UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN L. CONKLIN
United States Air Force

ACM 35217

30 December 2004

Sentence adjudged 30 April 2002 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Kyle R. Jacobson, Major Harold M. Vaught, and Major Andrea M. Gormel.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

The appellant was convicted, contrary to his pleas, of one specification of knowingly possessing child pornography, contrary to 18 U.S.C. § 2252A, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting alone, sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. On 28 June 2002, the convening authority approved the sentence as adjudged. On 23 July 2003, the convening authority remitted the bad-conduct discharge pursuant to a decision of the Air Force Clemency and Parole Board.

The appellant raises three allegations of error to this Court. He argues: (1) The military judge erred in denying the appellant's motion to suppress; (2) The appellant's conviction for receiving and possessing child pornography must be set aside because the government did not present proof beyond a reasonable doubt that the visual images on the appellant's computer were actual children; and (3) The evidence is legally and factually insufficient to establish that the offense occurred in the "special maritime and territorial jurisdiction of the United States."

Background

The appellant was a student in technical training at Keesler Air Force Base (AFB), Mississippi. During the period in question, he was in Phase IV of a five-phase training program, and resided in an airman's dormitory on base.

Staff Sergeant (SSgt) Christine Roy, a military training leader (MTL) at Keesler AFB, entered the appellant's dormitory room on 26 April 2001 to conduct a routine, random inspection. As part of this inspection, she looked inside the appellant's dresser drawers and found everything in order. When SSgt Roy closed the appellant's dresser drawer, the screen on the appellant's desktop computer powered on, displaying a background picture of the actress, Tiffani-Amber Thiessen, who was wearing a black fishnet top that exposed her breasts.

Keesler Air Force Base Instruction (KAFBI) 32-6003, *Dormitory Security and Living Standards for Non-Prior Service Airmen*, ¶ 4.2.3 (30 Aug 2003), prohibits the "open display of pictures, statues, or posters which display the nude or partially nude human body." Believing that the image on the computer screen was a violation of this instruction, SSgt Roy sought out the advice of Technical Sergeant (TSgt) Edward Schlegel, a more seasoned MTL. TSgt Schlegel came to the room and clicked the "Start" button on the appellant's computer, and then moved the cursor to "Documents," where he noticed about 12 to 15 JPEG (Joint Photographic Experts Group) files. He opened two or three of the files by double clicking on them and saw pictures of young nude females. TSgt Schlegel then went into the computer's C-drive and found a folder titled "porn." Upon opening this folder, he saw a folder titled "teen." TSgt Schelgel opened this folder, which happened to give him the location of other JPEG files. He then opened 6 to 8 of the JPEG files and each contained the image of a young nude female. TSgt Schlegel stopped his inspection, returned the computer to its original configuration, left the computer where it was, dead-bolted the appellant's room, and notified the Military Training Flight (MTF) commander (MTF/CC).

At his commander's direction, TSgt Schlegel notified the Air Force Office of Special Investigations (AFOSI), who assigned two special agents to investigate the case. The two agents met the appellant at the dining hall and asked for his consent to search his

room and his computer. The AFOSI agents did not tell the appellant what had previously occurred with TSgt Schlegel or the room inspection. The appellant consented to the search of his room and computer for evidence of child pornography. The AFOSI agents examined the contents of his computer and discovered a large number of files containing pornographic images of children. The appellant confessed to agents of the AFOSI that he had borrowed some compact discs containing adult and child pornography from a friend and copied the files from the compact discs onto his computer.

At trial, defense counsel moved to suppress the evidence taken from the appellant's computer. The government had the burden of proving that the evidence was obtained lawfully. Mil. R. Evid. 311(e). The government presented the testimony of SSgt Roy, TSgt Schlegel, and copies of regulations regarding the inspection. The government presented Air Education and Training Command Instruction (AETCI) 36-2216, *Technical Training Administration of Military Standards and Discipline Training* (2 May 2000), which discusses the standards for students in various phases of training with respect to inspections. This instruction provides that non-prior service airmen in Phase IV of training:

> 4.6.8. Will keep their rooms neat, orderly, and in accordance with their local base guidelines and airman handbooks at all times and will be subject to inspections on a random basis.

The government also presented KAFBI 32-6003, ¶ 2.1, which requires commanders, first sergeants, and MTLs to inspect facilities "to ensure standards of cleanliness, order, decor, safety, and security are maintained." The instruction further provides:

> 3.1.7. Material which, in the judgment of the squadron commander or MTF/CC, detracts from good order, discipline, morale, or loyalty of members is not allowed in dormitory rooms. Legal pornographic material is not prohibited if secured discretely inside a locked wall locker or locked closet.

The military judge also considered the 81st Training Group Pamphlet 36-2201, *Military Training* (5 Jul 1999) [hereinafter Training Pamphlet 36-2201], which set out the policies and procedures for managing the military and academic aspects of the training program for non-prior service airmen. In outlining the requirements for inspections, it states:

> • If unauthorized items are observed (in plain view) in an open locker, or anywhere in the dormitory room, i.e., alcohol, weapons, pyrotechnics, or unauthorized pornography (see Note below), these items will be

confiscated, brought to the attention of the Chief MTL/MTF Commander, and the appropriate action taken.

