

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ADRIAN A. TAYLOR
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000219
GENERAL COURT-MARTIAL**

Sentence Adjudged: 4 November 2009.

Military Judge: LtCol Robert Ward, USMC.

Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col B.T. Palmer, USMC.

For Appellant: LT Michael Torrisi, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

21 December 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

REISMEIER, Chief Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of possession of child pornography, in violation of clauses 2 and 3 of Article 134,¹ Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to 40 months confinement, reduction in pay grade to E-1, total forfeitures, and a

¹ The specification alleged a violation of 18 U.S.C. §2252(A)(a)(5)(B) and that the appellant's conduct was of a nature to discredit upon the armed forces. The appellant pleaded and was found guilty of under both a clause 2 and 3 theory of liability.

dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raised three assignments of error.² We find appellant's assignments of error to be without merit, and 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 pleaded guilty to possession of a laptop containing video files of child pornography. Record at 167-68. Thousands of suspected images of child pornography were discovered, over 3500 of which were forwarded for forensic examination. *Id.* at 248; Prosecution Exhibit 10 at 4. Of those, 26 were identified as known victims. Record at 235, 249.

During presentencing, the Government offered three compact discs, labeled as Prosecution Exhibit 8. Record at 226. One file was offered as aggravation from disc one, three were offered from disc two, and eight were offered from disc three. The offered files include, but are not limited to, videos of children of very young age (including toddlers and what appears to be an infant). The videos depict the use of leg restraints on one of the victims. Some videos depict what can only be described as active resistance by victims of sexual assaults. Force and strength is used to overcome the resistance against the videoed intercourse and/or anal sodomy. PE 8.

The forensic examiner described the videos as being the worst he had ever seen. He based this assessment on the fact that he had not seen depictions that included "hard-core child pornography that was with children as young as this that was as violent as this before." Record at 247. He stated that the images "involved children that were much younger than I've typically seen. A lot of [it] involved bondage, violence but a lot of it the children were struggling to get away or showing pain or what appeared to be an indication of pain or disgust."

² I. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY CONSIDERING IMPROPER SENTENCING EVIDENCE SUGGESTING THAT APPELLANT'S POSSESSION OF CHILD PORNOGRAPHY MAKES IT LIKELY THAT HE ALREADY MOLESTED CHILDREN IN THE PAST OR WILL LIKELY MOLEST CHILDREN IN THE FUTURE.

II. TRIAL DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO SENTENCING EVIDENCE SUGGESTING THAT APPELLANT'S POSSESSION OF CHILD PORNOGRAPHY MAKES IT LIKELY THAT HE HAS ALREADY MOLESTED CHILDREN IN THE PAST OR WILL LIKELY MOLEST CHILDREN IN THE FUTURE.

III. THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO DISMISS UNDER ARTICLE 10, UCMJ.

Id. The military judge permitted this testimony over the objection of the appellant, noting that although there was no baseline against which to measure the expert's evaluation (the expert's prior exposure could have been to only the most innocuous images), he would give the testimony what weight it deserved. *Id.* at 246.

The appellant's taped interview with NCIS agents was also admitted without objection. During the interview, the appellant disclosed his own concern that he himself might be capable of "touching" a child. At various points during the interview, the appellant stated that he was concerned that there was a potential for him to touch a child, that he was afraid of what he was capable of doing, and that he remains away from his young relatives because of his fear that he might "do something." PE 9 at 35, 36, 40, and 64.

The Government also offered, without objection, Prosecution Exhibits 12 and 13. Prosecution Exhibit 12 is an article that states that child pornography is intrinsically related to the sexual abuse of children. The article maintains that to stop the abuse of children, the market for photos of the abuse must be removed. Prosecution Exhibit 13 is an article entitled "Child Sexual Exploitation Update;" the stated purpose of the author was to "dispel the myth that viewing child pornography is merely looking at pictures and to alert prosecutors, investigators and frontline child abuse professionals to the significance of child pornography in predatory behavior patterns." The article includes statistical references suggesting that over one-third of child pornographers are actual sexual molesters, that three-fourths of those convicted of internet-related crimes against children admitted to contact sex crimes with children that were not detected by law enforcement, and that there is a positive correlation between possession of child pornography and the commission of crimes against children.

In his unsworn statement, the appellant conveyed that he was the victim of a sexual assault at the hands of his older cousin. The appellant's teen age cousin bound the eight-year-old appellant's feet and hands with his own underwear and anally sodomized him. The appellant stated that because of his own abuse, he went looking for child pornography to deal with his victimization. Record 260-71.

During his sentencing argument, the trial counsel requested confinement for six years, arguing that based on the appellant's experience and the evidence offered by the Government, there was a high likelihood that the appellant would act out on his obsession and molest children. Record at 277-78. The civilian defense counsel countered by arguing that the potential for future misconduct was "not before [the military judge]." *Id.* at 280. Rather, what was before the military judge was that the appellant only possessed images. *Id.* The defense went on to argue that their own exhibit, Defense Exhibit N, a Veteran's

Affairs article, noted that "[m]ost male victims of child sexual abuse do not become sex offenders." He further noted that "there has been no evidence that [the appellant]'s inclined to do this or know what he will do that and quite the opposite." Record at 280. The defense then recited the various statements admitted into evidence from the defense that noted how good the appellant was with children and the absence of evidence to the contrary. *Id.* at 280-81.

