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United States Navy - Marine Corps
Court of Criminal Appeals

Before
CRISFIELD, HITESMAN, and GASTON,
Appellate Military Judges

UNITED STATES
Appellee

v.

Brandon A. LAJOIE
Lance Corporal (E-3), U.S. Marine Corps
Appellant

No. 201800162

Decided: 27 November 2019.

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Lieutenant Colonel Robert D. Merrill, USMC. Sentence adjudged 31 January 2018 by a special court-martial convened at Marine Corps Base Quantico, Virginia, consisting of a military judge sitting alone. Sentence approved by the convening authority: reduction to pay grade E-1, confinement for 30 days, and a bad-conduct discharge.

For Appellant: Captain Jeremiah J. Sullivan, III, JAGC, USN.

For Appellee: Lieutenant Timothy C. Ceder, JAGC, USN.

Chief Judge CRISFIELD delivered the opinion of the Court, in which Judge GASTON joined. Senior Judge HITESMAN filed a separate dissenting opinion.

PUBLISHED OPINION OF THE COURT

CRISFIELD, Chief Judge:

A military judge sitting as a special court-martial convicted the Appellant, in accordance with his pleas, of one specification of indecent visual recording and three specifications of broadcasting an indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2012).

Appellant originally submitted his case to the Court on its merits, without specific assignment of error. Upon review of the record of trial the Court specified two issues: (1) whether the convening authority considered the supplemental matters submitted by Appellant's detailed defense counsel on 2 May 2018 prior to taking action in the case; and (2) whether Appellant's pleas to the three specifications of broadcasting an indecent visual recording were provident when the conduct admitted by Appellant consisted of displaying a video recording on his cell phone for another to view. After careful consideration of the record of trial and the pleadings of the parties, we find no prejudicial error and affirm.

I. BACKGROUND

In June 2017, Appellant visited his friend, Ms. C.M., at her residence, where they engaged in consensual sexual intercourse. While Appellant was penetrating C.M. from behind, he surreptitiously video recorded C.M.'s naked buttocks and genitalia with his cell phone's camera for approximately 20 seconds. He subsequently played the video on the same phone's display screen for three other Marines to view on three separate occasions. Appellant was charged with one specification of making an indecent visual recording and three specifications of broadcasting that recording in violation of Article 120c, UCMJ. During the providence inquiry, the military judge asked for, and received, the trial counsel's position on whether displaying an image on a cell phone meets the statutory definition of "broadcast." Appellant's trial defense counsel declined to comment on the issue. The military judge then determined that displaying a video on a cell phone met the statutory definition of "broadcast."

After the court-martial, Appellant submitted two clemency requests to the convening authority: one dated 20 April 2018 and one dated 2 May 2018. Appellant sought the same clemency relief in both requests: disapproval of the adjudged reduction to paygrade E-1. The text of the two clemency requests was identical except that the 2 May clemency request included an additional sentence stating that the Appellant has "shown rehabilitative potential by cooperating with command processing and request." The 2 May request also included four character letters that had not been attached to the

first clemency request but were already included in the record of trial as Defense Exhibit B.

The convening authority's action of 2 May 2018 states that he considered, among other things, the record of trial and the 20 April 2018 clemency request before deciding whether to grant clemency. It does not mention the 2 May clemency request.

Additional facts necessary to resolution of the issues are contained in the discussion.

II. DISCUSSION

A. Matters Considered by the Convening Authority

Post-trial processing errors are questions of law which we review de novo. See *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2005). An accused has the right to submit matters to the convening authority prior to the convening authority taking action. Article 60, UCMJ. In response to the Court's first specified issue, Appellant avers that the convening authority did not consider the second clemency request prior to taking action, and that a new convening authority's action is required. Appellee urges us to presume that the convening authority considered the 2 May 2018 clemency request.

"In the absence of evidence to the contrary, we will presume that the convening authority has considered clemency matters submitted by the appellant prior to taking action." *United States v. Doughman*, 57 M.J. 653, 655 (N.M. Ct. Crim. App. 2002) (citing *United States v. Zaptin*, 41 M.J. 877, 881 (N.M. Ct. Crim. App. 1995)). "[A] convening authority is not required to list all matters he or she considered prior to taking action in a case." *Id.* (citing *United States v. Stephens*, 56 M.J. 391, 392 (C.A.A.F. 2002)). Appellant argues that the convening authority's omission of the 2 May 2018 clemency request from the list of material considered prior to taking action is evidence that the 2 May 2018 clemency request was not considered.

