United States Navy–Marine Corps Court of Criminal Appeals

Before
MYERS, HOUTZ, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Joseph W. HAMLIN
Captain (O-3), U.S. Marine Corps
Appellant

No. 202200007

Decided: 13 April 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
John P. Norman

Sentence adjudged 3 November 2021 by a general court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: confinement for 8 years, forfeiture of all pay and allowances, and a dismissal.

For Appellant:
Captain Kimberly D. Hinson, JAGC, USN

For Appellee:
Lieutenant Michael A. Tuosto, JAGC, USN
Lieutenant R. Blake Royall, JAGC, USN

Senior Judge HOUTZ delivered the opinion of the Court, in which Senior Judge MYERS and Judge KISOR joined.

PUBLISHED OPINION OF THE COURT

HOUTZ, Senior Judge:

Appellant was convicted, pursuant to his pleas, of sexual abuse of a child involving indecent conduct, possession of child pornography, and distribution of child pornography, in violation of Articles 120b and 134, Uniform Code of Military Justice [UCMJ].[1] Upon consideration of the record of trial and appellate defense counsel's pleading submitted without specific assignment of error, this Court directed briefing on the following specified issue:

> **Is there a substantial basis in law or fact to question Appellant's guilty plea to the Specification of Charge II (Sexual Abuse of a Child) where Appellant stated during the providence inquiry that he video-recorded himself engaging in the charged indecent conduct and then sent the video via an online application to Ms. Bravo, which she then viewed? Under such circumstances, was the indecent conduct done "in the presence of" Ms. Bravo as charged?**

After reviewing the record and the pleadings from both Appellant and Government Counsel, we find error and dismiss Charge II, affirm the findings as to Charge I, and reassess and affirm the sentence.

I. BACKGROUND

During April 2021, Appellant engaged in conversations with Ms. Bravo who was under the age of sixteen at the time.[2] Appellant started the text conversations on the social media application "AntiLand." AntiLand allows users to view profiles of other users and engage in text conversations. Ms. Bravo's profile listed her age as 18 years old. Appellant engaged in conversation with her,

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[1] 10 U.S.C. §§ 920b, 934 (2016).

[2] All names, other than those of Appellant, the military judge, and counsel, are pseudonyms.

and she informed him that she was "4 years younger" than the age listed in her profile. Additionally, Ms. Bravo sent Appellant an image of her face where she appeared to be approximately 14 years old according to Appellant. The two eventually transitioned their conversations to the social media application "Snapchat." None of their interactions were in person – they were all virtual. During the conversations Appellant received child pornography which formed the basis of one of the possession of child pornography specifications under Charge I. The two other specifications under Charge I concerned possessing and distributing child pornography unrelated to Ms. Bravo. During the exchange with Ms. Bravo on Snapchat, Appellant also recorded and sent Ms. Bravo a video of himself masturbating – this conduct formed the basis for Charge II.

Appellant agreed to plead guilty pursuant to a plea agreement to two charges and four of the charged specifications—possession of child pornography, distribution of child pornography, and sexual abuse of a child involving indecent conduct. This opinion focuses on the sexual abuse of a child involving indecent conduct.

The facts surrounding the video sent by Appellant to Ms. Bravo which resulted in the sole specification of Charge II are the only ones at issue in this case.[3] That conduct formed the basis for the sole specification of Charge II which read:

> Specification: (Sexual abuse of a child involving indecent conduct) In that Captain Joseph W. Hamlin, U.S. Marine Corps, did, at an unknown location, between on or about 1 April 2021 and on or about 10 April 2021, commit a lewd act upon M.B., a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: masturbating, intentionally done in the presence of M.B., which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.[4]

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[3] In reaching its decision, this Court did not consider information outside of the Record, including certain information Appellant derived from the Snapchat website. Appellant sought to admit this information pursuant to *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), via a Motion to Attach dated 23 August 2022. We denied that Motion on 2 December 2022.

[4] The charge sheet, 17 September 2021.