Plain Error and Ineffective Assistance of Counsel

RULES FOR COURTS-MARTIAL 1001(b)(4) and (5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) provide that the trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty, and evidence of the accused's rehabilitative potential. The appellant argues that the military judge committed plain error in admitting portions of Prosecution Exhibits 9 and 13 that "painted [the] Appellant as a likely child molester," as the evidence was improper evidence under R.C.M. 1001. Appellant's Brief of 25 May 2010 at 13.

Where no objection is raised at trial, an appellant may prevail on appeal if he can show plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). To establish plain error, the appellant must demonstrate: (1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of his substantial rights. *United States v. Olano*, 507 U.S. 725, 737, (1993). The error must have "had an unfair prejudicial impact on the [judge's] deliberations." *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, 16 n.14, (1985)); see also *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998); *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997).

On the facts of this record, we need not decide whether there was error or whether any error was plain or obvious.³ Even if we found the error to be plain, the appellant has failed to

³ The appellant's admissions, admitted as Prosecution Exhibit 9, contain references to his concern regarding his potential to engage in sexual contact with children. Having admitted to fear about his own urges in this regard, there was at least some arguable logical relevance to statistical evidence suggesting a likelihood of sexual contact with children by those who possess child pornography. However, some portions of the admitted materials (such as noting that the average offender in one of the surveys had 30.5 child sex victims) would not meet even the low standard of logical relevance on this record. Additionally, even the appellant's statements of concern for future misconduct found within Prosecution Exhibit 9 are problematic when the offense before the sentencing authority includes possession of depictions of sexual assaults, not commission of sexual assaults. In all instances, the legal relevance -- whether any unfair prejudice created by the evidence outweighed its probative value -- was at least questionable.

establish any material prejudice to his substantial rights. See *Olano*, 507 U.S. at 725 (Supreme Court assumed without deciding the presence of the first two prongs of the analysis and directly addressed the prejudice prong).

Judges are presumed to know the law and apply it correctly. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009). That presumption holds absent clear evidence to the contrary. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Judges are presumed to be able to filter out inadmissible evidence, and presumed not to rely upon inappropriate evidence when making decisions as to guilt, innocence, or sentence. See *United States v. Ellis*, 68 M.J. 341, 347 (C.A.A.F. 2010); *United States v. McNutt*, 62 M.J. 16, 26 (C.A.A.F. 2005); *United States v. Robbins*, 53 M.J. 455, 457 (C.A.A.F. 2000).

Assuming without deciding that the challenged evidence was inadmissible, there is no indication that the military judge gave any - much less significant - weight to the complained of evidence in arriving at the adjudged sentence. The appellant has offered no evidence that he suffered material prejudice to any substantial right by the Government's presentencing evidence - only speculation. The appellant's arguments notwithstanding, the fact that the military judge, *sua sponte*, noted that he was not going to consider those portions of the victim impact letters that requested the court to think about these offenses happening to "your daughter" does not suggest that the military judge considered the objectionable evidence inappropriately. Indeed, the military judge's comments before announcing the sentence may reflect nothing more than a recognition that requests to the sentencing authority to place itself in the shoes of the victim are always inadmissible and improper.

On this record, we decline to translate the military judge's silence as to the rest of the evidence as proof of prejudice we otherwise do not see. Indeed, based on the sentence and the record as a whole, rather than be inflamed by the evidence in question, it appears that the military judge concluded that even if there might be some minimal relevance - logical and legal - in the connection between child pornography and child sexual abuse, the value of such evidence in this particular case was *de minimis* at best, given that there was little if anything (other than his coaxed admissions to NCIS agents regarding the potential to offend against unknown minors in the future) to tie this appellant to the statistical conclusions within the exhibit.⁴

⁴ The civilian counsel's argument to the military judge during presentencing appeared to focus on just that - that the evidence before the court regarding the appellant reflected a kind, caring, and trusted person around children, not someone who fit within some generalized category of future assailants. Similarly, Defense Exhibit N was offered by the defense in order to further underscore that males who have themselves been victims of sexual assault are unlikely to become adult sexual offenders.

Other than by making a generalized argument, the appellant does not explain how the outcome might have been different if evidence had been excluded, particularly in light of the fact that the sentencing was by a military judge alone. We also note that he received the protection and benefit of a pretrial agreement that limited his maximum possible time in confinement to 20 months regardless of the sentence adjudged by the court. See *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999); *United States v. Williams*, 47 M.J. 142, 145 (C.A.A.F. 1997). The maximum period of confinement for this offense was 10 years. The Government, relying on the argument that the appellant's future predatory danger demanded a significant sentence, requested six years confinement. As noted above, the appellant amassed a fairly large trove of child pornography involving 26 known victims. The videos collected included extremely young victims - infants and toddlers. The depictions included degradation, bondage, discomfort/pain, and active resistance by the victims trying to push the rapists away (where the victims were old enough or physically able to do so). Additionally, the appellant admitted to deriving sexual gratification by watching the horrible sexual abuse of these children. The sentence included a fairly lenient 40 months confinement, one-third of the maximum. On this record, there is an absence of evidence of material prejudice. The plain error claim must fail.⁵

Speedy Trial⁶

The Government must take immediate steps to bring the appellant to trial once he is placed in pretrial confinement. We do not expect "constant motion." We do expect steady progress toward trial. We review the question of whether the appellant received a statutory speedy trial *de novo*. *E.g.*, *United States v. Cossio*, 64 M.J. 254, 256-57 (C.A.A.F. 2007).

