

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

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

UNITED STATES OF AMERICA

v.

**TIMOTHY D. PIEPER
INTERIOR COMMUNICATIONS ELECTRICIAN
FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201100487
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 June 2011.

Military Judge: CAPT David Berger, JAGC, USN.

Convening Authority: Commander, U.S. Naval Forces Japan,
Yokosuka, Japan.

Staff Judge Advocate's Recommendation: CDR B. Keith, JAGC,
USN.

For Appellant: LT Gregory Morison, JAGC, USN.

For Appellee: Maj Paul Ervasti, USMC.

8 May 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.**

PAYTON-O'BRIEN, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of one specification of receiving child pornography and two specifications of possessing media containing 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 36 months and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the adjudged confinement and a bad-conduct discharge.

The appellant raises two assignments of error: 1) the military judge erred in accepting the appellant's guilty plea when he failed to inquire into a possible defense of lack of mental responsibility; and 2) the military judge erred in accepting the appellant's guilty plea to Specifications 2 and 3 of the Charge (possession of media containing child pornography) because the evidence does not establish that United States Naval Air Facility Atsugi, Japan was within the special maritime jurisdiction of the United States at the time of the alleged offenses. Appellant's Brief of 7 Nov 2011 at 1-2.

After reviewing the record of trial and the pleadings of the parties, we find merit to the appellant's second assignment of error, and take corrective action.¹

Background

The appellant pled guilty to the following specifications which allege violations of Article 134, UCMJ:

Specification 1: In that [appellant], on active duty, did, at or near U.S. Naval Air Facility Atsugi, Japan, on land or a building owned by, leased to, or otherwise used by or under the control of the Government of the United States, on divers occasions between on or about 4 September 2009 and on or about 8 September 2009, knowingly receive approximately thirty (30) images of child pornography that had been transported in interstate or foreign commerce, by downloading files from internet web sites to his personal computer, as defined by 18 U.S.C. 2252A(a)(2)(a), which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces.

Specification 2: In that [appellant], on active duty did, at or near U.S. Naval Air Facility Atsugi, Japan,

¹ The appellant does not challenge the providence of his plea to receipt of child pornography, charged in Specification 1 under the Charge. Given that the same language at issue in the second assigned error is contained within Specification 1, that is, "on land or a building owned by, leased to, or otherwise used by or under the control of the Government of the United States" we will take corrective action in our decretal paragraph.

on land or a building owned by, leased to, or otherwise used by or under the control of the Government of the United States, on or about 8 September 2009, knowingly possess, a 320 gigabyte Western Digital external hard drive serial number WXE508AP1797, containing approximately eight (8) images of child pornography, as defined by 18 U.S.C. 2252A(a)(5)(A), which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces.

Specification 3: In that [appellant], on active duty, did, at or near U.S. Naval Air Facility Atsugi, Japan, on land or a building owned by, leased to, or otherwise used by or under the control of the Government of the United States, on or about 8 September 2009, knowingly possess, a Sony VAIO laptop computer serial number 28209732 3000769 containing one 200 gigabyte hard drive, containing approximately twenty-six (26) images of child pornography, as defined by 18 U.S.C. 2252A(a)(5)(A), which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces.

Prior to the entry of pleas by the appellant, the parties had a pretrial conference with the military judge to discuss the form of Specifications 2 and 3. Then, during an Article 39(a), UCMJ, session, the military judge, in the presence of the appellant, raised the matter of jurisdiction with both trial and defense counsel. The military judge expressed concern with the extraterritorial application of 18 U.S.C. 2252A as it pertained to the specifications alleging possession of media containing child pornography. A similar discussion was also had between both trial and defense counsel and the military judge, in the presence of the appellant, during the providence inquiry. During the discussions, the defense counsel and the appellant agreed they were "waiving" any jurisdictional defect as to Specifications 2 and 3 in order to get the benefit of the pretrial agreement.²

The military judge thereafter advised the appellant that he was pleading guilty to receiving and possessing media containing child pornography and then provided the elements similar to

² Record at 15-16.

