

**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.

**JERAMY L.A. REESE
AVIATION ELECTRONICS TECHINICIAN
FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201200030
GENERAL COURT-MARTIAL**

Sentence Adjudged: 27 October 2011.

Military Judge: CAPT John Waits, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR M.C. Holifield,
JAGC, USN.

For Appellant: Maj Peter Griesch, USMCR.

For Appellee: Maj William Kirby, USMC; LT Joseph Moyer,
JAGC, USN.

31 July 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:

At a general court-martial, a military judge convicted the appellant, pursuant to his pleas, of one specification each of wrongful possession of a laptop computer containing child pornography, wrongful distribution of and attempting to download with intent to view child pornography in violation of Article

134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to fifteen months confinement, reduction to the pay grade E-3, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. The appellant raises a single assignment of error: that the military judge erred when he failed to dismiss a portion of the possession specification as multiplicitous with the distribution specification. For relief, he seeks a modification of the findings and a resentencing hearing.

We have examined the record of trial, the appellant's assignment of error, and the pleadings of the parties. With one modification, 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.

At trial, the appellant entered pleas of guilty to all three specifications. As he explained during the providence inquiry, in March 2011 he downloaded fifteen images of child pornography through the file sharing software program known as "Shareaza", and saved these images to the hard drive on his laptop computer. Record at 56-60; Prosecution Exhibit 1 at 2-4. These fifteen images form the basis of the possession specification.¹ He also selected settings for this Shareaza program that allowed all files in his shared file folder to be downloaded by other users of the program. Record at 63-67. On 29 March 2011, a Naval Criminal Investigative Service (NCIS) agent working as part of an Internet Crimes against Children task force detected the appellant's online searches for suspected child pornography; she downloaded these eight images

¹ Specification 1, alleging wrongful possession of a laptop computer containing child pornography, was pen changed at some point to reflect that the offense occurred "on or about 6 May 2011". Charge Sheet. However, this pen change is never mentioned on the record. When discussing Specification 1 and Specification 2, the distribution of child pornography, the military judge focused on 29 March 2011 for both offenses. Initially, the appellant explained that the Naval Criminal Investigative Service (NCIS) seized his laptop computer containing all fifteen images possessed (including the eight he distributed) on "that date". Record at 58-59. This would suggest near simultaneous possession and distribution, a fact that the military judge discusses later with counsel. *Id.* at 68-70. However, when the military judge later discusses Specification 3, the attempt to download offense, the appellant explains that NCIS came to his house and seized his laptop computer on 6 May 2011. *Id.* at 77-78. The stipulation of fact states that the appellant downloaded all fifteen images and saved them to the hard drive of his laptop in March 2011 and NCIS came to his residence and seized his laptop on 6 May 2011. PE 1 at 2-3. At the time NCIS seized the laptop, it contained all fifteen images. *Id.*

from the appellant's shared file folder on his computer. *Id.* at 66-68; PE 1 at 2. These eight images form the basis of the distribution specification.

When the military judge noted the overlap of these eight images between the two specifications, he raised the issue of multiplicity with counsel as follows:

MJ: Okay. That brings up a question, Trial Counsel, which I think is further down in my providency. If these files are the same files as he possessed, if the eight files that he distributed are the same as the eight files that he possessed, is there any kind of multiplicity issue here or is that waived by the pretrial agreement, or what are we talking about? Because you can't distribute something that you don't possess.

TC: Correct, sir, he did. The eight files alleged to be distributed are including (sic) in the 15 he's alleged to have possessed.

MJ: Okay. That's what I just said, so what's the impact of that on any type of sentencing issues?

TC: Well, sir, there's no agreement per the pretrial agreement, sir.

MJ: Okay. So you're going to leave it up to me to decide how I want to consider that?

TC: Yes, sir, the government is amenable to collapsing for purpose of the sentencing.

MJ: What's the defense position?

ADC: If the government is willing to do that, we agree.

MJ: So you're not going to all -- you're not going to argue that it's multiplicitious for findings, you're just going to agree with the government that it--that I should consider it multiplicitious for sentencing?

ADC: Yes, sir.

MJ: All right. The court will do that . . .

ACC: Yes, sir.

Record at 68-69. The military judge did not address the issue of multiplicity again during the remainder of the trial.