While it may be prudent to include a comprehensive list of materials reviewed in a convening authority's action, there is no requirement in the UCMJ or the Rules for Courts-Martial, and this Court declines to create such a requirement. The mere omission of the 2 May 2018 request from the list of matters considered does not rebut the presumption that the convening authority considered this material.

Assuming arguendo that the convening authority did not specifically consider the 2 May 2018 request prior to taking action, we would still find no prejudice to Appellant since essentially all the information in the 2 May clemency request was already included in the 30 April request and the record of trial.

B. Indecent Broadcasting

Prior to accepting a guilty plea, a military judge must make an inquiry of an accused to ensure a factual basis exists for the plea. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); RULE FOR COURTS-MARTIAL (R.C.M.) 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.). This inquiry must elicit sufficient facts to satisfy every element of the offense in question. R.C.M. 910(e). We review a military judge’s decision to accept a guilty plea for an abuse of discretion and review questions of law arising from a guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). In order to reject a guilty plea on appellate review, the record must show a “substantial basis in law or fact for questioning the guilty plea.” *Inabinette*, 66 M.J. at 322 (citation omitted). A ruling based on an erroneous view of the law constitutes an abuse of discretion. *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)).

Article 120c(a), UCMJ, reads in relevant part as follows:

(a) *Indecent Viewing, Visual Recording, or Broadcasting.* Any person subject to this chapter who, without legal justification or lawful authorization—

(1) knowingly and wrongfully views the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy;

(2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy; or

(3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.

....

(d) *Definitions.* In this section:

....

(4) *Broadcast.* The term “broadcast” means to electronically transmit a visual image with the intent that it be viewed by a person or persons.

(5) *Distribute*. The term “distribute” means delivering to the actual or constructive possession of another, including transmission by electronic means.

Article 120c, UCMJ.

During the providence inquiry the military judge invited the parties to be heard on whether the act of playing a video on a cell phone met the definition of “broadcast.” After hearing from counsel, the military judge ruled that such an act constituted a “broadcast.” The military judge reasoned that the “distribution” theory of liability under Article 120c(a)(3) would be unnecessary if Congress intended for “broadcast” to have a narrow meaning of transmitting through means such as e-mail or text message.

The meaning of “electronically transmit” as used in the definition of “broadcast” is determinative of whether or not Appellant broadcast the indecent recording he pleaded guilty to making when he elected to play it for three other Marines. The term “electronically transmit” is not defined in Article 120c, so we look to other sources to interpret it. “Statutory construction begins with a look at the plain language of a rule.” *United States v. Lewis*, 65 M.J. 88 (C.A.A.F. 2007) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989)). “Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012) (discussing the ordinary-meaning canon of statutory interpretation). “The plain language will control, unless use of the plain language would lead to an absurd result.” *Lewis*, 65 M.J. at 88.

On appeal, Appellant asserts that the plain meaning of “electronically transmit” requires that the image be transferred via an electronic medium from one electronic device to another. If the image does not move electronically between devices, Appellant argues, then there has been no electronic transmission and therefore no violation of Article 120c. If correct, then his pleas to Specifications 2, 3, and 4 of the Charge were improvident and the military judge abused his discretion in accepting them.

The Army Court of Criminal Appeals recently faced the same issue in a case with a similar fact pattern. *See United States v. Davis*, No. 20160069, 2018 CCA LEXIS 417 (A. Ct. Crim. App. 16 Aug 2018) (unpub. op.). In *Davis*, the Army court found the act of playing a video on a cell phone for another to view did not constitute an “electronic transmission.” The court defined “electronic” as “utilizing devices constructed or working by the methods or principles of electronics.” *Id.* at *24-25 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 280 (1981)). It defined “transmit” as “to send out a signal either by radio waves or over a wire line.” *Id.* at *25 (citing WEBSTER’S THIRD

NEW INTERNATIONAL DICTIONARY 280 (1981)). The court found: “The combination of these two definitions appears to require an electronic device to send the transmission and an electronic device to receive the transmission.” *Id.* at *25. Since the appellant played the video on the same device on which he recorded the video, the Army court concluded there was no electronic transmission and therefore no broadcast in violation of Article 120c.

We believe that the Army court’s interpretation of the statute is too narrow. Our analysis leads us to the conclusion that—provided the other elements are met—Article 120c’s prohibition on the broadcast of an indecent visual recording is violated when an individual uses an electronic device to display the recording for another to view, even if the electronic device is the same one that was used to record the image. Transmission of the visual recording from one electronic device to another electronic device with the intent that the image be viewed by another person could also constitute a broadcast, but we do not find that the involvement of more than one electronic device is necessary for a broadcast to occur. If the transmission from one electronic device to another electronic device has the effect of delivering actual or constructive possession of the image to another person, then the act constitutes a “distribution” of the image—a separate offense under Article 120c.

