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

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

UNITED STATES OF AMERICA

v.

JARED D. SCHMIDT
AVIATION STRUCTURAL MECHANIC THIRD CLASS (E-4), U.S. NAVY

NMCCA 201200339
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 April 2012.
Military Judge: CAPT Kevin O'Neil, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA .
Staff Judge Advocate's Recommendation: CDR J.M. Nilsen, JAGC, USN.
For Appellant: Capt Jason Wareham, USMC.
For Appellee: Maj William Kirby, USMC; LT Lindsay Geiselman, JAGC, USN.

19 March 2013

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification each of receipt and possession 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 confinement for 60 months, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement the convening authority approved the sentence as adjudged, but suspended confinement in excess of 40 months for the period of confinement served plus 12 months thereafter.

In his sole assignment of error, the appellant alleges that the military judge abused his discretion by accepting the appellant's plea to possession of child pornography. He asserts that he merely copied the same images and videos he received and put them on an external hard drive and took no further action.[1]

After careful consideration of the record and the pleadings of the parties, 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

From January to March 2010, while the appellant was assigned to Carrier Airborne Early Warning and Reconnaissance Squadron ONE ONE FIVE (VAW-115), in Atsugi, Japan, he searched for child pornography on LimeWire using search terms such as "nude young girls," "child sex," and "cp." Prosecution Exhibit 1 at 2-3; Record at 235-37. The appellant had previously downloaded the file-sharing software "LimeWire" to his personal computer. LimeWire is a "peer to peer" file sharing program that allowed the appellant to download files directly from the computers of other individuals who were online. PE 1 at 2; Record at 231-33.

Once LimeWire returned a list of results matching his search terms, the appellant selected various files, which he then downloaded to a temporary folder on his laptop computer. The appellant could not view the contents of the files until they were downloaded. After reviewing each file that he downloaded, he saved them to another folder on his laptop computer. Over this three-month period, the appellant admitted to searching for child pornography on LimeWire "[q]uite a few" times. Record at 240. As a result of his searches, the appellant downloaded and saved 110 images and 30 videos of suspected child pornography onto his laptop computer. He later copied some of these images and videos to an external hard drive

[1] The appellant focuses much of his brief on the argument that it was impermissible for the Government to charge receipt and possession of the same child pornography files on different devices, which seems to be an argument for unreasonable multiplication of charges for findings. At the same time, the appellant concludes his brief by stating that this situation was an unreasonable multiplication of charges for sentencing, and only requests that this court reassess the sentence.

for storage in case something happened to his laptop. He retained the original images and files on his laptop computer.[2]

Argument

The appellant contends that the "military judge abused his discretion in both law and fact when he did not rule that receipt and possession of the same child pornography represented an unreasonable multiplication of charges." Appellant's Brief of 7 Nov 2012 at 4. We disagree.

Unreasonable Multiplication of Charges

We reviewed a similar issue in a recent case. *See United States v. Sanschagrin*, No 201200333, 2013 CCA LEXIS 39, unpublished op. (N.M.Ct.Crim.App. 29 Jan 2013) (per curiam). Accordingly, we will apply the same legal analysis here.

We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)).

The doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). In order to determine whether there is an unreasonable multiplication of charges, we apply the five-factor test set forth in *Quiroz*: (1) whether the accused objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality; (4) whether the number of charges and specifications unreasonably increases the appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *Id*. at 338. "What 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 (2012 ed.). The concept of unreasonable

[2] The appellant admitted that in addition to copying the child pornography to the external hard drive, he also copied many other files, including music and "stuff" to the external hard drive, "[j]ust in case my hard drive broke." Record at 262.

multiplication of charges may apply differently on findings compared to sentencing. *Campbell*, 71 M.J. at 23-34.

