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

BEFORE

C.L. CARVER **R.W. REDCLIFF** **J.D. HARTY**

UNITED STATES

v.

Wayne D. SZYMCZYK
Major (O-4), U.S. Marine Corps

NMCCA 200000718 Decided 23 June 2005

Sentence adjudged 26 February 1999. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

WILLIAM E. CASSARA, Appellate Civilian Counsel
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PHILIP D. CAVE, Appellate Civilian Counsel
LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer members, convicted the appellant, contrary to his pleas, of 3 specifications of conduct unbecoming an officer, transporting child pornography in interstate or foreign commerce, receiving child pornography through interstate or foreign commerce, possessing 3 or more items containing child pornography that were transported in interstate or foreign commerce, and sending and exchanging obscene matters in interstate commerce or through an interactive computer service, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934, and 18 U.S.C. § 2252(a)(1),(2) and (4), and 18 U.S.C. § 1465. The members sentenced the appellant to a dismissal and confinement for 3 months. The convening authority (CA) disapproved and dismissed the finding of guilt to Specification

3, Charge II.[1] Otherwise, the CA approved the findings and sentence as adjudged and, except for the dismissal, ordered the sentence executed.

This court has carefully examined the record of trial, the appellant's 6 assignments of error,[2] and the Government's Answer. We find that the findings, as corrected herein, and the 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 subscribed to Infinity Internet Incorporated (Infinity), an internet service provider (ISP) located in Temecula, Riverside County, California. The appellant used this ISP to enter chat rooms from his home computer using the screen name "Aurther." One of the chat rooms entered was "dad&daughtersex." In this chat room, the appellant met and communicated with "SuzyQ17" who turned out to be an undercover detective with the Miami-Dade County Police Department, Miami, Florida. The appellant engaged in sexually explicit conversation with, and sent photographs of minors engaged in sexually explicit conduct to, "SuzyQ17."

The Miami detective used a chat program that recorded the date, time, images sent by and both sides of the conversation with "Aurther." He further conducted a query that traced the appellant's screen name to Infinity and provided its address in Temecula, California. The Miami detective turned the information over to a U.S. Customs agent who provided the information to a detective with the Riverside County Sheriff's Department, Riverside, California.

The Riverside detective was informed that some ISPs do not provide account identification information without a warrant. With that knowledge, the detective went to Infinity in hopes they would voluntarily provide the account owner's name. The detective was, however, prepared to obtain a warrant if necessary. The detective identified himself as a law

[1] Knowingly and wrongfully possessing 3 or more matters containing visual depictions of minors engaging in sexually explicit conduct transported in interstate or foreign commerce in violation of 18 U.S.C. § 2252(a)(4).

[2] The appellant's fifth assignment of error alleges there is legally insufficient evidence to support Specification 3, Charge II. That issue is moot as the CA dismissed that specification in his action. We are puzzled as to why counsel for both sides would brief an issue involving a dismissed specification.

enforcement official to the Infinity employee, stated that he was working on an internet child pornography investigation, and explained that he was looking for information that would identify "Aurther." The employee explained that the person who could provide that information, the technical contact, was not there but would return later that day.

The detective returned to Infinity to meet with the ISP's technical contact person later that day. That person had the requested information waiting for the detective. Infinity never requested a warrant or other court order before providing the requested information. The provided information identified "Aurther" by name and address. With the information from Miami-Dade County and the information received from the appellant's ISP, the detective sought and obtained a search warrant for the appellant's residence. The warrant was executed at the appellant's home resulting in the seizure of nearly 800 visual depictions of minors engaged in explicit sexual activity plus visual depictions of other obscene matters depicting bestiality and rape. Record at 392-93.

Lawfulness of Search

For his first assignment of error, the appellant alleges the military judge erred by denying the appellant's motion to suppress the results of an unlawful search of the appellant's home. The appellant asserts the search was illegal because the warrant was obtained with information seized from his ISP in violation of his 4th Amendment, right against warrantless searches, as well as in violation of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2701-2712. Appellant's Brief of 21 Jan 2003 at 2-12. The Government counters that the appellant did not have a reasonable expectation of privacy in the information and, therefore, a warrant was not required to obtain information from the ISP. The Government further argues that even if the information was obtained in violation of the ECPA, that statute does not provide an exclusion remedy. Finally, the Government asserts that the information would have inevitably been discovered anyway. Government's Answer of 28 Aug 2003 at 3-8.

"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 conclusions of law *de novo*. *Id.*

The threshold question is whether the appellant had a reasonable expectation of privacy in his ISP subscriber account information. An expectation of privacy exists when "an actual or subjective expectation of privacy is exhibited by a person in a place and when that expectation is one that society recognizes as reasonable." *United States v. Britton,* 33 M.J. 238, 239 (C.M.A. 1991)(citing *Smith v. Maryland,* 442 U.S. 735, 740-41 (1979)). "A person may challenge the validity of a search only by asserting a subjective expectation of privacy which is objectively reasonable." *Monroe*, 52 M.J. at 330 (citing *Minnesota v. Olson*, 495 U.S. 91, 95 (1990)).

