

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

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

UNITED STATES OF AMERICA

v.

**EVAN P. KANISS
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100020
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 August 2010.

Military Judge: LtCol Steven Logan, USMCR.

Convening Authority: Commanding General, 1st Marine
Division (REIN), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin,
USMC.

For Appellant: LCDR Edward Hartman, JAGC, USN.

For Appellee: Capt Robert Eckert, USMC.

28 July 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 three specifications of wrongful use of controlled substances and two specifications alleging wrongful receipt and possession of child pornography, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912 and 934. The military judged sentence the appellant to confinement for 25 years, reduction in pay grade to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Consistent with the recommendation of his staff judge advocate, and in an act of

clemency, the convening authority (CA) disapproved all confinement in excess of 10 years, but otherwise approved the adjudged sentence. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 12 months for the period of confinement, plus six months.

The appellant raises two assignments of error. He first avers that the military judge erred when he did not *sua sponte* dismiss the possession of child pornography alleged in Charge II Specification 1, as multiplicitious with the receipt of child pornography in Specification 2. In his second assignment of error, the appellant asserts that the sentence to a dishonorable discharge was inappropriately severe.¹ We find the assigned errors to be without merit and 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 occurred. Arts 59(a) and 66(c), UCMJ.

Background

The appellant served as a rifleman stationed aboard Marine Corps Air Ground Combat Center, Twentynine Palms, California. In November of 2009, he borrowed a laptop computer from a fellow Marine under the auspices of preparing a slide presentation. While in possession of the laptop, he installed commercial file-sharing software, which he used to browse, select and ultimately receive and download child pornography in still image and video formats. He subsequently used the contraband-containing laptop to view the contraband, loaned the laptop to a fellow Marine, and upon its discovery and return of the laptop, endeavored to delete the contraband. On three occasions between December of 2009 and mid-January 2010, the appellant knowingly consumed controlled substances.

Multiplicity

The appellant's first assignment of error asserts that the military judge should have *sua sponte* dismissed Specification 1 of Charge II as multiplicitious with Specification 2 of Charge II. We disagree.

An unconditional guilty plea waives multiplicity claims when the offenses were not facially duplicative. *United States v. Craig*, 68 M.J. 399, 400 (C.A.A.F. 2010) (per curiam) (citing *United States v. Campbell*, 68 M.J. 217 (C.A.A.F. 2009)). Offenses are not facially duplicative unless they are factually the same. *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997). Under this test, the court considers whether each specification requires proof of a fact which the other does not. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004). "Whether specifications are facially duplicative is determined by reviewing the language of the specification and 'facts apparent on the face of the

¹ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

record'". *United States v. Heryford*, 52 M.J. 265 (C.A.A.F. 2000) (quoting *United States v. Loyd*, 46 M.J. 19, 24 (C.A.A.F. 1997)).

The appellant was charged with receipt of child pornography and possession of a laptop computer containing child pornography under Article 134, UCMJ. The record before us establishes the separate offenses of receipt of the contraband itself and possession of the computer then containing the contraband. We find that while the images and videos in question are common, the offenses are not facially duplicative and are factually distinct. The receipt offense was the culmination of the appellant's conduct in installing the file sharing software, his use of that software as a mechanism to search for child pornography, his selection of specific files and file names, and his downloading of these files onto the borrowed computer. While the receipt specification is focused on the images and videos themselves, in the possession specification our attention turns to the laptop itself. While in possession of this laptop computer, now containing contraband, over a period of several days the appellant did various acts which exercised dominion and control over the computer, specifically relating to its contraband content. He possessed and used the laptop, to include during unspecified periods when he was beyond internet access (and therefore necessarily not coincident with the file-sharing receipt/download event). This use included viewing the contraband, notably, *inter alia*, a thirty-minute video involving a 6-8-year-old girl and a masked adult male; the loaning of the laptop to a fellow Marine, who discovered the contraband and reported it to his chain of command; and when the laptop was returned to his possession, he took efforts to delete the contraband. Such acts relating to the appellant's possession of the laptop, on the facts of this case, are clearly severable and legally punishable as distinct from the receipt specification.

This assignment of error is without merit.

Sentence Severity

The appellant's second assignment of error asserts that the sentence to a dishonorable discharge was inappropriately severe. We disagree.

This court reviews the appropriateness of the sentence *de novo*. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We engage in a review that gives "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender'". *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-181 (C.M.A. 1959)).

Pursuant to his pleas, the appellant stands convicted of receipt and possession of child pornography, which are serious offenses which victimize children and discredit the Marine Corps. Additionally, the appellant admitted to three separate specifications of wrongful use of controlled substances. While the appellant's request for clemency to the CA sought mitigation of the dishonorable discharge to a bad-conduct discharge, the CA declined to grant that specific relief. However, the CA did grant sentence relief, as also prayed for in clemency, reducing the adjudged sentence by some fifteen years. We find the approved sentence to be appropriate to this offender for these offenses and will not venture into the CA's prerogatives in clemency. Accordingly, we decline to grant relief.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court