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

Before
R.E. VINCENT, J.A. MAKSYM, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHARLES R. DAVIS III
CULINARY SPECIALIST THIRD CLASS (E-4), U.S. NAVY

NMCCA 200900137
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 December 2008.
Military Judge: CAPT Moira Modzelewski, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: LCDR W.A. Record, Jr., JAGC, USN.
For Appellant: LCDR Thomas Belsky, JAGC, USN.
For Appellee: Mr. Brian Keller, Esq.

8 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of two specifications involving possession of child pornography and two specifications involving receipt of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence was confinement for 12 months, reduction to pay grade E-1, and a bad-conduct discharge.

The case was submitted to us without assignment of error. We nonetheless observe that the factual misconduct reflected in the two possession specifications was charged in one specification as conduct prejudicial to good order and discipline and service discrediting under clauses 1 & 2 of Article 134, and then charged again in another specification as a violation of 18 U.S.C. § 2252A(a)(5) under clause 3 of Article 134. The same is true of the receipt specifications. Alternative charging is not problematic, as the Government must perfect its case anticipating varying contingencies of proof. The various clauses of Article 134 provide alternate theories of criminal liability, but do not thereby state separate offenses. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)(citing *United States v. Sapp,* 53 M.J. 90, 92 (C.A.A.F. 2000)). Therefore, in that the military judge did not compel the Government to choose between statutory theories, the findings in this case cannot stand.

The military judge found the appellant guilty of all 4 specifications, then *sua sponte* queried counsel to address the matter of multiplicity dealing with sentencing only, but not findings. The military judge then ruled that she would consider the two possession specifications and two receipt specifications multiplicious for sentencing. In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), our higher court accepted five nonexclusive factors our court could consider in determining whether a multiplication of charges is unreasonable. The third factor addresses the prejudice inherent in "misrepresenting or exaggerating" an appellant's criminality. Separate and distinct from this, the fourth factor addresses whether the charges and specifications "unfairly increase" the appellant's punitive exposure. *Id.* at 338.

While the military judge's sentencing ruling mitigated any potential sentencing prejudice to the appellant arising from the Government's alternative charging methodology, the appellant was nonetheless prejudiced in that he was found guilty of four separate specifications involving child pornography when he should have been convicted of no more than two specifications. Further corrective action by the military judge with respect to findings was necessary. The charges and specifications in their present form exaggerate the appellant's criminality. We will take appropriate action in our decretal paragraph.

The findings of guilty to Specifications 2 and 4 and to the Charge are affirmed. The findings of guilty to Specifications 1

and 3 of the Charge are set aside. The approved sentence is affirmed.[1] We conclude that the findings and sentence, as modified herein, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court

[1] The court notes, in the context of RULE FOR COURT-MARTIAL 1103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), the existence of three documents included with the authenticated record of trial which were neither offered nor admitted as exhibits of any kind. The Government did not present a case in aggravation, Record at 77-78, yet Prosecution Exhibits 2 and 3 for identification were made part of the record. We find that inclusion of these extraneous documents did not prejudice the appellant and no relief is warranted. Per the terms of the pretrial agreement with the convening authority, with advice from trial defense counsel, the appellant agreed not to object to these same documents. Appellate Exhibit I at ¶ 15g. Also, while never offered nor ordered appended by the military judge on the record, Appellate Exhibit III, documentation relating to the waiver of administrative discharge board proceedings, was also appended. Again, we find no prejudice to the appellant as this was also known to all parties, the military judge and the convening authority, as a stated term of the pretrial agreement. AE I at ¶ 15d. None of the foregoing militates against the need for continuing vigilance by military judges to ensure that records of trial adhere to R.C.M. 1103 requirements.