those drafted by the Government in Appellate Exhibit 1.³ During the plea colloquy, the appellant described that he received child pornography on numerous occasions via the internet while stationed at the Naval base in Atsugi, Japan, utilizing a file-sharing program to seek out and obtain child pornography from the computers of other individuals via the internet. After obtaining the images in this method, the appellant then saved them to two different media: a laptop computer hard drive and an external hard drive. The laptop, which was locked in the appellant's vehicle, had dual security protections: a biometrics fingerprint scanner as well as password protection.⁴ The external hard drive was stored in a locked drawer in the appellant's office to which he had the only key.⁵

The appellant acknowledged that the items of media he possessed and received constituted child pornography. The military judge specifically asked if he possessed the child pornography at issue "on land or in a building leased to or owned by the United States." In response, the appellant replied in the affirmative,⁶ and stated that he "was on-board Naval Air Facility Atsugi" and "within the fence line."⁷

When listing the elements to the appellant, the military judge also provided both terminal elements under Clauses 1 and 2, Article 134, UCMJ, and their respective definitions. The appellant offered the following reasons to explain how his conduct was prejudicial to good order and discipline and service discrediting: (1) "[I]f other people had known that I had possessed child pornography, that they might look less highly upon the Navy and wouldn't want or allow their children to be recruited or support the Navy in any way;" (2) "If someone outside the Navy knew that the Navy allowed people to have that kind of content in their possession, then they would think less of the Navy 'cause of the way military service is depicted in society;" and (3) If the Sailors the appellant supervised knew he had it, "it would undermine my authority" and "cause undue stress to my shipmates."⁸

³ It appears to us that the military judge utilized the Navy-Marine Corps Military Judge's "Providency Guide." The elements provided to the appellant tracked 18 U.S.C. §§ 2252A(a)(2)(A) and 2252(a)(5)(A). Definitions were derived from 18 U.S.C. §§ 10, 1030, and 2256, and appellate case law.

⁴ *Id.* at 68.

⁵ *Id.* at 58-59.

⁶ *Id.* at 62.

⁷ *Id.* at 73.

⁸ *Id.* at 49-50, 65.

The military judge also instructed the appellant that an act is "wrongful if it's done without legal justification or excuse." *Id.* at 33. The appellant admitted that his receipt of child pornography and possession of media containing child pornography was wrongful, that he was capable of avoiding those actions, that he was not forced to engage in such conduct, and that he had no legal justification or excuse.⁹

During the defense case in sentencing, Dr. Thomas Jones, a clinical psychologist testified. Dr. Jones testified that he had been seeing the appellant as a patient for approximately two years. Dr. Jones testified that when he first met the appellant, "he was definitely" addicted to child pornography.¹⁰ Dr. Jones also testified that he believed that the appellant was no longer addicted to child pornography.¹¹ Dr. Jones included details about how the appellant went through therapeutic treatment which caused him to remember extensive childhood abuse which occurred to him.¹² Additionally, he discussed that the appellant had contemplated suicide.¹³ The defense next called the appellant's mother as a sentencing witness. She testified that her former husband, the appellant's father, sexually abused both the appellant and his sister when they were children.¹⁴ Likewise, in his unsworn statement, the appellant related details of the sexual abuse he received as a young child over a period of approximately eight years at the hands of his father.¹⁵

Discussion

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside if there is a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We will not reverse a military judge's decision to accept a guilty plea unless we find "a substantial conflict between the plea and the accused's statements or other evidence of record." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). "A 'mere possibility' of such a conflict is not a sufficient basis to overturn the

⁹ *Id.* at 48, 63, 73; Prosecution Exhibit 1 at 2.

¹⁰ Record at 110.

¹¹ *Id.*

¹² *Id.* at 106-07.

¹³ *Id.* at 108.

¹⁴ *Id.* at 162-65.

¹⁵ *Id.* at 176-80.

