

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

**Before  
J.A. MAKSYM, F.D. MITCHELL, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ZORNELL L. MALONE  
EQUIPMENT OPERATOR SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201000387  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 18 February 2010.

**Military Judge:** CAPT C.J. Gaasch, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southwest, San Diego, CA.

**Staff Judge Advocate's Recommendation:** CDR D.C. King, JAGC, USN.

**For Appellant:** LT M.R. Torrisi, JAGC, USN.

**For Appellee:** Capt Samuel C. Moore, USMC.

**28 June 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

MAKSYM, Senior Judge:

A military Judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) made punishable by Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to two years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and with the exception of the punitive discharge, ordered it executed.

The appellant asserts three assignments of error: (1) that his confession made to a Special Agent of the Naval Criminal Investigative Service (NCIS) was involuntary because the agent did not provide cleansing warnings in spite of the fact that the appellant had made prior inculpatory statements to a superior petty officer in the absence of any rights advisement; (2) that the consent that the appellant provided to search his computer was not voluntarily given in light of the prior illegally obtained confession; and (3) that the conviction for distribution of child pornography is factually and legally insufficient. After considering the pleadings of the parties and the entire record of trial, we conclude that there is merit to the appellant's third assignment of error. We will dismiss Specification 2 in our decretal paragraph. Otherwise, we conclude that the remaining findings and the sentence, as reassessed, 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.

### **I. Background**

The appellant and his unit were in transit from California to Iraq in early 2008 when mechanical issues forced his plane to land in Bangor, Maine. While staying at a local hotel, another Sailor in the appellant's unit, Construction Mechanic Second Class (CM2) Billings, went onto iTunes and saw a shared folder available through the hotel internet connection titled "Malone Z." CM2 Billings clicked on the folder to see what files the folder contained and viewed streaming feeds of video files containing what he perceived to be underage males and females engaging in sexual acts.

Several hours later, at the airport awaiting departure, CM2 Billings mentioned what he had seen in the "Malone Z" folder to Builder First Class (BU1) Teel. BU1 Teel immediately confronted the appellant and asked him, "Do you have this F\*\*\*ing kiddy porn shit on your computer?", after which the appellant looked down, got very nervous, and said, "Yes." Record at 68-69, 71. BU1 Teel did not advise the appellant of his rights under Article 31(b) of the UCMJ before asking him this question. *Id.* at 87-88.

Roughly one month after the initial incident at the airport and after the appellant had already arrived in Iraq, the appellant was interrogated by Special Agent (SA) Patrick Rabin of NCIS about his suspected possession of child pornography. Before commencing the interrogation, SA Rabin advised the appellant of his Article 31(b) rights, but he never provided the appellant with any cleansing statement or warning to let him know that his previous statements made to BU1 Teel could not be used as evidence against him. *Id.* at 107-11, 141. In spite of being advised of his Article 31(b) rights, the appellant confessed to possessing child pornography and executed a permissive search authorization allowing SA Rabin to search his computer for child pornography. The record of trial did not contain any permissive

authorization form specifically mentioning permission to search the accused's quarters or to search and seize his computer, but the accused himself testified that he did in fact grant NCIS permission to search his computer. *Id.* at 115, 142; see also Appellate Exhibit XXVI, Ruling on Defense Motion to Suppress, at 12-13.

## Discussion

### The Confession

In his first assignment of error, the appellant asserts that his confession was involuntarily obtained because the interviewing agent did not provide him with a cleansing warning after a previous confession was obtained involuntarily without the questioner advising the appellant of his rights under Article 31(b) of the UCMJ. We disagree with the appellant and find that the evidence was properly admitted.

A military judge's decision regarding admission of evidence is reviewed for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Findings of fact are affirmed unless clearly erroneous while conclusions of law are reviewed *de novo*. See *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006). The voluntariness of a confession is a question of law reviewed *de novo*. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). When a prior statement is made involuntarily, as opposed to being coerced, we examine "the totality of the surrounding circumstances" to determine whether the subsequent confession is voluntarily made and whether it is "the product of an essentially free and unconstrained choice" by the accused. *Freeman*, 65 M.J. at 453 (quoting *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)) (internal quotation marks omitted); see also *United States v. Cuento*, 60 M.J. 106, 109 (C.A.A.F. 2004). While the absence of a "cleansing statement" is a factor to consider in determining the voluntariness of a confession made after a prior "unwarned" statement, failure to provide such a warning does not necessarily preclude the admission of a subsequent confession that was "properly obtained." *Cuento*, 60 M.J. at 109.

We have reviewed the military judge's extensive findings of fact, set forth at Appellate Exhibit XXVI, and find them to be fully supported by the record of trial. We adopt them as our own.

