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

BEFORE

C.L. CARVER **E.E. GEISER** **P.G. STRASSER**

UNITED STATES

v.

Christopher L. GARCIA
Midshipman First Class (MIDN 1C), U. S. Navy

NMCCA 200300993 Decided 22 March 2006

Sentence adjudged 10 September 2002. Military Judge: C.G. Ricciardello. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Superintendent, United States Naval Academy, Annapolis, MD.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT JASON LIEN, JAGC, USNR, Appellate Government Counsel
CDR CHARLES PURNELL, JAGC, USN, Appellate Government Counsel

STRASSER, Judge:

A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of violating a lawful general regulation by wrongfully using federal government systems to receive and view pornography, knowingly receiving child pornography in violation of 18 U.S.C.§ 2252A, and knowingly possessing child pornography in violation of 18 U.S.C. § 2252A, in violation of Articles 92 and 134, 10 U.S.C. §§ 892 and 934, Uniform Code of Military Justice.

The appellant was sentenced to a dismissal, total forfeiture of pay and allowances, and confinement for 6 months. The pretrial agreement had no effect on the sentence. The convening authority approved the sentence and ordered it into execution.[1] The appellant was sentenced on 10 September 2002. In his action, the convening authority also ordered "all confinement past 15

[1] The convening authority erred by ordering the dismissal into execution prior to appellate review. This error is a nullity requiring no corrective action *United States v. Caver,* 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994).

January 2003. . . vacated." Convening Authority's Action of 14 Jan 2003. Since no portion of the sentence was suspended, we will assume that the convening authority intended to, and did, disapprove, rather than vacate, all confinement past 15 January 2003.

After carefully considering the record of trial, the appellant's assignment of error that the military judge erred in failing to suppress the results of the search of the appellant's computer, and the Government's response, 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

On 8 May 2002, the appellant was in his last year at the Naval Academy. At that time, the appellant, his roommate, and many others in his class were off-grounds on "May intercessional leave." He had two weeks to go before graduation and was in possession of orders to the fleet. Unfortunately for the appellant, on that day Lieutenant Commander (LCDR) Smith, the appellant's company officer, was conducting routine "walk-through" inspections to ensure that his assigned midshipmen had locked their doors, shut their windows, turned off their electrical equipment, stowed their gear, and made their racks. LCDR Smith testified that, as the company officer, he was responsible for good order and discipline and for ensuring the proper moral and character development of his 150 midshipmen. Per his testimony and admitted regulations, "[m]idshipmen rooms are always inspectionable."[2]

As it turned out, the appellant had left his room, located on the 8th wing of Bancroft Hall, unlocked, gear was adrift, and clothing had been left in a pile by the window. When LCDR Smith picked up some clothes and tossed them on the desk, the screen on the appellant's desktop computer powered on, displaying two images, one behind the other. Although the second image was partially obscured, it was clearly that of a nude human form. LCDR Smith believed it to be an "inappropriate" image.[3] He clicked on the image to bring it to the front of the screen, only to be shocked to see that the image was that of a nude male with an erect penis by the mouth of a female infant.

LCDR Smith became disoriented, closed the screen image, and sat at the desk in a stupor. This was something he would now have to report to the company commander, but prior to doing so, he decided to check to see if this was an isolated image, or if there were others. He went into "documents," where he noticed several file names with the word "sex." He opened two or three

[2] Record of trial at 21.

[3] Record of trial at 71.

of the files and saw similar pictures. LCDR Smith then departed the room to inform his commanding officer, who then also reviewed the pictures. Thereafter, they returned the computer to its original configuration and left it where it was, locked the appellant's room, and went to notify the command staff judge advocate.

The next morning, LCDR Smith went by the appellant's room and was surprised to find it once again unlocked. He went inside and found the appellant asleep in his bunk. He woke the appellant, and told him to get dressed and accompany LCDR Smith to the company wardroom. Without telling the appellant why, LCDR Smith ordered him to wait there until further notice.