This court recently addressed a very similar issue in *United States v. Ohnesorge*, 60 M.J. 946 (N.M.Ct.Crim.App. 2005). There, the appellant had downloaded pornography onto a government computer through a subscription to EasyNews.com operated by El Dorado Sales, Inc. (El Dorado). The appellant accessed the subscription through his America on Line (AOL) account with a user name of "RuhRowRagy." An agent of the U.S. Customs Service went to El Dorado and asked if they had a subscriber with that user name, and assured El Dorado that an administrative summons or subpoena would be provided for the information. The Customs agent did not have a summons, subpoena or search warrant at the time. El Dorado then searched the subscriber database and found the pertinent account information. The appellant's name, service activation date, and the credit card number used to pay for the subscription was turned over to the agent. Customs served an administrative warrant on El Dorado 2 weeks later.

The appellant in *Ohnesorge* asserted, as does the appellant herein, that the Government's request for subscriber information constituted a search under the Fourth Amendment, that he had a reasonable expectation of privacy in that subscriber information, and that absent a warrant or similar authority, the obtaining of that information violated his Fourth Amendment rights and his rights under the ECPA. The Government contended, as it does here, that the appellant did not have a reasonable expectation of privacy in the subscriber information.

This court found there was no reasonable expectation of privacy in the subscriber information because: one, "there is a difference in the content of private communications and the means by which those communications are authorized, i.e.,

subscriber information"; two, "the nature of the agreement that the appellant had with EasyNews.com" put the appellant on notice the information may be shared with third parties; and, three, "the congressional intent manifest in the provisions of the ECPA" shows subscriber information may be shared with third parties. *Ohnesorge*, 60 M.J. at 949.

Here, there is no evidence concerning the contract between the appellant and Infinity establishing how personal information would be handled. However, our superior court has suggested that there is no reasonable expectation of privacy in subscriber information. *See United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996)(The subscriber to an ISP has a reasonable expectation of privacy in the content of electronic mail but not to the ISP's account records).

For the reasons stated above, and based on our review of the record, we conclude that the military judge did not abuse his discretion in denying the appellant's motion to suppress evidence. Even if the appellant held a subjective expectation of privacy in his subscriber information, such an expectation would be objectively unreasonable. And even if the appellant's expectation of privacy was objectively reasonable, we hold that the information would have inevitably been discovered through a search authorization or warrant for that information. *See Nix v. Williams*, 467 U.S. 431 (1984); *Maxwell*, 45 M.J. at 422-23.

Multiplicity

For his third assignment of error, the appellant alleges that the specifications under Charge II, alleging violations of Article 134, UCMJ, are multiplicious with Specification 2 under Charge I, alleging a violation of Article 133, UCMJ, based on the same conduct. Appellant's Brief at 19-22. The Government concedes this issue. Government's Answer at 10-12.

Multiplicity is a concept derived from the constitutional concept of double jeopardy[3] prohibiting individuals from being twice punished for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981). The legislature, however, is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). "[B]ut once the legislature has acted courts may not impose more than one

[3] U.S. CONST. amend. V.

punishment for the same offense. . . ." *Brown*, 432 U.S. at 165. Conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

Whether an offense is a lesser included offense is a matter of law that we review *de novo*. *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002). We apply the "elements" test to determine whether an offense is factually the same as another offense and, therefore, lesser included in that offense. *United States v. Foster,* 40 M.J. 140, 142 (C.M.A. 1994). An offense is not factually the same as another where one requires proof of some fact or facts that the other does not. *Blockburger v. United States,* 284 U.S. 299, 304 (1932). Such a determination can be made by comparing elements and determining whether each element of the lesser offense is "rationally derivative of one or more elements of the other offense - and vice versa." *Foster,* 40 M.J. at 146.

We hold that Specifications 1 and 2 under Charge II alleging the "transporting" and "receiving" of child pornography, respectively, in violation of 18 U.S.C. § 2252 under clause 3 of Article 134, UCMJ, are the same acts alleged in Specification 2 under Charge I. The same photographs were admitted to prove each of these offenses. Prosecution Exhibits 2, 6, 17, 20, 21, and 22.[4] Specification 2 under Charge I, however, has at least 1 additional element unique to a charge of conduct unbecoming. Finding the appellant guilty of both the greater offense under Article 133, UCMJ, and the lesser included offenses under Article 134, UCMJ, was plain error. *Ball v. United States*, 470 U.S. 856, 864-65 (1985).

Although the appellant does not challenge Additional Charges I and II on multiplicity grounds, we find plain error there as well. Additional Charge I alleges an Article 133, UCMJ, violation for the "sending . . . [and]. . . exchanging with other persons . . . visual depictions involving obscene matters", and Additional Charge II alleges an Article 134, UCMJ, violation of 18 U.S.C. § 1465 by "transporting . . . visual depictions involving obscene matter." Charge Sheet. The military judge instructed the members that "transporting" for purposes of Additional Charge II meant "with the intent to ultimately transfer possession of the articles to another person or persons." Record at 606; AE XLII at 7. The photographs

[4] Expert Tanner staging evidence was offered only as to Prosecution Exhibit 17 to establish the ages of the children depicted in the photographs. Record at 466-81.

admitted as "obscene matter" were the same photographs for both additional charges. Prosecution Exhibits 2, 6, 17, 19, 20, 21, and 22.[5] For the reasons stated above, we hold that finding the appellant guilty of both the greater offense under Article 133, UCMJ, and the lesser included offenses under Article 134, UCMJ, was plain error.

