

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

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

UNITED STATES OF AMERICA

v.

**JUSTIN M. JENKINS
HOSPITAL CORPSMAN SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201100420
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 April 2011.

Military Judge: Col Michael Richardson, USMC.

Convening Authority: Commanding General, Marine Air Ground
Task Force Training Command, MCAGCC, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: LtCol A.G. Peterson,
USMC.

For Appellant: LCDR Ronald Hocevar, JAGC, USN.

For Appellee: Capt David Roberts, USMC.

10 May 2012

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 knowingly and wrongfully receiving child pornography in violation of Article 134, Uniform Code of Military Justice, 18 U.S.C. § 934. The

approved sentence was confinement for twenty months, reduction to pay grade E-1, and a bad-conduct discharge.¹

In his sole assignment of error, the appellant asserts that the trial judge erred in taking judicial notice of congressional findings. We have considered the record of trial and the parties' pleadings. We conclude that the findings and sentence are correct in law and fact and that there are no errors materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was stationed at Marine Corps Air Ground Combat Center (MCAGCC), Twentynine Palms, California. Prosecution Exhibit 1. The appellant and his wife, ST, lived in base housing aboard MCAGCC. *Id.* Between 27 August and 9 November 2009, the appellant intentionally downloaded, via LimeWire, two images and five videos containing child pornography. *Id.* On 9 November 2009, the appellant's wife discovered files containing child pornography in the recycle bin of the appellant's computer. *Id.* She promptly notified law enforcement. Thereafter, Naval Criminal Investigative Service agents seized the computer. *Id.*

During the sentencing hearing, the Government asked the military judge to take judicial notice of verbatim sections of congressional findings relative to the dangers of child pornography.² Record at 81-82; PE 4 at 1-2. Individual military counsel (IMC) objected that these congressional findings were not appropriate for judicial notice under MILITARY RULES OF EVIDENCE 201 AND 201A, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), as the findings did not consist of adjudicative facts or law. Record

¹ To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

² Included in the congressional findings are statements to the effect that: (1) child pornography is a large, global industry facilitated by the internet; (2) child pornography is a permanent record of a child's abuse and thus revictimizes the child each time the image is viewed; (3) the creation, distribution, and viewing of child pornography affects both the victims and society as a whole; (4) child pornography desensitizes viewers and can lead to other abusive behaviors. Pub. L. 110-358, § 102, Oct. 8, 2008, 122 Stat. 4001; Pub. L. 109-248, Title V, § 501, July 27, 2006, 120 Stat. 623; Pub. L. 108-21, Title V, § 501, Apr. 30, 2003, 117 Stat. 676; Pub. L. 104-208, Div. A, Title I, § 101a, Sep. 30, 1996, 110 Stat. 3009-26; Pub. L. 99-500, Title I, § 101b, Oct. 18, 1986, 100 Stat. 3341-74.

at 82-83. The military judge stated, "we're not taking judicial notice of the fact. We are taking judicial notice of the fact that congress [sic] found it as a fact." *Id.* at 84. The IMC responded, "Well, sir, if that's where the Court's going, I'm okay with that." *Id.* Having effectively withdrawn his initial objection, the IMC then objected to the material based on relevance. *Id.* This objection was overruled by the military judge. *Id.* at 85.

Discussion

MIL. R. EVID. 103(a)(1) requires a "timely objection . . . stating the specific ground of objection" While forfeiture is "the failure to make a timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). If an objection is waived, then we cannot review the issue on appeal as no error remains for this court to correct. *Id.* (citing *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)).

Whether an appellant waived an objection at trial is a question heavily dependent upon the facts. While at least one civilian court has held that withdrawal of an objection can constitute waiver, military jurisprudence has yet to explicitly adopt this position. See *United States v. Campos*, 67 M.J. 330, 332 n.3 (C.A.A.F. 2009) (citing *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002) (finding waiver where counsel identified an issue by objecting to it at trial and then deliberately withdrew the objection)). While we would concur with the First Circuit's holding in *Rodriguez*, further analysis is warranted.

Military appellate courts have examined several factors when analyzing waiver, including whether the waiver was part of the overall trial strategy, whether the right was known at the time of the trial, whether the defense had knowledge of and an opportunity to examine the evidence, whether the appellant had an opportunity to object to the evidence, and whether the appellant alleges ineffective assistance of counsel with regard to the waiver. *United States v. Harcrow*, 66 M.J. 154, 156-58 (C.A.A.F. 2007); see also *Campos*, 67 M.J. at 332-33; *United States v. Rera*, No. 20090071, 2011 CCA LEXIS 70, unpublished op. (Army Ct.Crim.App. 7 Apr 2011) (explaining five factors that the Court of Appeals for the Armed Forces considers when determining

waiver). We find the application of these five factors by the Army Court of Criminal Appeals instructive.

In this case, the IMC's statement, "Well sir, if that's where the Court's going, I'm okay with that," constitutes waiver because it is effectively an affirmative withdrawal of the objection. Record at 84. Although it is unclear from the record that this withdrawal was part of an overall trial strategy, it is clear that the right was known at the time of the trial, as the IMC first objected to the admission of the evidence, congressional findings on child pornography, and then voiced concurrence with the military judge's view of the law. *Id.* Additionally, the IMC had previously seen the evidence and clearly had an opportunity to object to it. *Id.* at 81. Finally, the appellant has not alleged that his IMC's actions constituted ineffective assistance of counsel. Taken as a whole, the facts of the case establish that the appellant, through counsel, affirmatively waived his right to object to the evidence by agreeing with the military judge's view of the law and thereby withdrawing the objection.

Having effectively withdrawn his initial objection, the IMC then stated, "I would ask for it to be excluded under relevance then." *Id.* at 84. The military judge overruled this objection. He found that the congressional findings on child pornography were relevant and that, "the probative value of this evidence is not substantially outweighed by any danger of unfair prejudice or confusion of the issues or any of the other things listed in [MIL. R. EVID.] 403." *Id.* at 85.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994). In this case, the military judge did not abuse his discretion by admitting the congressional findings on child pornography. Notwithstanding IMC's withdrawn objection to the military judge taking judicial notice of these findings, they were properly admitted pursuant to MIL. R. EVID. 201A as domestic law.³ While retaining "an independent constitutional duty to review factual findings where constitutional rights are at stake," courts normally review congressional findings with a deferential standard. *Gonzalez v. Carhart*, 550 U.S. 124, 165

³ As legislative facts that relate to questions of law, policy, or legal reasoning, the judicial notice of these congressional findings was within the scope of MIL. R. EVID. 201A and did not require the normal procedural analysis found in MIL. R. EVID. 201 and applied to adjudicative facts. *United States v. Mead*, 16 M.J. 270, 272 (C.M.A. 1983); MIL. R. EVID. 201A Analysis, at A22-5.

(2007). In this case, we see no reason to question the congressional findings, or to disturb the military judge's decision to take judicial notice of these findings. The appellant is not asserting the loss of a constitutional right and has presented no evidence challenging these findings. Furthermore, these findings are, as the military judge stated, "entirely relevant" and do not violate MIL. R. EVID. 403. Record at 85. As such, the military judge did not abuse his discretion when he took judicial notice of the congressional findings on child pornography.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court