Before we delve any further, we note some confusion from the use of the phrases "multiplicity for findings" and "multiplicity for sentencing" in the record. While "multiplicity for sentencing" is often viewed as synonymous with unreasonable multiplication of charges (UMC), a wholly separate concept from multiplicity, it is unclear from this record whether the military judge and the parties were all operating on the assumption that the issue was limited to multiplicity, UMC, or both. As the Court of Appeals of the Armed Forces (CAAF) recently made clear, "multiplicity for sentencing" is illogical since offenses that are "multiplicious for sentencing...must necessarily be multiplicious for findings as well . . . [and] it makes no sense and is confusing to refer to 'multiplicity for sentencing' as a distinct concept since a ruling that an offense is 'multiplicious' for findings purposes necessarily results in dismissal of the multiplied offense and obviates any issue on sentencing." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012).²

From this record, it appears at first that all parties agreed that it was multiplicious to include the eight images distributed with the images possessed. However, the discussion then quickly devolved into how the issue should be resolved in sentencing, suggesting only UMC. We are not convinced from this record that the appellant affirmatively waived the issue of multiplicity. Therefore, we analyze this issue within the context of plain error.

Within this context, a multiplicity claim will fail on appeal unless the specifications are facially duplicative. *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009). Whether specifications are facially duplicative is a question of law reviewed *de novo*. *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Specifications that are factually the same are facially duplicative. *Id.* Specifications are not factually the same if they each require proof of a fact the other does not.

² In fairness to the military judge and counsel, *Campbell* was published four months after this trial. Following *Campbell*, however, there is no longer a legally viable distinction between "multiplicity for findings" and "multiplicity for sentencing". There is either multiplicity or UMC. *Campbell*, 71 M.J. at 23.

United States v. Hudson, 59 M.J. 357, 359 (C.A.A.F. 2004). We review the entire record of the guilty plea to make this determination. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997).³

We turn now to whether, based on this record, these two specifications in whole or part are "facially duplicative". First, in viewing the charge sheet, providence inquiry, and the stipulation of fact, we find that the appellant's possession of all fifteen images began in March 2011 when he downloaded these images through the Shareaza program. Next, we note that he testified that the images he downloaded in March were "saved to the hard drive of his laptop." Record at 57. His distribution of eight of these fifteen images occurred on 29 March 2011 when NCIS retrieved them from the appellant's shared file folder from the Shareaza program on his laptop.

If the fifteen images possessed were copied and saved to a different media from where the eight images were distributed, we might agree with the Government that there lies no multiplicity concern. See Government Answer at 6; see also *Campbell*, 68 M.J. at 219-20 (possession specifications were not facially duplicative where possession specifications contained different dates and images of child pornography were possessed on multiple media); *Craig*, 67 M.J. at 747 (replicating and saving child pornography images on separate media from location where images were downloaded was separate and discrete conduct that permitted both receipt and possession specifications).

But from this record, we cannot determine whether the appellant took the discrete action of saving and storing these images on separate media. We also note that unlike *Campbell*, these two specifications did allege the same date and the same exact file names for the eight images.⁴ Consequently, we are

³ In its Answer, the Government argues that this determination is limited solely to the factual recitations on the charge sheet, relying on *Campbell*, 68 M.J. at 217 and *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). See Answer of 4 Jun 2012 at 8. Our view of these cases does not bring us to the same conclusion. On the contrary, we continue to examine the charge sheet as well as "facts apparent on the face of the record" in conducting this inquiry. See *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (internal quotation marks and citation omitted). This includes both the providence inquiry and stipulation of fact. *Id.* at 267.

⁴ As explained *infra*, the pen change of "6 May" to Specification 1, the possession offense, is never discussed on the record. Although the Stipulation focuses on 6 May for this offense, the military judge used the original "29 March" date during the providence inquiry without any correction

left with two specifications that allege the same dates and same eight file names, and a providence inquiry that suggests that the same eight images were downloaded to, stored in and distributed from the same media. Thus, we find that the appellant has met his burden of demonstrating that these two specifications containing the same eight image files are facially duplicative and we will modify the guilty finding to Specification 1 accordingly.

Our modification to this guilty finding raises the final issue of sentence reassessment. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Mofeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006) and carefully considering the entire record, we conclude that there has not been a dramatic change in the penalty landscape. This modification has no impact on the maximum sentence authorized. The appellant also remains convicted of the unrelated offense of attempting to download 100 images of child pornography. Thus, we are satisfied that the military judge would have adjudged a sentence no less than that approved by the convening authority in this case.

Conclusion

The supplemental court-martial order will reflect that that portion of the guilty finding to Specification 1 of the Charge listing the image files identified as #3, 4, 5, 7, 8, 10, 11 and 13 is set aside. The remainder of the guilty finding to Specification 1 and the guilty findings to the charge and Specification 2 and 3, and the sentence approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

from counsel. Specification 2, the distribution offense, lists 29 March on the charge sheet and that is the date specified in the Stipulation for this offense. Charge Sheet; PE 1.