IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **J.F. FELTHAM** **K.K. THOMPSON**

UNITED STATES

v.

Christopher J. CHAMBERS
Aviation Boatswain's Mate (Aircraft Handling) Third Class (E-4), U. S. Navy

NMCCA 200500329 Decided 3 August 2006

Sentence adjudged 5 April 2004. Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

THOMPSON, Judge:

The appellant was convicted, in accordance with his pleas, at a special-court martial before a military judge alone of violating a lawful general regulation by using a government computer to view pornography, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. He was awarded a bad-conduct discharge, confinement for 12 months, forfeiture of $725.00 pay per month for 12 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of forty-five days.

We have examined the record of trial, the appellant's two assignments of error, and the Government's response. We find that the appellant's conviction for violating a general regulation is correct in law and fact. We conclude that the military judge erred in holding that the appellant's failure to object to admission of two sworn statements he gave to Naval Criminal Investigative Service (NCIS) agents amounted to a

stipulation of fact by the appellant in the sentencing phase of the trial. We will take corrective action in our decretal paragraph. *See* Arts. 59(a) and 66(c), UCMJ.

Self Incrimination During Providence Inquiry

In the appellant's first assignment of error, he asserts that the military judge violated his right to remain silent under the Fifth Amendment to the United States Constitution, when the military judge questioned him on matters in aggravation that were unrelated to establishing the factual basis underlying his plea of guilty. We disagree.

It is well-settled that an accused retains his right under the Fifth Amendment to remain silent when pleading guilty as to questions outside those necessary to establish the factual predicate underlying a plea of guilty. *United States v. Sauer,* 15 M.J. 113, 114 (C.M.A. 1983)(citing *Estelle v. Smith*, 451 U.S. 454 (1981)). The providence inquiry may not be used as a tool by the military judge or the Government to elicit responses that only serve to magnify the Government's case in aggravation. *Id.* To do so would be plain error. *United States v. Miller*, 23 M.J. 837, 839 (C.G.C.M.R. 1987). To overcome plain error of a constitutional magnitude, the Government must prove beyond a reasonable doubt that the error was not prejudicial to the appellant. *United States v. Carpenter,* 51 M.J. 393, 396 (C.A.A.F. 1999).

The appellant was at work after hours on 3 April 2003. He had accessed the internet using a Government computer. During this period he had viewed pop-up pictures of females and children who were naked with their genitals exposed. He also searched out pornographic sites. A common thread throughout the appellant's testimony during the providence inquiry was that he unintentionally and mistakenly received or opened these pop-ups. He suggested that, had these pop-ups not appeared before him, he would not have looked at the pornographic materials. He stated that he mistyped a search term and that is how the pop-ups began. He further stated that he viewed these images for the "shock value." Record at 35.

The military judge inquired of the appellant his reasons for looking at these images. When the defense counsel objected to the questioning as being beyond the scope required to prove the appellant committed the offense, the military judge responded (citing the military judge's bench book) that he "should enumerate the specific acts and any state of mind or

intent alleged or which must be established by the prosecution in order to constitute a violation of the order or regulation". He further stated, "[i]n other words, I must eliminate mistake." Record at 35.

The appellant further contends that the military judge erroneously asked him if there was any question in his mind that the pictures depicted "live human children." Upon defense objection that this was uncharged misconduct, the military judge explained that he was avoiding a possible conflict of law at the appellate level by inquiring into the nature of the images at the trial level. Further, he clearly stated that he would not sentence the appellant for anything more serious than what he was pleading to, thus negating appellant's assertion that this was calculated to elicit matters in aggravation.

Accordingly, we find no error in the military judge's providence inquiry. Review of the record shows that the appellant was reluctant to admit he knowingly and willfully viewed pornographic images, at one point stating that they were small thumbnail pictures that he couldn't clearly see at first and intimating he did not know what they were. We find that there was a proper purpose for this line of questioning by the military judge. In light of the appellant's reluctance throughout his plea colloquy, it was reasonable for the military judge to expand his inquiry to ensure the appellant's pleas were fully supported by a factual basis. This assignment of error is without merit.

Improper Weight Given to Sentencing Evidence

In the appellant's second assignment of error, he asserts that the military judge erred in the evidentiary weight he gave to certain statements given by the appellant to NCIS agents, admitted in aggravation essentially as stipulations of fact. We agree, for the reasons noted below.

The appellant gave two sworn statements to NCIS agents prior to this trial. Charges relating to this case were originally referred to a general court-martial (GCM) by the convening authority. Several motions pertaining to the admissibility of these statements were raised before the same military judge at arraignment on the GCM charges. Subsequently, the charges referred to the GCM were withdrawn and one specification of violating Article 92, UCMJ, was referred to a special court-martial.

The statements were offered as evidence in aggravation by the Government at the sentencing phase of the trial. Pursuant to his understanding of a provision contained in the pretrial agreement in this case, the defense counsel did not object to their admission. The appellant then gave an unsworn statement during sentencing, in which he questioned the interrogation techniques used in the taking of these statements. After sentencing argument by Government counsel, the military judge reopened the providence inquiry. The defense counsel objected to the military judge's questions concerning whether the statements he had given to NCIS were truthful. Twice during this exchange, the military judge stated his belief that, absent any objection to their admission, the defense counsel was conceding that the statements were truthful and accurate, and was placing his "affirmation on the veracity of that exhibit." Record at 210. The military judge thus indicated that he considered everything contained in the statements as a factual concession by the defense. We find no basis in law to support this ruling by the military judge.

This court reviews a military judge's ruling on the admissibility or exclusion of sentencing evidence for a clear abuse of discretion. *United States v. Clemente,* 50 M.J. 36, 37 (C.A.A.F. 1999); *United States v. Rust,* 41 M.J. 472, 478 (C.A.A.F. 1995); *United States v. Zakaria,* 38 M.J. 280, 283 (C.M.A. 1993). We will not overturn a military judge's ruling in this regard unless this court finds that the decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Miller,* 46 M.J. 63, 65 (C.A.A.F. 1997). When a military judge's ruling is based on an erroneous view of the law, it is generally considered an abuse of discretion. *United States v. Becker,* 46 M.J. 141 (C.A.A.F. 1997).

It is clear from the comments of the military judge that, in considering the defense to have conceded to the truthfulness of the statements, he gave undue weight to this evidence. Furthermore, we find there is a reasonable likelihood that the military judge's improper consideration of these NCIS statements played a role in the determination of the adjudged sentence in that he sentenced the appellant to the maximum jurisdictional punishment allowed for a special court-martial. Our conclusion requires that we take corrective action. Art. 59(a), UCMJ.

Conclusion

Accordingly, the findings as approved by the convening authority are affirmed. We reassess the sentence in accordance

with the principles set forth in *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples,* 29 M.J. 426, 427-29 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-09 (C.M.A. 1986). Upon reassessment, we are confident that the minimum sentence for this offense without considering the aggravating evidence the military judge gave undue weight to would have included a minimum of 90 days, forfeiture of $725.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. We therefore affirm only so much of the sentence as extends to confinement for 90 days, forfeiture of $725.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. *See United States v. Buber,* 62 M.J. 476, 478-79 (C.A.A.F. 2006) and *United States v. Doss,* 57 M.J. 182, 185 (C.A.A.F. 2002).

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court