . . . .
>
> MJ: Did you intend to commit this offense of wrongful distribution of child pornography?
> ACC: Yes, sir.

Id. at 133.

2007)(quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)).

A. Defining "specific intent" within the context of attempting to distribute child pornography using a peer-to-peer file sharing network.

The issue we must decide is whether there is a sufficient factual predicate to conclude that the appellant had the specific intent to distribute child pornography when he changed his LimeWire settings to "share" and thereby opened up his computer, which he knew contained child pornography, to other LimeWire users.

The appellant contends that he did not demonstrate the necessary *mens rea* to satisfy the specific intent element of the crime of attempting to distribute child pornography. He points out that he stated during the providence inquiry that he changed his LimeWire settings to "share" in order to augment his download speed. Although he knew doing so would allow other LimeWire users to access the child pornography on his computer, he claims he did not specifically intend for others to access that child pornography. Rather, he argues, because most of his answers during the providence inquiry evidenced "recklessness" with regards to distribution of the child pornography on his computer (i.e., all he cared about was faster download speed and did not care either way whether someone else downloaded his child pornography files), he does not satisfy the specific intent element of the crime.[15] We disagree.

Article 80, UCMJ, defines the crime of attempt as "[a]n act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." 10 U.S.C. §880. The Government charged the appellant with attempting to distribute child pornography as an attempted violation of Clauses I and II of Article 134, UCMJ. Article 134, UCMJ, provides no definition of distribute.[16] In *United States v. Craig*, 67 M.J. 742, 744 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010), however, this court fashioned a definition of the word distribute to be applied in cases involving the attempt to distribute or distributing of child pornography through peer-to-peer file sharing networks.

Craig concluded that an incomplete transfer of child pornography does not satisfy the definition of the word distribute, *per se*. *But see United States v. Sewell*, 513 F.3d

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[15] Appellant's Brief at 7-8, 10.

[16] Nor does the federal crimes nearest in elements: 18 U.S.C. § 2252A (Certain activities relating to material constituting or containing child pornography) or § 2256 (Definitions).

820, 822 (8th Cir. 2008)(placing images in Kazaa[17] shared folder was offer to distribute under § 2251(d)(1)(A)), *cert. denied*, 553 U.S. 1066 (2008). However, considering that "Congress has separately provided for the punishment of offering child pornography and of attempts to offer and distribute it," the act of making child pornography available on a peer-to-peer file sharing network under the facts of this case is punishable as an attempt to distribute child pornography. *Craig*, 67 M.J. at 746; *see also* 18 U.S.C. §§ 2251(d), 2252A(b). In other words, the appellant's actions of making child pornography available on a peer-to-peer file sharing network under these circumstances satisfy the specific intent element requirement for an attempting to distribute child pornography.

The appellant stated, under oath, that he changed his LimeWire setting to "share" fully aware that this decision would allow others access to the child pornography on his computer. His statement is corroborated by the stipulation of fact which establishes that the appellant "decided to allow other users of [LimeWire] to have access to all files contained in his share folder."[18] We cannot overlook the fact that the appellant took every step he could have to facilitate the distribution of child pornography from his computer via LimeWire. Indeed, he admitted that he had downloaded child pornography from other LimeWire users' shared folders and understood that file sharing was the very purpose of LimeWire, while also admitting that he had child pornography stored in his own computer's LimeWire "share" folder that he could have, but did not, save in a folder not susceptible to file sharing. The appellant made a conscious decision to allow for the sharing of the illicit files he maintained.[19] The evidence in this case overwhelmingly supports the conclusion that the appellant knowingly acted as a node for distributing child pornography within a network of file-sharers. Evidence that he knew this would be the outcome of his actions is all that is required to establish that he specifically intended to make child pornography available via a peer-to-peer file sharing network, and is accordingly guilty of attempting to distribute child pornography. *Craig*, 67 M.J. at 746.

We conclude that the facts in this case –specifically, the appellant's thorough knowledge and explicit understanding of the LimeWire system, and his understanding that by choosing to "share" his files he was making child pornography available for download by other Limier users - sufficiently establishes the *mens rea* for attempting to distribute child pornography. Although the appellant had two reasons why he chose to "share"

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[17] "Kazaa" is a peer-to-peer file sharing network very similar in function to LimeWire.

[18] Stipulation of Fact, Page 2, Paragraph 11.

[19] *See United States v. Shaffer*, 472 F.3d 1219, 1224 (10th Cir. 2007) (discussing the process of distributing child pornography using the similar file-sharing network "Kazaa").

his illicit files, his stated reasons are not in actual conflict. The factual predicate necessary to establish the contested element of specific intent is met whether the appellant made child pornography available on a peer-to-peer file sharing network for faster download speed *or* because he wanted to proliferate the contraband files. *See id.* All that matters is that he intended to make it available and did in fact make it available. *Id.* Although, at first, there may have been conflicting statements during providency from the appellant as to why he attempted to share the child pornography on his computer, that conflict was clearly resolved to the military judge's satisfaction. *See United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). Regardless, it is not in dispute that the appellant intended to make child pornography available on LimeWire, and then took the necessary actions to actually achieve that goal. In short, the law does not require that, in the case of dual rationales for acting in the manner that he did, the appellant place one rationale in primacy over the other. One of the appellant's motivating reasons was criminal in nature – and he knew it.

B. The appellant's other contentions

The appellant also contends that even if his true motivation for sharing files was established by his responses, his *mens rea* was still not established for the following two reasons. First, he argues "he said he wanted to share all his files, not just those containing child pornography."[20] Second, he claims the military judge never asked him why he wanted to share the child pornography.

We address these arguments in order: that the appellant was willing to share more than just child pornography does not negate the fact that he wanted to share child pornography. So long as the military judge was satisfied that all inconsistencies in the providence inquiry were resolved, he was under no obligation to determine *why* the appellant wanted to distribute child pornography. *Garcia*, 44 M.J. at 498.

Pretrial Confinement Credit

We note the court-martial order only provides for 255 days of pretrial confinement credit pursuant to *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984), while the military judge awarded 256 days of confinement credit. Record at 317. The appellant is entitled to correction of his official records. Art. 59(a), UCMJ; *United States v. Glover*, 57 M.J. 696, 697-98 (N.M.Ct.Crim.App. 2002); *United States v. Crumpley,* 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Thus, we will order appropriate relief in our decretal paragraph.

[20] Appellant's Brief at 8.

Conclusion

Considering the appellant’s clear if disjointed statements and the evidence of his actions, there was a sufficient basis in law and fact to find him guilty of attempting to distribute child pornography. *Inabinette*, 66 M.J. at 322; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). We conclude, therefore, that the military judge did not abuse his discretion in accepting the appellant's plea of guilty to attempting to distribute child pornography. *Inabinette*, 66 M.J. at 322; *Prater*, 32 M.J. at 436. The findings and the sentence, as approved by the convening authority, are affirmed. The supplemental court-martial order shall indicate that the appellant is entitled to 256 days of confinement credit.

Senior Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court