During the providence inquiry the military judge defined "in the presence of" to include constructive presence via communication.[5] Appellant admitted he created a video that showed him masturbating.[6] Appellant further admitted to using his iPhone to access the Snapchat application and then sending the video of himself masturbating with the intent that the victim receive it.[7]

During the plea, the following colloquy occurred between the military judge and Appellant:

> MJ: So, at this time, for the sole Specification of Charge II, please just tell me, in your own words, why you believe you're guilty of the offense alleged there.
>
> ACC: Yes, sir. On or about 1 April to 10 April 2021, on the application Snapchat, I was having an inappropriate conversation with M.B, who was a minor. During this conversation, I had sent a video of myself naked, masturbating, on the couch.
>
> …..
>
> MJ: Okay. Explain exactly what you did. Describe to me the method by which you did this lewd act.
>
> ACC: Yes, sir. On Snapchat, there's a tool that you can use to take a video directly through the Snapchat app.
>
> MJ: Okay. So, different than already having a video or filming a video with your phone and it going into the camera -- I'm sorry -- the camera or the photo roll, but you can actually access your phone's camera via Snapchat?
>
> ACC: Yes, sir.
>
> MJ: And record something, kind of, real time while you're in Snapchat and upload it straight from there?
>
> ACC: Yes, sir.
>
> MJ: Okay. Is that what you did in this case?
>
> ACC: Yes, sir.
>
> MJ: Okay. You can continue. Thanks.
>
> ACC: Yes, sir. And I used that tool to take a video of myself masturbating, where my genitals were exposed on the video, sir, and it directly uploaded to the conversation chain between me and M.B.

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[5] R. at 106-09.

[6] R. at 113; Pros. Ex. 1 at 9.

[7] R. at 113.

> MJ: Okay. And then, once it films this video or file and it's uploaded automatically, because you're using the Snapchat application to do so, do you then have to hit "send" or something like that?
>
> ACC: Yes, sir.

Ultimately, the military judge accepted Appellant's pleas and found him guilty of all of the offenses.[8] Pursuant to his plea agreement, the military judge imposed a segmented sentence sentencing him to eight years of confinement, total forfeiture of all pay and allowances, and a dismissal.[9] The sentence included eight years confinement for Charge I, Specification 1; six years confinement for Charge I, Specification 2; seven years confinement for Charge I, Specification 3; and eight years confinement for Charge II. Per the plea agreement all of the confinement was to run concurrently.

II. DISCUSSION

A. Standard of Review and Law

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion.[10] Questions of law arising from a guilty plea and questions of statutory construction are reviewed de novo.[11]

A military judge abuses his discretion during a guilty plea if, during the providence inquiry, he does not ensure the accused has provided an adequate factual basis to support the plea.[12] In considering whether there exists a factual basis to support the plea, appellate courts apply the "substantial basis test."[13] This test looks at "whether there is something in the record of trial,

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[8] R. at 146, 149.

[9] R. at 194.

[10] *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012); *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

[11] *Inabinette*, 66 M.J. at 322; *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019).

[12] *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[13] *United States v. Ferguson*, 68 M.J. 431, 434 (C.A.A.F. 2010) (quoting *Inabinette*, 66 M.J. at 322).

with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea."[14] "By pleading guilty, an accused does more than admit that he [committed] the various acts alleged in a specification; 'he is admitting guilt of a substantive crime.'"[15] "The factual predicate [of a plea] is sufficiently established if the factual circumstances as revealed by the accused himself objectively support that plea."[16] On the other hand, a "military judge may not accept a guilty plea if it is 'irregular,' the accused 'sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect.'"[17] Absent a substantial conflict between an appellant's pleas and the factual or legal circumstances supporting those pleas, appellate courts should not reverse a military judge's decision to accept a plea when the appellant admits to all the elements on the record.[18]

Article 120b(c), UCMJ, prohibits "commit[ting] a lewd act upon a child."[19] In order to be found guilty of the charged offense the military judge explained to Appellant that the following elements must have been met:

> (1) between on or about 1 April 2021 and on or about 10 April 2021, at an unknown location, [Appellant] committed a lewd act upon M.B., by engaging in indecent conduct, to wit: Masturbating, intentionally done in the presence of M.B, including via any communication technology;
>
> (2) that, at the time, M.B. had not attained the age of 16 years; and,
>
> (3) that the conduct amounts to a form of immorality relating to sexual impurity, which is grossly vulgar, obscene, and repugnant to common propriety and tends to excite sexual desire

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[14] *Id*.

[15] *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009) (quoting *United States v. Broce*, 488 U.S. 563, 570 (1989)).

[16] *Ferguson*, 68 M.J. at 434 (citation and internal quotations omitted).

[17] *Id*. at 433 (quoting Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2006)).

[18] *See United States v. Garcia*, 44 M.J. 496, 498-99 (C.A.A.F. 1996).