trial results." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

1. Child pornography addiction and child sexual abuse

"A military judge can presume, in the absence of contrary circumstances, that the accused is sane and, furthermore, that counsel is competent." *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing *United States v. Shaw*, 64 M.J. 460, 460 (C.A.A.F. 2007)); R.C.M. 916(k)(3)(A). Should an appellant establish facts during a guilty plea inquiry which raise a possible defense, the military judge incurs a duty to inquire further and resolve the matters inconsistent with the plea, or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006); see also Art. 45(a), UCMJ; RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). A failure to do so constitutes a substantial basis in law or fact for questioning the guilty plea. *Phillippe*, 63 M.J. at 311. The existence of a mental disorder, without further indication on the record of the affect of the disorder on the appellant's ability to appreciate the nature of his act or understand the proceedings, only raises the "mere possibility" of conflict. *Shaw*, 64 M.J. at 464. Further, the mere existence of an addiction, without more, does not even constitute evidence of a mental disease sufficient to raise the issue of lack of mental responsibility. See *United States v. Falcon*, 65 M.J. 386, 391-92 (C.A.A.F. 2008) (mere existence of a gambling addiction does not constitute a defense of lack of mental responsibility); *United States v. Georgeson*, 44 C.M.R. 724, 726 (N.C.M.R. 1971) (evidence of drug addiction did not raise even a mere possibility of a mental disorder which could have formed a basis for further providence questions).

The appellant avers that the military judge abused his discretion in accepting his guilty plea when he did not explore the possibility of a defense of lack of mental responsibility when the record included evidence by way of expert testimony elicited from the defense that the appellant may have suffered sexual abuse as a child, that he contemplated suicide, and that he had been addicted to child pornography during the time period he committed his offenses. While these factors the appellant raises are indicative of trying periods in the appellant's life, they do not rise to the level of a mental disease, defect, or disorder. See *Falcon*, 65 M.J. at 391-92; see also *Georgeson*, 44 C.M.R. at 726. The record of trial contains ample evidence that at the time of the offenses the appellant had the ability to

stay away from child pornography, and was not forced or compelled to commit the offenses.

Further, the military judge specifically asked the appellant about his mental responsibility at the time the offenses. The appellant stated he was not forced to commit the offenses, could have avoided committing his offenses, and had no legal justification or excuse for committing the offenses. There was no evidence of record that the appellant lacked mental responsibility at the time the offenses were committed. To the contrary, the appellant acknowledged to members of his chain of command that "this wasn't the right path to do down" and he wanted "to get away from this type of stuff" and he "knew he needed to go a different direction."¹⁶ The appellant also took steps to hide the child pornography he received and possessed by using password protection measures, and also by locking his desk to keep others out. These steps demonstrate the appellant's acknowledgement of the wrongfulness of his crimes.

Given these facts, we cannot say that the military judge was required to explain or discuss the defense of lack of mental responsibility with the appellant. Moreover, no evidence exists to suggest the appellant did not understand the nature and quality or the wrongfulness of his actions when committing the offenses. Nor did the testimony from Dr. Jones or the appellant's mother suggest that the appellant failed to understand the nature and quality or wrongfulness of his actions. Under these circumstances, the military judge was not required to explain or discuss the defense of lack of mental responsibility, pursuant to Article 50a, UCMJ, with the appellant. The evidence before the military judge presented at most the mere possibility of conflict with the appellant's guilty plea and did not raise a substantial basis in law or fact for questioning the providence of that plea. Consequently, the military judge did not abuse his discretion in accepting the appellant's guilty plea.

2. Extraterritorial Jurisdiction of 18 U.S.C. 2252A

The appellant argues that the military judge erred in accepting his pleas to possession of media containing child pornography because he did not develop facts which would establish that United States Air Facility Atsugi, Japan, was

¹⁶ Record at 121.

within the special maritime jurisdiction of the United States.¹⁷ The appellant argues that the phrase "as defined by 18 U.S.C. 2252A" in the specifications meant that the appellant's actions must be in violation of 18 U.S.C. § 2252A, which the appellant argues includes the requirement that the conduct occur in a special maritime jurisdiction of the United States.

The statutory elements of an Article 134, UCMJ, offense are:

(1) The appellant did or failed to do certain acts; and
(2) Under the circumstances, the appellant's conduct was either prejudicial to good order and discipline in the armed forces [*a clause (1) offense*], of a nature to bring discredit upon the armed forces [*a clause (2) offense*], or constituted a noncapital offense [*a clause (3) offense*]. *United States v. Fosler*, 70 M.J. 225, 228-30 (C.A.A.F. 2011); *United States v. Medina*, 66 M.J. 21, 24-26 (C.A.A.F. 2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶60(b).