While the appellant waited in the wardroom, a special agent of Naval Criminal Investigative Service (NCIS) applied to the Superintendent for a search and seizure authorization. It was given, and at 1300 NCIS entered the room and seized the computer. Thereafter, the appellant was brought to the NCIS office. He was advised of his rights, informed that he was suspected of possessing child pornography, and informed that his computer had been seized (but was not specifically told that this was pursuant to a command authorized search). The appellant then signed a waiver of rights form and gave a written statement confessing to viewing child pornography over an extended period of time. The appellant also signed his consent to a search of his computer files. He claimed at trial he was somewhat confused when he authorized his consent as he thought he wouldn't get his computer back unless he consented. The NCIS agent, however, testified that the appellant was very clear in authorizing his consent and never expressed any concerns about whether he would get his computer back. Forensic review of the computer files revealed nearly 100 images of adult males having sexual intercourse or oral sex with young girls.

The military judge listened to the testimony of LCDR Smith, the NCIS Agent, and the appellant; reviewed the applicable regulations; and entered findings of fact and conclusions of law. *Inter alia*, the military judge found that the appellant had a diminished expectation of privacy in both his room and his computer, which had been left unsecured and hooked up to a Navy network. She ruled that it was not unreasonable and within LCDR Smith's authority as company officer to view more closely the partially obscured image on the screen. Once he saw this picture of a naked, aroused male with a small child, probable cause existed to seize the computer.

This one image, however, was as far as LCDR Smith's inspection authority extended. The military judge ruled that the appellant had a reasonable expectation of privacy from further intrusion into the computer. Accordingly, the military judge suppressed the testimony by LCDR Smith and his commanding officer about the other images they saw on the screen. The actual images found in the computer, however, were not suppressed. The

military judge ruled that the granted search authorization was valid based on the one image, as it alone justified a proper search authorization. She ruled that the evidence discovered through the warrant would have been inevitably discovered. Under the totality of circumstances, the appellant properly waived his rights, voluntarily consented to make a statement, and gave a valid consent to the search. The military judge denied the defense motion to suppress and admitted into evidence the appellant's statement and the child pornography taken from the appellant's computer.

Motion To Suppress

In his assignment of error, the appellant contends that the military judge erred in failing to suppress the computer images seized from his computer. The appellant entered conditional pleas of guilty so as to permit him to contest the military judge's ruling on appeal. We conclude that the military judge did not err and decline to grant relief.

"A military judge's denial of a motion to suppress is reviewed for an abuse of discretion." *United States v. Khamsouk,* 57 M.J. 282, 286 (C.A.A.F. 2002)(citing *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000)). When considering the correctness of a military judge's ruling on a motion to suppress, we review the military judge's findings of fact under a clearly erroneous standard, and review his or her conclusions of law *de novo*. *Id.* We specifically adopt the military's judge's findings of fact.

I. Expectation of Privacy

The threshold question in this case is whether the appellant had a reasonable expectation of privacy in his personal desktop computer situated in his dormitory room. The Court of Appeals for the Armed Forces has assessed a military member's expectation of privacy as it relates to computers in two settings - in the office and in the home.[4] Obviously, the setting for this case is different, as it involves neither a private dwelling nor a government office. Here, the appellant shared his dormitory room with another midshipman. It has generally been recognized in military law that an occupant of a

[4] In *United States v. Maxwell,* 45 M.J. 406 (C.A.A.F. 1996), the court held that a servicemember has an expectation of privacy in the contents of a personal computer in his or her home. By comparison, in *United States v. Tanksley,* 54 M.J. 169 (C.A.A.F. 2000), *overruled in part on other grounds by United States v. Inong,* 58 M.J. 460 (C.A.A.F. 2003), the Court held that the appellant had a reduced expectation of privacy in his government computer because the computer was unsecured in an office that he shared with co-workers.

shared military dormitory room does not enjoy the same expectation of privacy as in a private home.[5]

Though not yet decided when the military judge below issued her ruling, *United States v. Conklin,* ACM 35217, 2004 CCA LEXIS 290 (A.F.C.M.R. 2004), *rev. granted*, 61 M.J. 330 (C.A.A.F. 2005) provides guidance to answering the question posed above. In a child pornography case strikingly similar to the one at bar, the appellant Conklin was a student in technical training residing in an airman's dormitory on an Air Force base. During a routine, random inspection, when an inspector closed Conklin's dresser drawer, the screen on the defendant's desktop computer powered on, displaying a background picture of a woman with exposed breasts. Believing that the image on the computer screen was in violation of a base instruction, the inspector sought out the advice of a more "seasoned" instructor. The two then clicked the "start" button on the defendant's computer, and upon extensive examination in the computer's files found numerous images of young, nude females. After shutting down the computer and locking Conklin's door, the two notified their commanding officer.

