

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**COLBY J. STRAVA
AIRCREW SURVIVAL EQUIPMENTMAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200600737
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 January 2006.

Military Judge: CAPT Donald J. Sherman, JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: CDR L.R. Langevin,
JAGC, USN.

For Appellant: LT J.M. Lokey, JAGC, USN.

For Appellee: LT T.R. Booker, JAGC, USN.

8 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of failing to obey a lawful general regulation, receiving child pornography, and possessing child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to 48 months confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement (PTA), the convening authority (CA) suspended the adjudged confinement in excess of 42 months for a period of 36 months from the date of the CA's action and deferred and waived automatic forfeitures for a period of 6 months, for the benefit of the appellant's spouse.

As an act of clemency, the CA mitigated the reduction in rate to E-3.

The appellant raised four assignments of error.¹ The appellant's fourth assignment of error alleges that he had not received the benefit of his PTA bargain regarding deferment/suspension/waiver of adjudged/ automatic forfeitures. In January 2007, we returned the record of trial to the Judge Advocate General of the Navy for submission to a CA empowered to order a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968). A *DuBay* hearing was held on 8 and 22 June 2007. The record was authenticated and subsequently returned to this Court on 6 November 2007. On 15 November 2007, the appellant declined to provide further matters for consideration.

PTA Compliance

The Government performed an audit of the appellant's pay account. The military judge conducting the *DuBay* hearing considered documentary evidence reflecting the appellant's pay since his conviction and several witnesses testified to various aspects of that record. The military judge made detailed findings of fact which the appellant does not contest. Having carefully reviewed the record, we find the military judge's findings are well-supported by the record and we adopt them as our own.

While the record reflects that payments to the appellant's intended beneficiary were delayed for about a month after the appellant finally put in his allotment request, it also reflects that the intended beneficiary ultimately received at least \$14,000 more than she was entitled to under the terms of the PTA. We agree with the military judge that the appellant has not demonstrated that the timing of the deferred payments was material to his decision to plead guilty. Further, we do not find that the miscues and brief confusion in setting up the payments constituted a Government breach of the PTA. This assignment of error is without merit.

¹ The appellant's assignments of error are as follows:

1. THE MILITARY JUDGE ERRED BY FAILING TO DISMISS SPECIFICATION 2 OF CHARGE II AS MULTIPLICIOUS WITH SPECIFICATION 1 OF CHARGE II.
2. TRIAL COUNSEL COMMITTED PLAIN ERROR WHEN HE GAVE AN IMPROPER SENTENCING ARGUMENT.
3. APPELLANT'S SENTENCE WAS INAPPROPRIATELY SEVERE IN LIGHT OF APPELLANT'S TWELVE YEARS OF SERVICE, HIS ADMITTED ADDICTION TO PORNOGRAPHY, HIS FULL COOPERATION WITH THE INVESTIGATION AND COURT-MARTIAL, AND HIS UNCONDITIONAL GUILTY PLEAS.
4. APPELLANT DID NOT RECEIVE THE BENEFIT OF HIS BARGAIN IN THAT THE GOVERNMENT DID NOT COMPLY WITH ALL THE TERMS OF THE PRETRIAL AGREEMENT.

Multiplicity

Although not raised at trial, the appellant now contends that Specifications 1 and 2 of Charge II are facially duplicative and therefore multiplicitious.

The appellant entered an unconditional guilty plea to receipt of child pornography (Specification 1, Charge II) and to possession of the same pornography (Specification 2, Charge II). By pleading guilty, the appellant conceded that there are no factual disputes - and in this case, that there are no issues concerning the factual separateness of the two specifications. Under the circumstances, we will only find multiplicity if the facts underlying the two charges or specifications are facially duplicative, meaning that the facts are the same. *United States v. Madigan*, 54 M.J. 518, 521 (N.M.Ct.Crim.App. 2000)(internal citations omitted). "A determination that charges are facially duplicative is made by reviewing the language of the specifications and the facts in the record pertaining to the charges. If the charges are facially duplicative, we do not apply the 'guilty-plea waiver doctrine.'" *Id.* (internal citations omitted).

We have reviewed both the language of the specifications and the facts in the record. The language of the two specifications is not facially duplicative as one alleges *receipt* of child pornography and the other *possession* of the same. Receipt and possession are two different offenses as properly defined by the trial judge on the record and acknowledged by the appellant. Record at 24, 28. The facts in the record pertaining to these specifications are likewise not facially duplicative. The appellant testified that he received the child pornography by downloading it from the internet. *Id.* at 37. The record also reflects that the appellant possessed the images on two different computer hard drives. This indicates at least some subsequent action by the appellant to preserve the images for future use without his having to re-access the originating internet sites. In view of this, the appellant waived this issue at trial and this assignment of error is without merit.

Conclusion

The appellant's remaining assignments of error are without merit. The findings and the approved sentence are affirmed.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court