. . . .

- When inspecting drawers (dresser, nightstand, desk, etc.), MTLs will check for clutter. If there is a non-transparent plastic container in a drawer or anywhere in the dorm room with small items within, it will not be opened and searched unless the owner is present. If the container is transparent and unauthorized items can be observed by sight, . . . a security violation has occurred.

. . . .

NOTE: Authorized pornography is defined as any pornographic material legal for purchase in the state of Mississippi.

TSgt Schlegel testified about his involvement in the inspection of the appellant's dormitory room. He also explained that during inspections an MTL should make sure that airmen can follow directions and that there are no contraband items such as pornography that might detract from the good order and discipline of the dormitory. According to TSgt Schlegel, when he entered the room, the appellant's computer was "opened to the main windows menu, and the wallpaper was of a partially nude female." TSgt Schlegel further testified that he routinely thumbed through magazines and files he found in trainees' desks and nightstand drawers during his inspections. He indicated that this was the second time he had come across a computer in a trainee's room that was not password protected or shut down, and in the previous case he contacted AFOSI for advice. An agent from the AFOSI told him to treat the computer as if it were a desk drawer. As a result, TSgt Schlegel looked at some of the files in appellant's computer just as he would go through paper files in a trainee's desk drawer.

The military judge listened to SSgt Roy's and TSgt Schlegel's testimony, reviewed the applicable regulations, and entered findings of fact and conclusions of law. Specifically, the military judge found that:

> [U]nder this scenario, under this fact pattern, and this unique training environment, that this was a valid inspection and a valid search and seizure of Airman Conklin's computer. I also find that the consent later that Airman Conklin gave to searching his computer further in his room was voluntarily given--I haven't heard any evidence to the contrary--and, certainly, that the statement he gave was also voluntarily given. Since I found that this was a valid inspection under the law, in this particular case, I

> don't find that any fruit, if you will, of any alleged illegal tree, or poisonous tree, should be suppressed in this case as I don't find that it was illegal fruit to begin with.

Then 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

"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.*

> The threshold question in this case is whether the appellant had a reasonable expectation of privacy in the desktop computer in his dormitory room. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if the accused makes a timely objection and had a reasonable expectation of privacy in the person, place, or property searched. Mil. R. Evid. 311(a). 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)).

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. 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. *See generally O'Connor v. Ortega*, 480 U.S. 709 (1987).

> This case involves neither a private dwelling nor a government office. Here, the appellant shared his dormitory room with one other airman. It has generally been recognized that the armed forces' transition from open bays to semi-private rooms

affords recruits "a much greater expectation of privacy" than they had "in large bays holding large numbers of individuals and having no walls or barriers between bunks and lockers." *United States v. Thatcher*, 28 M.J. 20, 24 n.3 (C.M.A. 1989). Nonetheless, an occupant of a shared military dormitory room does not enjoy the same expectation of privacy as in a private home. *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"); *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981); *United States v. Middleton*, 10 M.J. 123, 128 (C.M.A. 1981); Rule for Courts-Martial (R.C.M.) 302(e)(2) (a "private dwelling" does not include living areas in military barracks, whether or not subdivided into individual units).

The appellant's computer was not in an office to which his fellow workers had an equal, unfettered right of access. The computer at issue was sitting on a dresser in government quarters that the appellant shared with only one roommate. For all practical purposes, the dormitory room was the appellant's home throughout his technical training at Keesler AFB. In the instant case, the appellant left his desktop computer powered on, displaying an image of a partially nude female in violation of dormitory regulations. While his room was not open to the general public, the appellant was well aware that inspectors regularly had access to his room. Clearly then, as to the image openly displayed as a background on the computer screen, the appellant had forfeited any expectation of privacy. However, we are not convinced that by displaying the image of a partially nude adult woman, the appellant had forfeited his expectation of privacy in the non-displayed contents of the computer. We find, under these circumstances, that the appellant had a reasonable expectation of privacy in the files stored in his personal desktop computer.

In view of that reasonable expectation of privacy, the question becomes whether there was any lawful basis for TSgt Schlegel to search or inspect the computer's files. The appellant's commander had the authority to order an inspection of all or any part of his unit. Mil. R. Evid. 313(b). Examinations conducted within the scope of a properly directed inspection are permissible despite any reasonable expectation of privacy which might otherwise exist in the area to be inspected. *United States v. Ellis*, 24 M.J. 370, 372 (C.M.A. 1987). "[I]nspections are necessary and legitimate exercises of command responsibility." *Thatcher*, 28 M.J. at 22. The question before us is whether TSgt Schlegel exceeded the scope of the inspection when he examined the contents of the appellant's computer. We conclude that he did.