In an Article 10 case, we consider the factors enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the member's statutory right to a speedy trial has been violated. See *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005)

⁵ For the same reasons, the appellant's claim of ineffective assistance in the second assignment of error also fails. In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both deficient performance and prejudice resulting therefrom - a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). "The [appellant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the absence of prejudice, there can be no ineffective assistance of counsel.

⁶ The appellant's claim that the military judge erred by denying the motion to dismiss was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(length of the delay; reasons for the delay; whether the defense demanded speedy trial; and prejudice to the defense).

The Government's accountability in the appellant's case began on 1 February 2010, when the appellant was placed in pretrial confinement. The appellant was served on 1 July, on day 148, and was arraigned on 7 July, day 154, after exercising his statutory right to a five-day delay between service of charges and arraignment. Art. 35, UCMJ.

Admittedly, the delay between the appellant's placement in pretrial confinement and his appearance before the military judge was lengthy. However, the bulk of the delay surrounded two significant events: (1) the time it took for forensic review of the computer files, and (2) the time it took for the mental responsibility/competency review conducted pursuant to R.C.M 706.

The amount of potential forensic material in this case was substantial, including some 70,000 images found on the appellant's computer. The NCIS special agent assigned to this case completed his review of 70,000 images on the appellant's computer on 5 May, or day 91, after roughly 100 hours of work.⁷ His efforts included the culling of 3,555 images of suspected child pornography for review by the Defense Cyber Crime Center (DCCC), which is part of the Defense Computer Forensics Laboratory. The DCCC received and reviewed 3,555 images of suspected child pornography for this case, completing an initial review and report on 15 June, or day 132. The completed report was submitted for peer review and ultimately released to the trial counsel the day after arraignment on day 155.

On 20 February, day 19, the defense counsel submitted a request for an R.C.M. 706 evaluation for the appellant. The report from the evaluation was completed on 26 June, on day 143, 124 days after the defense counsel submitted the request for the evaluation.

We agree with the military judge's assessment that the overall processing of this case was not a model of efficiency. Appellate Exhibit X at 7. However, as he also noted, the appellant generally may not be the source of a request for Government action which necessarily requires time to accomplish, then claim that the Government is responsible for the delay attendant to resolving his request. See *United States v. King*, 30 M.J. 59, 66 (C.M.A. 1990). In this case, the request for the evaluation apparently was misrouted and delayed in transmission, but ultimately reached the legal office at the hospital on 29 April. The request was forwarded to the department head around 4 or 5 May, to begin a process that generally takes 30 to 90 days, depending on how many providers are available and the type of

⁷ This was not the agent's only case.

testing required. The "short form"⁸ report from the evaluation in this case was completed on 25 June.

Regarding the length of the delay, this factor favors the appellant. Considerable time passed before placing this case in the hands of the judiciary through referral. While we acknowledge that the delay occurred, the delay was prompted by the defense request for a mental evaluation, and necessitated by the review of tens of thousands of images from the appellant's computer. The delay in this case did not constitute the sort of "spiteful neglect" generally necessary to rule in favor of the appellant. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). We therefore assess this factor in favor of the United States.

The defense made two speedy trial demands - on 29 April (day 85), and on 16 June (day 133). However, those requests were made only after the defense submitted a request for an R.C.M. 706 evaluation, and after acknowledging that the defense could accept at least some portion (60 days) of the delay associated with the evaluation for Article 10 speedy trial purposes. The United States actually attempted to accommodate at least part of the demand by attempting to hold the arraignment the same day as the charges were served, but the appellant exercised his statutory right to delay, pushing the arraignment back an additional 5 days. Given the timing of the requests, the acknowledgment of the delay when the request for the R.C.M. 706 evaluation was submitted, and the later request to delay the arraignment, we assess this factor in favor of the United States as well.

Finally, the appellant has demonstrated (and alleged) no prejudice from any alleged denial of a speedy trial. We find that the appellant suffered no prejudice from pretrial delay.

As we noted above, the military judge's findings of fact in Appellate Exhibit X are amply supported by the record of trial. His legal conclusions are correct, and in our review *de novo* we likewise conclude that the appellant was not denied a speedy trial in violation of his statutory right.

⁸ The "short form" is the truncated version of the R.C.M. 706 report that includes the conclusions from the examination, but does not include the privileged communications passed during the consultations. The short form is provided to the Government.

Conclusion

Accordingly, we affirm the findings and sentence as affirmed by the CA.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court