

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**THOMAS D. FASICK
SENIOR CHIEF CRYPTOLOGIC TECHNICIAN TECHNICAL (E-8)
U.S. NAVY**

**NMCCA 201000410
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 March 2010.

Military Judge: CDR Tierney Carlos, JAGC, USN.

Convening Authority: Commander, Navy Region, Mid-Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR F.D. Hutchinson,
JAGC, USN.

For Appellant: CAPT Norman J. Aranda, JAGC, USN.

For Appellee: Capt Samuel C. Moore, USMC.

17 February 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RUE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, 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 possession of child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for two years, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and a dishonorable discharge. The convening authority (CA) approved the adjudged sentence of confinement, reduction and forfeitures, and also approved a bad-conduct discharge. In conformity with

the pretrial agreement (PTA), the CA suspended all confinement in excess of 18 months.

On appeal, the appellant asserts two assignments of errors: (1) that the military judge committed plain error by considering in sentencing images of child pornography and (2) that the imposed sentence was inappropriately severe. We have examined the record of trial and the pleadings by all 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Factual Background

From May to August 2008, the appellant used his personal computer to access "chat rooms" via the internet. The appellant received emails containing images and videos of child pornography from individuals he was communicating with in these "chat rooms." The appellant viewed and downloaded images and videos of child pornography from the internet and saved them to his computer and external hard drive. An agent from the Naval Criminal Investigative Service (NCIS) properly seized the appellant's computer and his external hard-drive. During the subsequent forensic analysis of the computer and hard-drive, 16 images and videos of child pornography were discovered.

The Child Pornography Compact Disc

In his first assignment of error, the appellant contends the military judge erred when he considered the compact disc (CD) containing the images and video of child pornography during sentencing deliberations. We disagree. Upon reviewing the entire record, it is clear that it was the parties' intention for the CD containing the child pornography to be incorporated into the stipulation of fact, and for the military judge to review such images during his sentencing deliberations.

At trial, the appellant pleaded guilty to the charged conduct. As part of his PTA, the appellant agreed to enter into a stipulation of fact. The appellant and the Government agreed to select five images and one video of child pornography "to be incorporated into the stipulation of fact, as a representative sampling of the child pornography." Appellate Exhibit VII at 5. The stipulation of fact, admitted into evidence as Prosecution Exhibit 1, lists the specific child pornography images and a video the parties had agreed to show the military judge. Prosecution Exhibit 1 at 2-3.

The morning of the trial, the parties had a RULE FOR COURT-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference with the military judge, wherein they discussed the manner in which they would present the child pornography evidence to the court. After the subsequent summation of the R.C.M. 802

conference on the record by the military judge, in reference to the images of child pornography, the civilian defense counsel, Mr. M, indicated: "I'm satisfied, Your Honor, you are reviewing them during deliberations, that's fine." Record at 23. Thereafter, when the military judge discussed with the appellant his rights concerning the stipulation of fact, neither the appellant nor his counsel registered an objection to the stipulation, except to a file name contained therein for one of the images of child pornography. *Id.* at 35.

Then, during the military judge's discussion with the appellant over PTA provisions, the topic of the child pornography images arose anew related to a specific PTA provision concerning those images. The military judge asked the appellant about the timing of the introduction of the images of child pornography, whether the appellant had discussed this provision with his attorney, and whether the appellant had freely and voluntarily agreed to the provision. *Id.* at 75. Upon completion of his sentencing deliberations, the military judge announced that he had reviewed the CD which had been agreed to by both parties. The military judge, in referencing the CD, stated, "It was referred to in the stipulation of fact" It's been marked as page four of the stipulation, of Prosecution Exhibit 1, which is the stipulation." *Id.* at 114. Neither side registered an objection to the military judge's characterization of the CD child pornography evidence in this fashion.

When the record of trial was received by this court for review, it was noted that the CD reviewed by the military judge as part of the stipulation of fact was, in fact, missing. On 28 December 2010, we ordered the Government to produce it. In response to our order, on 13 January 2011, the Government produced the CD containing the images and video of child pornography reviewed by the military judge during sentencing deliberations.

It is apparent from the record in this case that the parties expressly agreed upon the child pornography images to be considered by the military judge during his sentencing deliberations. The military judge thoroughly discussed with the appellant his rights in this regard. The stipulation of fact incorporated the child pornography contained within the CD. Although the CD was initially not attached to the record forwarded for appellate review, the record of trial is now complete. Based upon the facts of this case, it was not error for the military judge to consider the incorporated images and video of child pornography during his sentencing deliberations.¹

¹ Assuming *arguendo* that the CD was not incorporated into the stipulation, due to the lack of objection to the military judge's consideration of the CD during sentencing deliberations or as a part of the stipulation, coupled with the appellant's affirmative statements about his agreement to select certain images for the court's consideration, we find sufficient evidence of an intentional relinquishment of a known right. See *United States v. Campos*, 67

Sentence Appropriateness

The appellant's second assignment of error is that his sentence is inappropriately severe. The main theme of the defense sentencing case was that the appellant had over 23 years of exemplary Naval service at the time of his court-martial, that he had on his own initiative sought out counseling for his offenses, that had taken responsibility for his crime, that he had extreme financial circumstances, and that the loss of his retirement would have a significant financial impact on him.

A court-martial is free to impose any lawful sentence that it determines to be appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Sentence appropriateness under Article 66(c), UCMJ, requires the court to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). The court is mindful that sentence appropriateness is distinguishable from clemency, which is the prerogative of the CA. *Healy*, 26 M.J. at 395.

In this case, the maximum punishment the appellant faced was confinement for 10 years, total forfeiture of pay and allowances, a fine, reduction to the lowest enlisted pay grade, and a dishonorable discharge.² We have carefully considered and examined the record of trial -- including the appellant's unsworn statement and his record of service, and balanced that against the appellant's possession of child pornography. Of significance, the appellant was a senior enlisted person, traveling on government orders when he commenced possession of numerous images and videos of child pornography on his personal computer. Taking into account all the facts and circumstances, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005).

M.J. 330, 332 (C.A.A.F. 2009) and *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). We, therefore, find waiver here.

² While not raised as error, we note that the appellant was incorrectly advised as to the maximum punishment pertaining to the forfeitures and fines in this case. Record at 29. Since total forfeiture of pay and allowances and a fine were the maximum possible monetary punishments in this case, such misadvisement resulted in no prejudice to the appellant.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court