[19] 10 U.S.C. § 920b(c).

> or deprave morals with respect to sexual relations.[20]

The definition of lewd acts includes:

> [A]ny indecent conduct, intentionally done with *or in the presence of a child*, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.[21]

Based on this Court's recent opinion in *United States v. Tabor,* to be "in the presence of" requires the conjunction of both time and place.[22] In *Tabor*, the appellant encouraged a third party to masturbate while she was lying next to the victim who was unaware of the act.[23] This Court held that the appellant was provident to the presence requirement during his guilty plea to sexual abuse of a child because "it was unnecessary for [the victim] to be aware of the sex act [the appellant] directed [the third party] to commit in the child's presence."[24] This Court determined that "awareness" is not required in order to satisfy the presence under Article 120b(c).[25]

With regard to the presence requirement, in *Tabor*, this Court relied on "the first definition of 'presence' in Black's Law Dictionary—and all of the similar definitions in lay dictionaries—"[26] As such, the definition of "presence" is the "quality, state, or condition of being in a particular time and place, particularly with reference to some act that was done then and there . . .."[27]

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[20] R. at 106-07.

[21] 10 U.S.C. § 920b(h)(5)(D) (emphasis added).

[22] *United States v. Tabor*, 82 M.J. 637, 679 (N-M. Ct. Crim. App. 2022) (en banc).

[23] *Id*. at 643.

[24] *Id*.

[25] *Id*. at 656.

[26] *Id*. at 655 (overruling *United States v. Schmidt*, 80 M.J. 586 (N-M. Ct. Crim. App. 2020) and discarding awareness requirement for purposes of proving presence).

[27] *Id*. at 653.

1. Waiver

As an initial matter we disagree with the Government that Appellant's unconditional guilty plea waived any challenge to the factual issue of guilt. The Government maintains that Appellant's guilty plea relieved the United States of the burden of proving that he engaged in indecent conduct "in the presence of" the victim.[28] The Government correctly points out that R.C.M. 910(j) provides a "bright-line rule" that an unconditional guilty plea that "results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s)."[29] In support of its argument the Government cites *United States v. Ferguson* for the proposition that "[w]hen an accused pleads guilty, there is no requirement that the government establish the factual predicate for the plea."[30] We find *Ferguson* to be distinguishable . *The Ferguson* court found the appellant's plea provident and explained that the appellant could have challenged the case against him but instead admitted to both his conduct and his admissions objectively supported his plea its satisfaction of the charged element. In this case we find Appellant's plea improvident because his response during the plea inquiry raises a substantial question regarding the charged offense.

2. Appellant's Plea did not Establish that the Conduct was "In the Presence of" the Victim

With regard to the providence of Appellant's plea, the Government argues "no substantial basis in law or fact exists to question Appellant's guilty plea: nothing in the plain language of Article 120b(c) requires the lewd act occur simultaneously with the victim's ability to perceive it."[31] Further, the Government argues that making the video available to the victim for her to view at any time is "no different than the Appellant masturbating behind the victim, leaving it to the victim to enter the application (or turn around) whenever the victim is inclined to do so."[32] We disagree, and find that in order to be provident to the crime of sexual assault of a child by indecent conduct, an appellant must have committed the acts "in the presence of" the child as defined in *Tabor*. Presence can, of course, be "constructive" meaning via communication technology in order to accomplish both a spatial and temporal element. In that re-

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[28] *Ferguson*, 68 M.J. at 434.

[29] *United States v. Hardy*, 77 M.J. 438, 443 (C.A.A.F. 2018).

[30] *Ferguson*, 68 M.J. at 434 (citation omitted).

[31] Gov't Brief at 11.

[32] Gov't Brief at 13.

spect, we agree with the Government that communication technology can effectively remove the requirement that the perpetrator and victim occupy the same physical space. However, the medium of communication technology still requires temporal presence. In this case, the Government alleged and Appellant agreed that the act was done via communication technology which, in this case, satisfies physical presence. That said, the temporal "presence" requirement still remains—meaning despite communication technology being the mode, we still must determine whether the lewd act was done in the temporal presence of the victim.