Prior to entering pleas, the trial defense counsel raised a motion for "multiplicity," which the military judge indicated he would address during the sentencing phase. Record at 213-14. The military judge expressed to the parties that he understood the defense's motion to be for an "unreasonable multiplication of charges . . . for sentencing." *Id*. at 214. There was no opposition at that time by the Government to the defense counsel's raising of the motion. Prior to announcing sentence, the military judge denied the defense motion, citing the *Quiroz* factors and the decision in *Campbell*. While the Government now asserts that, as a term of the pretrial agreement, the appellant waived all waivable motions, it did not oppose the appellant's raising such motion at trial, and the military judge entertained the motion. We consider the matter to have been raised.[3]

The first *Quiroz* factor weighs in favor of the appellant, since trial defense counsel made a motion to treat the two specifications as an unreasonable multiplication for sentencing.[4] The second and third factors weigh against the appellant because the Government may properly charge him with separate offenses for receiving and possessing child pornography under our holdings in *United States v. Madigan*, 54 M.J. 518 (N.M.Ct.Crim.App. 2000) 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). In *Madigan*, we held that "the crime of receiving the pornographic images is complete at the time the appellant downloaded the images to view them," and that "the appellant's possession of these images continued long after their receipt, because he had saved the images on the computer and was thus able to display them at will as he chose." 54 M.J. at 521. In *Craig*, we affirmed that a separate *actus reus* was

required to support child pornography specifications for both receipt and possession. 67 M.J. at 747 n.2.

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[3] We decline to adopt the Government's position that the appellant waived this assignment of error by pleading guilty unconditionally, *see United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009), since we are not bound by the waiver doctrine due to the plenary powers granted us by Article 66(c), *see United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010).

[4] At the same time, trial defense counsel conceded that the specifications were not an unreasonable multiplication for findings, which weighs against the appellant's current argument. Record at 340.

Here, the appellant admitted that he entered specific terms to search for child pornography and had to direct LimeWire to download the files to his personal computer before he could actually view the contents of such files. Thus, the crime of receipt was completed at the time he downloaded the child pornography files to his computer. The appellant later took the separate step of copying some of the images and videos to an external hard drive. When the appellant transferred images and videos of child pornography from his laptop computer to his external hard drive, he completed a separate *actus reus*.

Furthermore, the appellant also used a separate and distinct form of media when he transferred the images and videos to his external hard drive, which made possession a separate and distinct criminal action from receipt. *See United States v. Campbell,* 66 M.J. 578, 583 (N.M.Ct.Crim.App. 2008) ("[E]ach possession on different media was a separate crime, and, therefore, a proper basis for a separate specification alleging possession, regardless of the similarity of the images and videos in each instance"), *aff'd in part and rev'd in part on other grounds*, 68 M.J. 217 (C.A.A.F. 2009); *see also United States v. Planck*, 493 F.3d 501, 504-05 (5th Cir. 2007). Though the images were identical to the originals when viewed, the duplicates on the external hard drive are separate electronic files, created by the appellant, and embedded in different media. Therefore, we conclude that the number of specifications under the charge did not misrepresent or exaggerate the appellant's criminality.

As to the fourth factor, these separate offenses increased the appellant's punitive exposure, but not unreasonably so. Finally, we find that the Government's charging strategy in this case reflected a reasoned approach and was not overreaching. In sum, the majority of the *Quiroz* factors weigh against the appellant. We hold that it was not an abuse of discretion for the military judge to accept the appellant's guilty pleas to both receipt and possession of child pornography, nor was it an abuse of discretion to not merge the specifications for sentencing.[5]

[5] We note that in the appellant's Non-Consent Motion to Attach of 26 February 2012, it appears there may have been a *sub rosa* agreement between the appellant and the Government concerning a motion for unreasonable multiplication of charges. Email communication between the trial and defense counsel during PTA negotiations indicate a discussion whether to include a PTA provision permitting the filing of a motion for unreasonable multiplication of charges (UMC). It appears from the language of the email and the defense counsel's Unsworn Declaration that the parties agreed that although the PTA would contain a provision requiring the waiver of all

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

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waivable motions, the defense could raise a UMC motion prior to entry of pleas. Assuming, *arguendo*, that a *sub rosa* agreement existed to allow the appellant to raise the UMC motion despite the PTA provision requiring the waiver of all waivable motions, we can see no prejudice to the appellant. Art. 59(a), UCMJ. *See* Footnote 3. Nor do we find the plea improvident. We caution counsel to ensure that all terms of the pretrial agreement are placed in writing and signed by the accused and counsel to avoid misunderstandings and preclude unnecessary appellate litigation.