The military judge properly admitted the appellant's confession to NCIS. In its Motion to Suppress, the defense argued that the appellant would not have confessed to NCIS had BU1 Teel not elicited the prior incriminating statements from him. The defense specifically relied on the fact that the appellant was never given a cleansing warning and that "he was not sophisticated enough to understand his rights at that time." AE V at 3. The military judge did in fact suppress the initial

statements made by the appellant to BU1 Teel at the airport based on the fact that the appellant "clearly perceived [the encounter] as official questioning," and that BU1 Teel failed to advise the appellant of his rights under Art. 31(b). AE XXVI at 11-12.

Despite her ruling regarding the appellant's statement to BU1 Teel, the military judge denied the defense's motion to suppress the appellant's statement to NCIS, concluding that his confession "on its own merits" was voluntary. AE XXVI at 14. The military judge then found that the appellant's statement to NCIS was admissible "as derivative evidence" as well. *Id.* at 13-14. In coming to that conclusion, the military judge applied the "totality of the circumstances" test, citing to *United States v. Sojfer*, 47 M.J. 425 (C.A.A.F. 1998), and examined, among other things, rights' warnings, the length of the interrogation, the characteristics of the appellant and the nature of the NCIS agent's conduct. The military judge found that the appellant was a thirty-six-year-old second class petty officer and that the NCIS interrogation was only two hours long, the appellant was advised of his rights under Article 31(b), the appellant was not threatened or intimidated at any time during the interrogation, and that SA Rabin's failure to provide cleansing warnings was based upon his lack of knowledge of the appellant's prior statement to BU1 Teel and was not "due to trickery or deceit." AE XXVI at 13-14. Considering all of the surrounding circumstances, the military judge properly found that the appellant's confession was voluntary despite the lack of cleansing warnings and that it should be admitted into evidence. The trial judge's findings of fact were not clearly erroneous; her conclusions of law were correct. Therefore, we find that the judge did not abuse her discretion in admitting the appellant's confession to NCIS.

### **The Consent Search**

For his second assignment of error, the appellant alleges that the consent he provided for NCIS to search his computer was not voluntary, and that if it was voluntary, it was not done freely enough to purge the taint of his prior illegal confession to BU1 Teel. As with the first assignment of error, we disagree with the appellant and find that the evidence was properly admitted.

We review the military judge's ruling on this motion for an abuse of discretion, examining her findings of fact for clear error and her conclusions of law *de novo*. *United States v. Gallagher*, 66 M.J. 250, 253 (C.A.A.F. 2008). When determining whether consent was voluntarily given, we look at all of the surrounding factors and apply a "totality-of-the-circumstances analysis." *United States v. Wallace*, 66 M.J. 5, 9 (C.A.A.F. 2008) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973)). A "non-exhaustive" list of some of the factors that should be considered has been adopted by the Court of Appeals for the Armed Forces (CAAF). *Wallace*, 66 M.J. at 9. It includes the

following: "(1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors; (4) the suspect's mental state at the time; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights." *Id.* (citing *United States v. Murphy*, 36 M.J. 732, 734 (A.F.C.M.R. 1992)).

Evidence derived from an unlawful search, seizure or interrogation is known as "fruit of the poisonous tree" and is normally inadmissible at trial. *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)). When an appellant alleges that his consent to search was not voluntary or that it was not an act of free will because of the taint of a prior illegal act, we must test to determine whether the appellant's consent was "an independent act of free will." *Conklin*, 63 M.J. at 338. Applying the same principles that the Supreme Court, the Fifth Circuit, and the CAAF have utilized in similar cases, we look at the following factors: "(1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial misconduct." *Conklin*, 63 M.J. at 338-39 (citing *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002)); see also *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

We have reviewed the military judge's extensive findings of fact, set forth at Appellate Exhibit XXVI, and find them to be fully supported by the record of trial. We adopt them as our own.

Employing the *Wallace* factors as we have previously, *United States v. Weston*, 66 M.J. 544, 551 (N.M.C.Ct.Crim.App. 2008), *aff'd*, 67 M.J. 390 (C.A.A.F. 2009), we find that the appellant's consent was in fact voluntarily given. His liberty was not unreasonably constrained at the time he provided his consent: the door to the interrogation room was closed but the appellant was never told he could not leave. Record at 150. There was no finding of coercion or intimidation at the trial level and we identify none on review. While it is true that the appellant was encumbered with the stress of being in a deployed environment at the time he provided his consent, he was also a mature second class petty officer who had twice deployed to the western Pacific. *Id.* at 419. In light of these factors, we find that the appellant's consent was voluntarily given.

Relative to whether the taint of any previous violation was sufficiently attenuated, we apply the *Conklin* three-prong test to the present case and discern that all factors weigh against the appellant. First, almost a month passed between the time when BU1 Teel illegally questioned the appellant without advising him of his Article 31(b) rights and the time when he provided his

consent. Second, while the record does not contain the search authorization form executed by the appellant for his laptop, the appellant himself testified that he consented to allow his computer to be searched. This was at the same interrogation where he had previously been advised of his rights under Article 31(b) and also executed a permissive authorization for items on his person. *Id.* at 111-15. Finally, the initial misconduct that could have tainted the appellant's consent was the questioning by BU1 Teel. This was hasty questioning of a petty officer by a senior petty officer. It was not an orchestrated ruse meant to trick the appellant into subsequently providing consent. As such, we do not find the act to be so "flagrant" as to vitiate being purged by subsequent intervening events or remedies. Therefore, we find that intervening factors sufficiently attenuated the taint of any prior violation making the appellant's consent to have his computer searched "an independent act of free will." *Conklin*, 63 M.J. at 338-39.