In this case there is no need to consolidate the charges because Specification 2 under Charge I and the sole specification under Additional Charge I recite explicitly the significant facts. Accordingly, we will dismiss Charge II and its 2 specifications, and will dismiss Additional Charge II and its sole specification. We will reassess the appellant's sentence in our decretal paragraph.[6]

Unreasonable Multiplication of Charges

For his fourth assignment of error, the appellant asserts that Additional Charge I alleging an Article 133, UCMJ, violation for the sending and exchanging of visual depictions involving obscene matters, and Additional Charge II alleging an Article 134, UCMJ, violation of 18 U.S.C. § 1465 by transporting visual depictions involving the same obscene matter, constitute an unreasonable multiplication of charges with Charge I and Charge II. Appellant's Brief at 23-27. The Government concedes that Additional Charge II is an unreasonable multiplication of charges with Charge II but does not address the balance of the assigned error. Government's Answer at 12-13. This assignment of error would appear to be mooted by our corrective action taken to resolve the multiplicity error, however, further discussion is required.

We use the following nonexclusive factors to determine whether there was an unreasonable multiplication of charges:

> (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?

[5] Prosecution Exhibit 19 appears to be the only exhibit containing photographs admitted solely on the allegations involving "obscene material."

[6] Because we are dismissing the charge and specifications alleging violations of 18 U.S.C. § 2252, transporting and receiving child pornography, the appellant's second assignment of error challenging those convictions under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), is moot.

(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?

In weighing all of these factors together, we are able to determine whether charges are unreasonably multiplied. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). We note at the outset that the appellant did not object to the charges or specifications as being an unreasonable multiplication of charges. Under the facts and circumstances of this case, we will not apply the principle of forfeiture, despite the absence of an appropriate motion at trial.

Conduct unbecoming an officer is described, in part, as an:

[A]ction or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer . . . . This article includes acts made punishable by any other article . . .

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 59c(2).

The appellant's actions can be broken down into two distinct acts. First, he engaged in a sexually explicit chat room conversation during which he transferred 6 visual depictions involving the use of minors engaged in sexually explicit conduct. Two, he possessed and traded visual depictions of obscene material. Prosecution Exhibit 12 at 3. Those obscene visual depictions can be broken down into 2 categories: those involving the use of minors engaged in sexually explicit conduct, and those that are obscene but do not involve the use of minors engaged in sexually explicit conduct.[7] Although they may violate 2 different federal statutes, and be repugnant to 2 different societal interests, the photographs were possessed at the same location, at the same time, for the same purpose, and all were obscene.

Applying *Quiroz,* we find on balance that charging the appellant with 7 offenses constituted an unreasonable multiplication of the charges. We also find that the unreasonable "piling on" of charges resulted in prejudice to the accused. "[A]n unauthorized conviction has 'potential adverse collateral consequences that may not be ignored,' and constitutes unauthorized punishment in and of itself." *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999)(quoting *Ball*, 470 U.S. at 865).

[7] Prosecution Exhibit 19 contained photographs of adults having sex with animals and adult females being raped.

We have already provided some relief through our findings of multiplicity. The remaining charges include Specifications 1 (communicating obscene language in a chat room) and 2 (possessing and trading child pornography) under Charge I, and the sole specification (sending and exchanging obscene matter) under Additional Charge I, all alleging conduct unbecoming an officer under Article 133, UCMJ. We hold that creating 2 acts of conduct unbecoming out of the possession and trading of obscene photographs, based solely on the nature of the photographs' content, is an unreasonable multiplication of charges. We set aside the findings of guilty for Additional Charge I and its sole specification. Additional Charge I and its specification are dismissed.

Conclusion

We conclude that the remaining assignments of error are without merit. In summary, we have dismissed Charge II and its 2 specifications and Additional Charges I and II and their specifications. The findings as to Specifications 1 and 2 under Charge I and Charge I are affirmed.[8] Given our corrective action, we have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (1998) and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We find that the sentence continues to be appropriate for the offenses and the offender and affirm the sentence as approved by the convening authority. The supplemental court-martial promulgating order shall reflect our action.

The appellant's Motion to Request Oral Argument of 14 October 2003 is hereby denied. The Government's Motion to Seal Prosecution Exhibits of 28 August 2003 is hereby granted. Investigative Exhibits 16, 22, and 23 and Prosecution Exhibits

[8] We have considered the appellant's sixth assignment of error, unlawful command influence based on the Commandant of the Marine Corps being in the building where the members were deliberating, and find the issue was fully discussed at time of trial and that there is no merit to the issue.

2, 6, 17, 19-22, and Defense Exhibit A shall be sealed in the original and all copies of the record of trial.

Senior Judge CARVER and Judge REDCLIFF concur.

For the court

R.H. TROIDL
Clerk of the Court