

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DANIEL K. SOTO
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100680
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 September 2011.

Military Judge: LtCol Robert G. Palmer, USMC.

Convening Authority: Commanding Officer, MCAS, Beaufort, SC.

Staff Judge Advocate's Recommendation: Maj V.C. Danyluk, USMC.

For Appellant: Maj Rolando Sanchez, USMCR.

For Appellee: Capt Samuel Moore, USMC.

15 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 receiving and distributing child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for seven years, reduction to pay grade E-1, forfeiture of all pay and allowances for seven years, and a dishonorable discharge. The convening

authority (CA) approved the sentence and, in accordance with a pretrial agreement, suspended all confinement in excess of five years. Additionally, in an act of clemency, the CA suspended an additional six months of confinement.

The appellant alleges a single error: that the military judge committed plain error when he considered victim impact statements contained in Prosecution Exhibit 5. RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

We have carefully reviewed the record of trial and the parties' pleadings. 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.

Background

The appellant used the internet and file sharing software to amass thousands of files containing child pornography. Many of these files depicted young boys being raped, sodomized, and sexually abused. By the appellant's own estimation, at least one hundred of the files depicted known, identified child victims. Having received and amassed the files, he distributed them via the same file sharing programs.

The appellant entered into a pretrial agreement with the CA. Appellate Exhibit I. Paragraph 15(e) to that agreement reads, in pertinent part, "I and the Government (sic) agree not to object to . . . written victims' or witness statements being offered into evidence in sentencing on the basis of hearsay, authenticity, and the right to confrontation." The military judge discussed this provision with the appellant on the record and confirmed his understanding of it. In return for his guilty pleas and adherence to the terms of the pretrial agreement, the appellant received valuable consideration in the form of sentence limitation, specifically regarding confinement. During presentencing, the military judge received PE 5 into evidence without objection; it contained impact statements from some of the known child victims and their families. The military judge also considered voluminous additional exhibits in aggravation.

Discussion

R.C.M. 1001(b)(4) provides that trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. The appellant avers that the military judge committed plain error by considering PE 5.

Where no objection is raised at trial, an appellant may only prevail on appeal if he can show plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). To establish plain error, the appellant must demonstrate: (1) that there was error; (2) that the error was plain or obvious; and, (3) that the error materially prejudiced one of his substantial rights. *United States v. Olano*, 507 U.S. 725, 737 (1993). The error must have "had an unfair prejudicial impact on the [judge's] deliberations." *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, 16 n.14 (1985)); see also *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998); *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997).

Judges are presumed to know the law and apply it correctly. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009). That presumption holds absent clear evidence to the contrary. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) and *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Judges are presumed to be able to filter out inadmissible evidence, and presumed not to rely upon inappropriate evidence when making decisions as to guilt, innocence, or sentence. See *United States v. Ellis*, 68 M.J. 341, 347 (C.A.A.F. 2010); *United States v. McNutt*, 62 M.J. 16, 26 (C.A.A.F. 2005); *United States v. Robbins*, 53 M.J. 455, 457 (C.A.A.F. 2000).

The Government entered 125 pages of documentation into evidence in aggravation pursuant to R.C.M. 1001(b)(4), without defense objection. PE 5 is ten pages of that submission, containing direct victim impacts of the identified child victims.

We are not persuaded by the appellant's assertion that these statements are not directly related to his actions. We are likewise not persuaded that the child victims' statements, to the limited extent that they opine on matters relating to sentencing, constituted plain error, particularly in the context

of a bench trial. Even assuming error, we find that the appellant has failed to establish any material prejudice to his substantial rights. See *Olano*, 507 U.S. at 725. The assigned error is without merit.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court