Thereafter, two Air Force Office of Special Investigations (AFOSI) agents met Conklin at the dining hall. The agents did not tell Conklin what had previously been discovered during the room inspection, but they asked for his consent to search his room and his computer for evidence of pornography. He consented, and in due course, they discovered a large number of files containing pornographic images of children. The appellant then confessed that he had copied the files from compact discs lent by a friend.

The analysis by the *Conklin* court reaffirms the logic undertaken by the military judge below. Although Conklin's dorm room was his "home" throughout his technical training, like appellant herein, Conklin was well aware that inspectors regularly had access to his room. As to the nude image openly displayed as a background on the computer screen, the court ruled that Conklin had forfeited any expectation of privacy. But, Conklin had *not* forfeited his expectation of privacy in the non-displayed contents of the computer. The court held that the inspectors exceeded the scope of the inspection when they opened and examined the contents of Conklin's computer. The scope of room inspections should be limited to reasonable measures to effectuate the specific purposes of cleanliness, order, decor, safety, and security. Digging deep into the computer files went

[5] *See United States v. McCarthy,* 38 M.J. 398, 403 (C.M.A. 1993)("the threshold of a barracks/dormitory room does not provide the same sanctuary as the threshold of a private home"); and RULE FOR COURTS-MARTIAL 302(e)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), which in delineating guidelines for apprehension, states that a "private dwelling" does not include living areas in military barracks, whether or not subdivided into individual units.

far beyond that scope and turned the inspection into an impermissible search for criminal evidence.[6]

II. Consent

The *Conklin* court held, just as did the military judge below, that the one picture on display gave the inspector due cause to seize or secure the computer and to report the violation. The factual pattern of the agents thereafter retrieving the defendant from the dining hall, asking him if he would talk to them, and then getting written consent and a subsequent confession completes the parallel picture to the instant case. Rather than relying on the trial court's ruling that the pornographic evidence would have been inevitably discovered, the Air Force court ruled that Conklin properly waived his rights, voluntarily consented to make a statement, and validly consented to the search. The court stated, "When a person consents to a search, he or she is effectively waiving whatever reasonable expectation of privacy they have in the object or place being searched." *Id.* Thus, the confession and all the seized images were admissible to support Conklin's conviction.

It is likewise with the case at bar. We specifically concur in and adopt the reasoning and logic of our Air Force brethren. We find, as did the military judge below, that the picture on display gave probable cause for seizure and search, that thereafter the appellant properly waived his rights, and that he voluntarily consented to make a statement, and knowingly and validly consented to the search.

III. Plain View

The *Conklin* decision thus puts to rest all issues in this case, save one. Whereas Conklin's screen fully displayed a nude female, in and of itself not a criminal violation but a violation of a base regulation, this appellant's screen never fully displayed the nude image believed by LCDR Smith to be

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[6] See also *United States v. Astley-Teixera,* ACM 35161, 2003 CCA LEXIS (A.F.C.M.R. 2003), involving the same Air Force "seasoned" inspector as in *Conklin*. In the *Astley-Teixera* case, the inspector on his own accord powered on the computer and started rummaging through the computer files, where he found images of child pornography. Ruling that this went beyond the scope of an authorized room inspection, the court reversed the conviction. Nothing in the computer's electronic files could be related to the room's décor or cleanliness. Similarly, nothing in the files would relate to legitimate safety concerns, such as the presence of weapons, drugs, or pyrotechnics. The seizure of any unauthorized items is limited to those items observed in "plain view", which of course precludes any type of intrusive inspection. The court stated, "We are not convinced that electronic files on a computer are a reasonable place to inspect to assure good order." *Id.*

