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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RYAN L. SANSCHAGRIN
ELECTRONICS TECHNICIAN SEAMAN (E-3), U.S. NAVY

NMCCA 201200333
GENERAL COURT-MARTIAL

Sentence Adjudged: 10 April 2012.
Military Judge: CAPT Eric C. Price, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: LT J.A. Lovastik, JAGC, USN.
For Appellant: Capt David A. Peters, USMC.
For Appellee: LT Ann E. Dingle, JAGC, USN.

29 January 2013

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.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of two specifications of receiving child pornography and three specifications of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, as defined by 18 U.S.C. § 2256(8). The military judge sentenced the appellant to confinement for 42 months, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority (CA) suspended all

confinement in excess of 36 months but otherwise approved the adjudged sentence.

The appellant raises two issues on appeal: first, that the military judge abused his discretion by accepting the appellant's pleas to the possession specifications because the appellant "moved the contraband to a second location but never disclosed it to anyone;" second, that the CA violated RULE FOR COURTS-MARTIAL 1114(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) when he incorrectly stated the appellant's pleas and the findings in his action. We will order the correction of the court-martial order in our decretal paragraph as requested by the appellant. Otherwise, after carefully considering the record of trial and the submissions of the parties, we conclude that the findings and 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.

Background

The appellant was suspected of the charged offenses after his roommate reported to law enforcement officials what he believed to be child pornography on the appellant's personal computer. The law enforcement officials obtained search authorization from Commander Fleet Activities, Yokosuka, Japan, and seized the appellant's computer and other personal storage media. The ensuing forensic analysis revealed thousands of images and videos of child and adult pornography. Record at 134, 206. As a result of the evidence seized, the appellant was charged with receiving (Specifications 2 and 3) and possessing (Specifications 4, 5, and 6) child pornography.

During his providence inquiry, and in his detailed stipulation of fact, the appellant admitted that while he was assigned to Naval Nuclear Power Training Unit, Ballston Spa, New York, from April 2009 to January 2010, he downloaded a file-sharing software called "LimeWire" to the main hard drive of his personal computer. *Id.* at 70. LimeWire is a "peer-to-peer" file sharing program that allows users to connect with each other and to share files across the Internet. *Id.* at 59. The appellant explained that he searched for child pornography on LimeWire using search terms such as "'preteen,' 'underage,' and ages like '14' and '13' that I knew were likely to result in the child pornography." PE 1 at 1; Record at 60, 68. The appellant admitted that, once the LimeWire program returned a result, he selected images and videos which he downloaded to his personal computer. According to the appellant, "[i]t is not until after

the file has been downloaded and saved to your computer, that you can actually view the contents of the files." Record at 72-73. The appellant admitted that he received child pornography once the download was complete; he then viewed the images and videos. Record at 73-74. The appellant later moved some of these images and videos to his external hard drive; he left at least one video file of child pornography on the main hard drive of his personal computer, forming the basis for Specification 6 of the Charge. PE 1 at 2, 4-5; Record at 148.

After the appellant transferred to the USS GEORGE WASHINGTON, in Yokosuka, Japan, he "continued searching for child pornography on the internet." PE 1 at 2. This time, he used another peer-to-peer file sharing program called uTorrent on the same personal computer to search for and receive child pornography. *Id.* Like LimeWire, one can only view the contents of uTorrent after the file has been downloaded; but uTorrent is much more proficient at downloading large files. *Id.* at 80, 82, 84-85. The appellant admits that he used search terms such as "preteen," "underage," and "14" and "12," and that he received child pornography by directing the program to download "one large mass file" (800 megabytes) of images and videos from uTorrent to the main hard drive of his personal computer, which took "between a day and-a-half, to 2 days" to download. *Id.* at 82, 87-88, 99. The appellant later moved images and videos to the same external hard drive he owned and used in Ballston Spa, New York, forming the basis for Specifications 4 and 5. *Id.* at 89, 103, 117-18; PE 1 at 4.

The military judge merged Specifications 4 and 5 (both alleging possession of child pornography) for sentencing purposes as both Specifications 4 and 5 deal with a "majority, if not all" of the items on the same external hard drive. Record at 235-36. While such merger left four specifications remaining with a 10-year maximum confinement for each offense,[1] the military judge considered the authorized maximum confinement to be 30 vice 40 years.[2] Record at 236.

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[1] The military judge concluded that based upon the Executive Order signed by the President in December 2011, effective 12 January 2012, and the change to the Manual for Courts-Martial, the authorized maximum punishment for receipt and possession of child pornography is 10 years per offense. Record at 34, 236-37.

[2] It is not clear from the record what the military judge's intentions were with regard to Specification 6 of the charge when calculating the maximum authorized confinement. The military judge stated, "As I noted that would authorize a maximum of 10 years for Specification 2, 10 years for Specification 3, and 10 years for the merged Spec 4 and 5. As the court had

Argument

The appellant asserts that the military judge abused his discretion by accepting the appellant's pleas to the possession specifications (Specifications 4, 5, and 6) because the appellant "moved the contraband to a second location but never disclosed it to anyone." This assignment is without merit due to the lack of supporting facts. We will address, instead, the appellant's argument that "the military judge abused his discretion in both law and fact when he did not rule *sua sponte* that receipt and possession of the same child pornography represented an unreasonable multiplication of charges." Appellant's Brief of 25 Sep 2012 at 5. We disagree.

Unreasonable Multiplication of Charges

"A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)).

The doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001) (*Quiroz III*). To resolve a claim of unreasonable multiplication of charges, this court applies the five-part *Quiroz* test: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citing *Quiroz III*, 55 M.J. 338); *see also United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007). When conducting a *Quiroz* analysis, we

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notified the accused that the maximum authorized punishment was 30 years, I am not inclined to rule that Specification 6, as indicated here is, in fact, necessarily included in either Specification 2 or 3. But the court will note that for purposes of sentencing I consider it consistent with the information provided to [the appellant] . . . earlier on in this proceeding, that the maxim[um] authorized punishment would, in fact, be: 30 years confinement . . . ." Record at 237-38.

are mindful that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

We note that the trial defense counsel did not object to an unreasonable multiplication of charges at trial, but the record indicates that discussions between the military judge and counsel occurred during R.C.M. 802 conferences on the issues of merging offenses and possibly unreasonable multiplication of charges. When summarizing the R.C.M. 802 conferences, the military judge addressed merger of two of the three possession charges, and on one occasion during trial, the trial counsel mentioned unreasonable multiplication of charges with regards to Specification 6, but did not develop anything further on the record. Record at 33-34, 151, 235-38. "While failure to object at trial may significantly weaken a later claim of an unreasonable multiplication of charges on appeal, it is not dispositive of the issue." *United States v. Campbell*, 66 M.J. 578, 581 (N.M.Ct.Crim.App. 2008) (citing *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000) (*Quiroz II*)), *aff'd in part, rev'd in part, and remanded on other grounds*, 68 M.J. 217 (C.A.A.F. 2009).

With regard to the second and third *Quiroz* factors, the appellant can be charged with separate offenses for receiving and possessing child pornography. We previously held in *United States v. Madigan*, 54 M.J. 518, 521 (N.M.Ct.Crim.App. 2000), that "the crime of receiving the pornographic images is complete at the time the appellant downloaded the images to view them," and that "the appellant's possession of these images continued long after their receipt, because he had saved the images on the computer and was thus able to display them at will as he chose."[3] *See also Campbell*, 66 M.J. at 581-82.

During the appellant's providence inquiry, and as part of his stipulation of fact, he admitted that he entered specific search terms such as "preteen," "underage," "14," "13," and "12," and had to direct the LimeWire and uTorrent programs to download the files to the main drive of his personal computer

[3] During the providence inquiry, the military judge defined "receive" as the "means to take into one's possession and control or *accept custody of*." Record at 49 (emphasis added). He defined "possess" as "to exercise control of something. Possession may be direct, physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car *to which that person may return to retrieve it*." Record at 106-07 (emphasis added).

before he could actually view the contents of such files. The crime of receipt was completed at the time he downloaded the images and videos of child pornography to his personal computer.

Further, the appellant's possession of these images and videos continued long after their receipt because he had saved the images on his personal computer, and then later transferred some of them to an external hard drive, thus having the ability "to display them at will as he chose." *Madigan*, 54 M.J. at 521. When the appellant transferred images and videos of child pornography (Specifications 4 and 5) from his personal computer to his external hard drive, he was using a separate and distinct media, which made it a separate and distinct criminal action. *See United States v. Planck*, 493 F.3d 501, 504-05 (5th Cir. 2007). "[E]ach possession on different media was a separate crime, and, therefore, a proper basis for a separate specification alleging possession, regardless of the similarity of the images and videos in each instance." *Campbell*, 66 M.J. at 583. The fact that the appellant left behind at least one video file of child pornography on his personal computer (Specification 6) does not change the fact that he was now in possession of this file and that the crime of receiving was complete. To ensure no one "snooped" around in the appellant's pornography, he labeled the folder on his personal computer "confidential," further taking possession of the file and hiding it from public view. Record at 128. Furthermore, even though the Government separately charged the appellant with the possession of 13 video files and 10 images (Specifications 4 and 5), where the appellant downloaded them to the same external hard drive, the download of these videos and images could have occurred at two separate times and two separate locations.[4] Further, the military judge merged Specifications 4 and 5 for sentencing purposes. Therefore, we conclude that the number of specifications under the charge did not misrepresent or exaggerate the appellant's criminality.

As to the fourth *Quiroz* factor, there is no question that charging the appellant with these separate offenses increased

[4] The appellant admits that he downloaded videos and images of child pornography to the only external hard drive he owned after downloading files from LimeWire in Ballston Spa, New York, and again from uTorrent while assigned to the USS GEORGE WASHINGTON. PE 1 at 2, 4. During his providence inquiry, the appellant could not specifically remember which videos he viewed and when. The military judge called a recess for the appellant to view at least one video file to refresh his recollection. Record at 151-52, 157.

his punitive exposure, but not unreasonably.

Finally, we find that the Government's charging strategy in this case reflected a reasoned approach. The appellant first received child pornography when he was assigned to Ballston Spa, New York. Then, within a year after being transferred to the USS GEORGE WASHINGTON, the appellant began to take up a more aggressive approach to receiving child pornography by using the uTorrent peer-to-peer share filing program, a more proficient and faster way to download massive files. He not only received images and videos of child pornography on his personal computer on two separate occasions, using two separate programs at two locales, he exercised possession of these items in order that he could view them at his leisure, committing a criminal act legally distinct from the receipt.

Conclusion

The findings and the sentence are affirmed. The supplemental court-martial promulgating order shall accurately reflect the appellant's plea of "not guilty" to Specification 7 of the charge.

For the Court

R.H. TROIDL
Clerk of Court