Current case law requires the presence of both parties, at the same time—either physically or virtually—when the alleged conduct occurs. We find that this means without delay because presence requires both physical presence (which, as discussed, can and was satisfied by communication technology ("there") as well as temporal presence ("then"). It must still meet the temporal requirement—meaning it still must be at a particular time and place. Based upon the record, the conversation between Appellant and the victim occurred via communication technology but there was a temporal break when the video was recorded, uploaded to the application, and then sent. This is markedly different from communications that occur over "live-stream" applications and platforms which, based upon the circumstances of the case, could satisfy both the physical and temporal presence requirements. In this case, Appellant and the victim were not simultaneously communicating. Appellant's testimony during the providence inquiry was that the video uploaded to the Snapchat application required him to hit "send" to transmit the video to the victim. On the other end of the communication, we also note that although it appears the two were both accessing the application at approximately the same time, Appellant could not have known when the recipient would open or view that particular message or video. We agree with Appellant that this essentially amounted to a one-way communication where the parties take turns sending messages and because of the temporal break, it cannot be construed as "in the presence of" the other party. The bottom line is the record and facts do not support the conclusion that Appellant performed the lewd act (masturbation) in the presence of the victim.

The Government chose the language in the specification. Specifically, it read in part, "by engaging in indecent conduct, to wit: masturbating, intentionally done in the presence of M.B.." Had the Government charged the indecent conduct as the actual sending of the video to the victim, the analysis in this case may have been different. The specification alleges that he masturbated in "the presence" of the victim and based upon our review of the record and the law, he did not. We find that because Appellant recorded the video prior to sending it to the victim, it could not have met the "presence" requirement as alleged in the charge.

We agree with the Government's assertion that awareness is not an element of the crime but that is not pertinent to this set of facts. Appellant would have been provident to charge had he done this, for example, via "livestream" communication technology—whether the victim was aware it was happening or not. That is the holding of *Tabor* and in this case, while we are confident that the victim was likely "aware" of the lewd act, we simply are not convinced and do not find that the lewd act, of which she became eventually aware, was done in her presence.

Finally, the Government cites *United States v. Garcia* for the proposition that absent a substantial conflict between an appellant's pleas and the factual or legal circumstances supporting those pleas, appellate courts should not reverse a military judge's decision to accept a plea when the appellant admits to all the elements on the record.[33] The Government's reliance on *Garcia* is misplaced in this case, as we find, based upon the discussion above, that a substantial conflict did indeed exist between Appellant's pleas of guilty and the factual and legal circumstances surrounding his responses during the providence inquiry. As such, we find that military judge abused his discretion because there existed a substantial conflict between an appellant's pleas and the factual or legal circumstances supporting those pleas. We take action by dismissing Charge II in our decretal paragraph.

3. Sentence Reassessment as to the Remaining Charge and its Specifications

Because this Court has determined that the proper remedy is to dismiss Charge II and affirm the findings as to Charge I, we reassess the sentence Appellant received. We note that Appellant has not challenged his convictions for possession and distribution of child pornography.

Appellant's segmented sentence allows this Court to approve his adjudged confinement for the remaining offense. Under *United States v. Winckelmann*, this Court can therefore reassess and affirm the remaining portions of Appellant's sentence.[34] "[W]hen determining whether to reassess a sentence or order a rehearing," courts analyze "the totality of the circumstances presented" and the following factors:

> (1) Dramatic changes in the penalty landscape and exposure;
>
> (2) Whether an appellant chose sentencing by members or a military judge alone;

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[33] *See United States v. Garcia*, 44 M.J. 496, 498-99 (C.A.A.F. 1996).

[34] *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses;
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.[35]

In Appellant's case, all four *Winckelmann* factors favor reassessment. Appellant's punitive exposure of eight years' confinement for the remaining portion of his sentence does not change.[36] Second, Appellant pled guilty and elected sentencing by military judge.[37] With regard to the third *Winkelmann* factor, we find that the segmented sentence amounting to eight years confinement for the specifications in Charge I remains an appropriate and permissible punishment. Additionally, we find that the dismissal and imposition of forfeitures was also an appropriate and permissible punishment for the remaining specifications. Finally, we determine that, this Court is sufficiently familiar with cases of child pornography and can reliably determine what sentence would have been imposed at trial. The sentence is affirmed.

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[35] *Winckelmann*, 73 M.J. at 15-16.

[36] R. at 194.

[37] R. at 32, 35.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that error materially prejudicial to Appellant's substantial rights occurred.[38]

Charge II is **DISMISSED**. Charge I and its specifications, and the sentence as reassessed, are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[38] Articles 59 & 66, UCMJ.