inappropriate. It was not until LCDR Smith "manipulated"[7] the computer that he saw that the image went far beyond inappropriate, and in fact went to criminal. The appellant argues that under *Arizona v. Hicks,* 480 U.S. 321 (1987), LCDR Smith's act of touching the mouse removes the case out of the "plain view" exception to the Fourth Amendment. What the appellant wants us to do is to treat the obscured image with the same degree of protection under the Fourth Amendment as we and the military judge give to the filed images. This, however, we decline to do.

In *Hicks,* a police officer entered the defendant's apartment to investigate a shooting that had occurred there shortly before, injuring a man in the apartment below. In the apartment, the officer saw a number "of expensive stereo components" that "seemed out of place in the squalid and otherwise ill-appointed four-room apartment." *Id.* at 323. After moving some of the components in order to reveal their serial numbers, the officer recorded those numbers, reported them, and learned that the items had been stolen. The Court held that the moving of the components so that the officer could see and record the serial numbers constituted a Fourth Amendment search without probable cause:

> *taking action, unrelated to the objectives of the authorized intrusion,* which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstances that validated the entry.

Id. at 325 (emphasis added). In *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990), an Air Force unit officer entered Jacobs' apartment via emergency entry to preclude further complaints to the chain of command by a very irate landlord about Jacobs "trashing" the apartment. While on the premises, he noted possibly stolen equipment and wrote down the serial numbers. The Court of Military Appeals held that *Hicks* did not apply since the officer did not move any of the items while recording the serial numbers. Although Chief Judge Everett dissented on other grounds, he made a few observations on the plain view doctrine. He stated that any "plain view" analysis needs to place significance on the emphasized portion of the passage from *Hicks* quoted above: "*taking action, unrelated to the objectives of the authorized intrusion*." *Id.* at 148.

The intrusion in *Hicks* was an emergency entry to check out a shooting. The intrusion in *Jacobs* was an emergency entry to check out the bad smells and lack of upkeep to the apartment. Neither entry contemplated objectives connected to viewing or examining items contained in the apartments. The intrusion in the case at bar, however, was a command authorized room

[7] Appellant's Brief of 28 Oct 2004 at 8.

inspection. The whole objective of the inspection was to examine items in the dorm rooms. Military law makes it clear that the circumstances of an inspection must be reasonable, otherwise, the intrusion which society is willing to tolerate loses its justification. The reasonableness of an inspection is determined by whether the inspection is conducted in accordance with the commander's inspection authorization, both as to the area to be inspected and as to the specific purposes set forth by the commander for ordering the inspection. But even if the intrusion is not specifically authorized by the terms of the inspection, it may still be upheld if the purposes of the inspection would be served by the challenged activity. *United States v. Ellis,* 24 M.J. 370, 372 (C.M.A. 1987).

The appellant complains that room inspections had never before included residents' computers; rather, the stated purpose had always been to maintain room standards. But, implicit within this stated category of inspection are the traditional reasons for any inspection, *i.e.*, good order and discipline of the unit and health and welfare of the unit. *See e.g. Astley-Teixera*. LCDR Smith was responsible for ensuring the proper moral and character development of his midshipmen. He testified that he had previously counseled other midshipmen who had displayed pornographic images on their computer screens. This testimony underlines that it was within the scope of his duties as company officer to fully inspect any such inappropriate images within his plain view. LCDR Smith would be in dereliction of his duty if he did not do so.

Thus, we concur with the military judge that LCDR Smith, as the company officer, "had a duty and right to further inspect the image on the screen in furtherance of his inspection to maintain good order and discipline, military fitness, or security."[8] Accordingly, his action in "manipulating" the mouse was fully in accord with the objectives of the authorized intrusion, *i.e*. the room inspection. The Fourth Amendment was not thereby violated.

Conclusion

The findings of guilty and the sentence, as approved on review below, are affirmed.

Senior Judge CARVER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court

[8] Record at 197.