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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, M. FLYNN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KYLE I. JESPERSEN
NAVAL AIRCREWMAN AVIONICS FIRST CLASS (E-6), U.S. NAVY

NMCCA 201100623
GENERAL COURT-MARTIAL

Sentence Adjudged: 6 September 2011.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holified, JAGC, USN.
For Appellant: LCDR Shannon Llenza, JAGC, USN.
For Appellee: Capt Crista Kraics, USMC.

31 May 2012

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of soliciting a parent online to consent to her child's participation in sexual conduct, and one specification each of possessing, receiving, and distributing images of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to be confined for 10

years, to be reduced to pay grade E-1, and to be dishonorably discharged from the United States Navy. The convening authority approved the sentence as adjudged and, in accordance with the terms of a pretrial agreement, suspended all confinement in excess of 30 months.

In his sole assigned error, the appellant argues that charging receipt of child pornography along with wrongful distribution of child pornography is an unreasonable multiplication of charges because the receipt and distribution were essentially one transaction. Appellant's Amended Brief of 7 Mar 2012. We disagree.

Background

At trial, after explaining the elements and definitions of the offenses, the military judge discussed with counsel and the appellant whether there was any overlap between the images that were charged in three of the specifications (possession, receipt, and distribution). All agreed that while there was some overlap between the images alleged in the receipt and distribution specifications, those images were different than the ones alleged in the possession charge. Record at 70-72. The following colloquy took place:

> TC: There's no overlap with possession, sir. Possession is 50 different images and then for Specifications 4 and 5, the receipt and distribution, there's some overlap between those two but none with possession.
>
> MJ: Okay. Well, I don't care about any overlap between receipt and distribution.
>
> TC: Yes, sir.
>
> MJ: But in order for someone to receive and distribute, they have to possess.
>
> TC: Yes, sir. Understood.
>
> MJ: Because you have to exercise control over something before you can receive or distribute it. So as long as the only overlap is among - -or is between the receipt and distribution those are two separate criminal acts - - -

TC: Right. Yes, sir.

MJ: And he can be punished separately for that.

TC: Yes, sir. That's correct. I just wanted to clarify that there is overlap between 4 and 5. But possession of those 50 images are completely independent from the receipt and distribution.

MJ: Okay. Defense, do you agree with what I just said as far as the impact of any overlap?

DC: Yes, sir, the defense agrees.

MJ: So do you agree that your client can be separately punished then for all three specifications if the government's proffer is true?

DC: Yes, sir.

MJ: And do you agree that the 50 images that are alleged to have been possessed in Specification 3 are different than any of the 50 images alleged in each of the specifications for receipt and distribution?

DC: Yes, sir.

Id. at 71-72.

During the providence inquiry, the appellant testified that on 11 May 2011, he was on Yahoo Messenger talking to two different people. *Id.* at 76. While chatting with them, he was receiving images from one individual and then transmitting some of those images and some additional images to another individual through Yahoo Messenger using Photo Share. In explaining the process, the appellant stated that, after viewing each image he received, he saved them to his computer so that he could later send them to another person. *Id.* at 78. During his chat with Individual #1, the appellant received images of child pornography and then forwarded images of child pornography to Individual #2. The appellant also received images of child pornography from Individual #2 and then forwarded images of child pornography to Individual #1. *Id.* at 83. The images he sent included some of those that he had recently viewed and saved, as well as older images that he had previously viewed and saved to his computer at an earlier date. *Id.* at 80; Prosecution Exhibit 4. Following a thorough discussion of each

of the specifications and the appellant's rights, the military judge accepted the appellant's pleas of guilty to each of the separate specifications. *Id.* at 118.

Unreasonable Multiplication of Charges

The prohibition against unreasonable multiplication of charges allows this court to address prosecutorial overreaching by imposing a standard of reasonableness. *United States v. Paxton,* 64 M.J. 484, 490 (C.A.A.F. 2007); *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). In addressing whether the Government has unreasonably multiplied charges, this court applies a five-part test: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)); *see also Paxton*, 64 M.J. at 491. When conducting a *Quiroz* analysis, we are mindful that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Initially, we need not engage in an analysis of the five factors because we find that the appellant waived appellate review of this issue. Waiver is the intentional relinquishment or abandonment of a known right. When an appellant intentionally waives a savable right at trial, it is extinguished and may not be raised on appeal. *See United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)(citing *United States v. Harcrow,* 66 M.J. 154, 156 (C.A.A.F. 2008)).

In *Gladue,* the court found that unreasonable multiplication of charges may be waived. *Gladue,* 67 M.J. at 314. Whether waiver has occurred is reviewed on a case-by-case basis. In *Harcrow,* the Court of Appeals for the Armed Forces held that the trial defense counsel's failure to object to hearsay evidence did not constitute an intentional waiver because, subsequent to the appellant's trial and during his direct appeal, the Supreme Court's opinion in *United States v. Crawford,* 541 U.S. 36 (2004), created a new rule of criminal procedure which applied

retroactively to cases on direct appeal. *Harcrow,* 66 M.J. at 157. By contrast, in *United States v. Campos,* 67 M.J. 330, 332-33 (C.A.A.F. 2009), the court found that defense counsel's "no objection" statement in response to questions from the military judge regarding the admissibility of certain testimony, coupled with the fact that he had advance notice of the substance of the expected testimony and had entered into a stipulation of expected testimony, demonstrated an intentional relinquishment of a known right.

Likewise, we see this case as an appropriate one in which to apply the waiver doctrine. The appellant entered into a pre-trial agreement, signed two detailed stipulations of fact describing the specific conduct in each of the charged specifications, and pled guilty to the separate specifications as drafted. Record at 23-24; Prosecution Exhibits 1 and 4; Appellate Exhibit IV. When asked by the military judge if he had any motions to present, trial defense counsel stated that he did not. Record at 23. At no time during the trial did the appellant raise the issue of unreasonable multiplication of charges. Moreover, trial defense counsel affirmatively agreed with the military judge's statement that receipt and distribution were two separate criminal acts and further agreed that the appellant could be separately punished for all three specifications. Record at 72. In sum, we find that the record reflects that the appellant intentionally relinquished his right to object to the multiple specifications and disavowed any entitlement to relief on that basis.

Nevertheless, assuming *arguendo* that waiver does not apply, having considered the *Quiroz* factors, we find that there has not been an unreasonable multiplication of charges. First, the appellant did not object at trial to an unreasonable multiplication of charges. Second, each of the two specifications is aimed at distinctly separate criminal acts. The appellant's misconduct of receiving child pornography through the Internet was a separate crime from his misconduct of uploading from his child pornography collection and transmitting them to another over the internet. *See United States v. Madigan,* 54 M.J. 518, 521 (N.M.Ct.Crim.App.2000)("[T]he crime of receiving the pornographic images is complete at the time the appellant downloaded the images to view them"). While some of the images alleged in the distribution specification were the same as those charged in the receiving specification, the conduct involved in transmitting the images was different. Third, the two specifications under the Charge do not exaggerate the appellant's criminality because they do not describe the

same behavior. PE 1. Fourth, although the addition of another specification under the Charge did increase the appellant's punitive exposure, it was not unreasonable. Finally, there is no evidence of prosecutorial overreaching or abuse in the drafting of a second specification under the Charge. Consequently, we do not find that the specifications constitute an unreasonable multiplication of charges.

We are convinced 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. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court