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

Before
C.L. REISMEIER, J.K. CARBERRY, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DAVID A. YANEZ
SHIP'S SERVICEMAN SEAMAN (E-3), U.S. NAVY

NMCCA 201100374
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 April 2011.
Military Judge: CDR Douglas P. Barber, Jr., JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.D. Hutchison, JAGC, USN.
For Appellant: LT Michael R. Torrisi, JAGC, USN.
For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

31 January 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 general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of three specifications of possessing child pornography in violation of Article 134, UCMJ. The members sentenced the appellant to five years confinement, a dishonorable discharge, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant assigns the following errors: (1) Specifications 1 and 2 represent an unreasonable multiplication of charges; (2) the evidence against him was legally and factually insufficient; and, (3) his sentence is inappropriately severe.[1]

Statement of Facts

The members convicted the appellant of three specifications of possessing child pornography. The first specification alleged that the appellant possessed child pornography on his Dell laptop in violation of clauses 1 and 2 of Article 134. Specification 2 of the Charge alleged that the appellant possessed the same child pornography on the same Dell laptop in violation of 18 U.S.C. § 2252A, as assimilated by clause 3 of Article 134. The third specification alleged that the appellant possessed child pornography on a thumb drive.

Following the trial counsel's request, the military judge informed the parties that he would instruct the members that Specifications 1 and 2 were one offense for sentencing purposes. Record at 530. Trial defense counsel did not object or request that the specifications be found multiplicious for findings.

Discussion

In Quiroz, the Court of Appeals for the Armed Forces set out the five-part test to determine whether findings of guilty amount to an unreasonable multiplication of charges. *See United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). Applying the test to Specifications 1 and 2 of the Charge, we conclude that convicting the appellant of two specifications stemming from the possession of the same images of child pornography, on the same computer, during the same time period, under two different theories of criminal liability, represents an unreasonable multiplication of charges. Although three factors weigh in favor of the Government (i.e., the appellant's failure to challenge either specification at trial; the military judge's merging of the specifications for sentencing alleviating any unreasonable punitive exposure; and, charging alternative theories of liability does not amount to prosecutorial overreaching), we find that the specifications were not aimed at distinctly separate criminal acts and that multiple convictions for the same conduct exaggerates the appellant's criminality. Accordingly, Specification 2 will not be affirmed. Art. 66(c),

[1] The second and third assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

UCMJ. In light of the trial judge's treatment of the offenses as "merged" for sentencing, we are satisfied that the sentence adjudged and approved would be no different absent the error. *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006).

Legal and Factually Sufficiency

The appellant asserts that the evidence was legally and factually insufficient to prove his guilt beyond a reasonable doubt. Applying the well-known tests for legal and factual sufficiency, we are satisfied that the evidence was both legally and factually sufficient to establish the appellant's guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

Sentence Appropriateness

The appellant asserts that the approved sentence, which included five years confinement, reduction to pay grade E-1, and a dishonorable discharge, "is inappropriately severe" in light of the limited number of images he possessed. We disagree.

After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and the offenses committed.

Conclusion

Accordingly, the finding as to Specifications 1 and 5 of the Charge, and the sentence as adjudged and approved by the convening authority, are affirmed. The finding of guilty as to Specification 2 is set aside and that specification is dismissed.

For the Court

R.H. TROIDL
Clerk of Court