We rely on a textual analysis to reach our conclusion and use definitions from MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003). That dictionary is approvingly cited in READING LAW: THE INTERPRETATION OF LEGAL TEXTS, as “useful and authoritative for the English language” SCALIA & GARNER at 419, 423. The dictionary defines “electronic” as “of, relating to, or utilizing devices constructed or working by the methods or principles of electronics” and “of, relating to, or being a medium (as television) by which information is transmitted electronically[.]” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY at 401. It defines “transmit” as “to cause (as light or force) to pass or be conveyed through space or a medium” and “to send out (a signal) either by radio waves or over a wire[.]” *Id.* at 1329. As we interpret those definitions and apply them to Article 120c, UCMJ, “broadcast” means to use an electronic device to send out an image through space or a medium with the intent that it be viewed by a person. We find no textual requirement for another electronic device to receive the image.

Even if we were to agree with the dissent and the Army court’s narrow interpretation of “electronic transmission,” we think that the essence of their requirement for transmission between electronic devices would be satisfied by the electronic transmission of an image that takes place from a cell phone’s camera sensor to the phone’s digital storage area or memory card, and from the phone’s digital storage area or memory card to the phone’s display screen when played. In other words, we see no reason why such an “electronic transmission” could not take place between electronic components

inside a single device in the context of showing the recording on a display screen to another person. Even under their interpretation, whether passing from one electronic device to another, from external “cloud” storage to an electronic device, or from an electronic device’s internal data storage to its display screen, the act of electronically displaying a recording with the intent that it be viewed by a person involves an electronic transmission that could constitute a broadcast.

Our conclusion is bolstered by the canon of statutory interpretation requiring that “sections of a statute should be construed in connection with one another as ‘a harmonious whole’ manifesting ‘one general purpose and intent.’” *United States v. Quick*, 74 M.J. 517, 520 (N-M. Ct. Crim. App. 2014) (quoting NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46:05, at 154 (6th ed. 2000)). “Just as a single word cannot be read in isolation, nor can a single provision of a statute.” *Smith v. United States*, 508 U.S. 223, 233 (1993). It is apparent to us that “broadcasting” and “distributing” as described in the statute are focused on different kinds of acts. “Broadcast” is aimed at prohibiting the electronic display of a visual recording for another to view, while “distribute” is aimed at prohibiting the transfer or proliferation (electronic or otherwise) of the recording through delivery into the actual or constructive possession of another. On their face they are different theories of liability. Under the dissent and Army court’s interpretation, “broadcast” would essentially encompass conduct already prohibited by electronic “distribution.” See *Davis*, 2018 CCA LEXIS at *27 (focusing on the fact that “Appellant did not send the video to another person by any means”). We believe the statute should be interpreted so as not to render “broadcast” superfluous in this manner.

In this case, Appellant pleaded guilty to broadcasting the indecent video he had made of Ms. C.M.’s genitalia without her knowledge while he was engaged in sexual intercourse with her. He played this video for three other Marines on his personal cell phone, which he held in his hand while opening the video file and running the video on the phone’s display screen. It is clear that the Appellant intended the contents of the video to be viewed by the three Marines when he showed it to them. It is also clear that he used an electronic device to transmit the video when the Marines viewed it. Thus, irrespective of whether he used the same phone to record and store the video, his acts in electronically displaying the video for another person to view constituted a “broadcast” of an indecent visual recording under Article 120c(a)(3). We are convinced that Appellant’s pleas to that offense were provi-

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. Arts. 59 and 66, UCMJ. Accordingly, the findings and sentence as approved by the convening authority are **AFFIRMED**.

Judge GASTON concurs.

HITESMAN, Senior Judge (dissenting in part):

I dissent from the Court's interpretation of "broadcast" with respect to Article 120c. The Court's interpretation means that to merely "show" one person an image on a cell phone meets the definition of "broadcast" as an electronic transmission. In my view, the correct application of "broadcast" with regard to displays of audiovisual works requires an electronic transmission be sent out and received "beyond the place from which [it is] sent." 17 U.S.C. § 101 (defining terms as applied to copyright infringement). Accordingly, the Army Court of Criminal Appeal's decision in *Davis* was correct in that merely showing a nonconsensual recording to others does not constitute a broadcast as an electronic transmission.



FOR THE COURT:

A handwritten signature in blue ink, reading "Rodger A. Drew, Jr.", with a stylized flourish at the end.

RODGER A. DREW, JR.
Clerk of Court