### **Distribution of Child Pornography**

For his third and final assignment of error, the appellant argues that his conviction for distribution of child pornography under 18 U.S.C. § 2252A(a)(2)(A) is not factually and legally sufficient. We agree and dismiss the specification in our decretal paragraph.

Per Article 66 of the UCMJ, this Court has an independent obligation to review each case *de novo* for factual and legal sufficiency. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether this court is convinced of the appellant's guilt beyond a reasonable doubt, after weighing all of the evidence in the record of trial and making allowances for lack of personal observation. *Id.* at 325. When testing for legal sufficiency, we consider the evidence in the light most favorable to the prosecution and determine whether a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Id.* at 324-25 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

At issue in the present case is what it means to "distribute." While many of the salient terms in 18 U.S.C. § 2252A are defined in 18 U.S.C. § 2256, the term "distribute" is not. Additionally, the present case is unlike *United States v. Craig*, 67 M.J. 742 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010), or *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009), in that the case at bar was a contested court-martial before a military judge alone. Therefore, we do not have the benefit of a guilty plea colloquy between the military judge and the accused to determine what definition of "distribution" was being used by the fact finder. Nor is this a case like *United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008) where we can analyze members' instructions to determine what definition of distribution was provided to and applied by the fact finder before deliberations. Instead, we must divine a definition

ourselves on appeal. "When a statute does not define a term, we consider three sources of guidance in ascertaining its meaning: (1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance gleaned from any parallel UCMJ provisions." *Craig*, 67 M.J. at 744 (citing *Kuemmerle*, 67 M.J. at 143). Employing the same definition as we did in *Craig*, we find that to "to distribute" in the present case means to deliver to the possession of another. *Craig*, 67 M.J. at 744-45. Based upon that definition, we find that there is insufficient evidence in the record to find beyond any reasonable doubt that any "distribution", i.e. delivery of possession of child pornography to anyone else, was ever effected by the appellant.

The prosecution presented evidence that CM2 Billings viewed, in "streaming" video format, child pornography located on the appellant's computer. However, no evidence was ever presented that any files were ever actually transferred from the appellant's possession to CM2 Billings. While it may be clear that CM2 Billings was able to "access" the videos in the "Malone Z" folder on the appellant's computer at the time of viewing, no evidence was presented that CM2 Billings ever had any sort of possession of the visual depictions he saw such that he would be able to "preclude control by others" of those files on his own computer. See *United States v. Navrestad*, 66 M.J. 262, 267 (C.A.A.F. 2008). We note the testimony of the prosecution's computer forensic expert witness who when asked about CM2 Billings' account of viewing streaming files in the appellant's LimeWire folder through an iTunes application stated "you're not really transferring anything." Record at 350. With no forensic or testimonial evidence of a knowing transfer of possession to CM2 Billings, we cannot affirm the distribution based conviction.

Similarly, we find no evidence in the record that any files were transferred from the appellant's computer to other users on the peer-to-peer network, "LimeWire," which was employed by the appellant to acquire various forms of media. The appellant appears to have confessed to distribution in his statement to NCIS when he says that he utilized Limewire and that "you automatically share with other users" while on LimeWire and that "it is impossible not to." Prosecution Exhibit 1. Again however, the prosecution's own computer forensic expert witness could not gather from his study of the appellant's computer whether any files had actually been shared. Record at 360. Indeed, the examination revealed that any matter related to LimeWire had been deleted off of the appellant's computer by the time it was studied. *Id.* at 320, 360. Minus such a forensic finding, the state of the evidence raises doubt that contraband material had been sent from the appellant's computer to others. Affirming this conviction is not possible. As such, we dismiss the specification for distribution of child pornography.

With the dismissal of a specification, we must analyze whether the dismissal would in any way affect the appellant's

sentence. As we did in *Craig*, we find that "the sentencing landscape would not have been drastically changed" by the dismissal of the specification below. *Craig*, 67 M.J. at 746. Evidence of how files possessed by the appellant could have been more broadly accessed "within a larger file-sharing network would still have been correctly placed before the military judge as a matter in aggravation." *Id.* We are therefore satisfied beyond a reasonable doubt that even if Specification 2 had been dismissed at trial, the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. *Id.*; see also *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

### **Conclusion**

The finding of guilty to Specification 2 is set aside and Specification 2 is dismissed. The remaining findings and the sentence, as reassessed and approved by the convening authority, are affirmed.

Senior Judge MITCHELL and Judge PERLAK concur.

For the Court

R.H. TROIDL  
Clerk of Court