First, is clear from the record that the appellant's receipt of child pornography and possession of media containing child pornography did not occur domestically: it occurred exclusively in Japan on a United States military base. Therefore, the appellant's actions in Japan did not occur on "land or any building owned by, leased to, or otherwise used by or under the control of the United States Government." *United States v. Martinelli*, 62 M.J. 52, 61 (C.A.A.F. 2005). Nor did the receipt of child pornography occur via interstate or foreign commerce. *Martinelli*, 62 M.J. at 64. The appellant was not provident to a Clause 3 offense, and the military judge's finding with regard to all three specifications that the appellant's conduct occurred on "land or building owned by, leased to, or otherwise used by or under the control of the United States" and with regard to Specification 1 that the child pornography was "transported in interstate or foreign commerce" "is incorrect in law, and cannot be affirmed. Had the appellant committed his offenses in an area where the Child Pornography Prevention Act (CPPA), clearly applied, it would have been proper to allege and find the appellant guilty of "clause 3" violations of Article 134 for commission of a non-capital crime or offense, specifically, receipt of child pornography and possession of media containing child pornography. MCM, Part IV, ¶ 60a.

¹⁷ We note that the military judge apparently sought to obtain a "waiver" of this jurisdictional defect from the appellant and his counsel prior to and during the plea inquiry. Lack of jurisdiction may not be waived. See R.C.M. 907(b)(1)(A).

While the appellant's plea to clause 3 offenses is not provident, our inquiry in this case does not end there. As noted in the MCM, conduct that may not constitute a violation of clause 3 in a foreign country may still be punishable under clauses 1 and 2. See MCM, Part IV, ¶ 60c(4)(c)(i). An improvident plea to a CPPA-based clause 3 offense under Article 134 may be upheld as a provident plea to a lesser included offense under clauses 1 and 2 of that same Article. *Martinelli*, 62 M.J. at 66. As the Court of Appeals for the Armed Forces has explained, the providence inquiry must reflect that the accused clearly understood the nature of the prohibited conduct. *United States v. Reeves*, 62 M.J 88, 95 (C.A.A.F. 2005). In this case, the appellant demonstrated he clearly understood the nature of the prohibited conduct.

The gravamen of the appellant's offense was receipt and possession of child pornography, activity to which the appellant admitted. In this case, the Government, in drafting the two specifications at issue, included the terminal elements under Clauses 1 and 2, Article 134. Then the military judge included the terminal elements when listing the elements of the offenses to the appellant. Without hesitation, the appellant succinctly articulated reasons why his conduct was prejudicial to good order and discipline and was of a nature to be service discrediting during the military judge's colloquy. He also agreed that his conduct was prejudicial to good order and discipline as well as service discrediting in the stipulation of fact. The appellant's answers and statements demonstrate that he clearly understood the nature of the prohibited conduct. The record reveals that the appellant was convinced of the facts predicate to a conviction under both clause 1 and 2 of Article 134, UCMJ, and that there was a sufficient factual basis for guilty pleas to the lesser included offenses to the three specifications of the Charge. See R.C.M. 910(e).

Under these circumstances, we conclude that this record reflects an appropriate discussion of the character of the conduct at issue as both prejudicial to good order and discipline and service discrediting, and demonstrates that the accused clearly understood the nature of the prohibited conduct as being a violation of both clause 1 and 2 of Article 134, UCMJ. Accordingly, we will take corrective action in our decretal paragraph by excepting all language from the specification referencing the CPPA.

Our action does not alter the essential nature of the offense, and there is no prejudice as to the sentence. Sentence

reassessment, therefore, is not required. See *United States v. Hayes*, 62 M.J. 158, 168-69 (C.A.A.F. 2005) (citing *United States v. Augustine*, 53 M.J. 95-96 (C.A.A.F. 2000)); *United States v. Mason*, 60 M.J. at 15, 20 (C.A.A.F. 2004) (affirming the sentence)).

Conclusion

The finding as to Specification 1 under the Charge is affirmed except for the words "on land or a building owned by, leased to, or otherwise used by or under the control of the Government of the United States" and the words that had been transported in interstate or foreign commercial." The findings as to Specifications 2 and 3 under the Charge are affirmed except for the words "on land or a building owned by, leased to, or otherwise used by or under the control of the Government of the United States "and the words "as defined by 18 U.S.C. 2252A(a)(5)(A),". The finding as to the Charge and the sentence are affirmed.

Senior Judge MAKSYM and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court