The appellant's commander indicated the purpose of the dormitory inspection was to "ensure that standards of cleanliness, order, decor, safety, and security" were maintained. While the stated purposes for the inspections were quite broad, the instructions make it clear that the scope of the inspections were not unlimited. The MTLs were authorized to confiscate unauthorized items, if they were in "plain view." Additionally, MTLs were authorized to inspect the contents of drawers, and to look into

transparent containers within those drawers. Furthermore, the MTLs could look into non-transparent containers when the owner was present. *See* Training Pamphlet 36-2201. We note that the commander did not provide specific written guidance to the MTLs for inspecting personal computers in an airman's dormitory room.

Based on the available evidence, we find that the appellant's commander intended the inspections to be limited to the specific purposes of cleanliness, order, decor, safety, and security, and that the scope of the inspections be limited to reasonable measures to effectuate these purposes. As stated above, a key purpose for inspections is to assure "order," that is, determining that the trainees are complying with the rules and regulations. As noted earlier, the instruction specifically prohibits the open display of nude or partially nude human bodies. KAFBI 32-6003, ¶ 4.2.3. The appellant violated this prohibition by leaving his computer powered on and openly displaying an image of a partially nude woman. This breach gave TSgt Schlegel due cause to seize or secure the computer and to report the violation. However, the fact that the appellant had violated the "open display" prohibition did not logically form any basis to extend the inspection (or justify a search) into computer files that were not openly displayed. Under these circumstances, we conclude that TSgt Schelgel's perusal of the electronic files on the appellant's computer exceeded the authorized scope and purpose of the inspection.

Training Pamphlet 36-2201 directs MTLs to confiscate unauthorized items and bring them to the attention of the Chief MTL or the MTF Commander so that appropriate action could be taken. In this case, the MTLs did not confiscate the appellant's computer because of its size. After examining the contents of the appellant's computer, TSgt Schlegel secured the appellant's room and contacted his commander, who told him to contact the AFOSI. The AFOSI agents went to the dining hall and asked the appellant to step outside. After the two AFOSI agents introduced themselves, they obtained the appellant's written consent to search his computer and room without relaying any of the information they learned from the MTLs. Therefore, none of the evidence the appellant asserts is not within the scope of a "neat and orderly" inspection played a part in the appellant's decision to consent to the search of his computer.

Even if the AFOSI agents had told the appellant that the MTLs had already looked at some of the images in his computer, that fact alone would not have precluded the admissibility of the images as long as the appellant's consent to search the computer was voluntary. *See United States v. Murphy*, 39 M.J. 486 (C.M.A. 1994). In the case sub judice, the military judge found that the appellant voluntarily consented to the search of his room. We agree. The appellant was not in custody, was not evasive or uncooperative, and acknowledged that he had the legal right to refuse to give his consent. "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." *See* Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 3-359 (5th ed. 2003) (citing *United States v Bramble*, 103 F.3d 1475 (9th Cir. 1996)). Once the appellant gave

his consent to search his room and his computer, he waived any reasonable expectation of privacy he might have enjoyed. Thus, although we reach our conclusion by a different route than the military judge, we agree that the appellant was not entitled to have the evidence suppressed.

Legal and Factual Sufficiency of the Child Pornography Specification

The appellant was charged with knowingly possessing child pornography in violation of 18 U.S.C. § 2252A. Relying on *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the appellant asserts that his conviction should be set aside because the government failed to prove the appellant's guilt beyond a reasonable doubt. Specifically, the appellant avers that the government's evidence is insufficient to prove that the images were of actual children. We disagree.

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The United States Supreme Court issued *Free Speech Coalition* on 16 April 2002, which was four days before the appellant's trial. In *Free Speech Coalition*, the Supreme Court held that the definitions of child pornography in 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. The Supreme Court concluded that the First Amendment prohibits any prosecution under the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2251-2260, based upon "virtual" child pornography.

In the instant case, the military judge and the appellant were well aware of the Supreme Court's ruling in *Free Speech Coalition.* In fact, the appellant's trial defense counsel asked the military judge to make special findings as to whether each of the photographs depicted a natural child, whether the child was under the age of 18, and whether the photographs constituted child pornography. In making her special findings, the military judge stated she did not consider the two prongs of the CPPA that the Supreme Court found unconstitutionally vague and overbroad. After hearing the testimony of an AFOSI special agent and a pediatrician, and after reviewing a statement by the appellant stating that he knew that some of the pictures were of underage females, and then viewing the photographs herself, the military judge concluded that some of the images found on the appellant's computer constituted child pornography in violation of the CPPA. The military judge stated, "19 photographs depict real children and were not produced by computer imaging." Having viewed the photographs, we agree that some of

the photographs are visual depictions of actual minors engaging in sexually explicit conduct. Therefore, we hold that the appellant's conviction on the child pornography specification is legally and factually sufficient.

Territorial Jurisdiction

The MTLs encountered the appellant's computer in his dormitory room located on Keesler AFB, Mississippi. Therefore, we find that the appellant's assertion that there was no evidence that the appellant's conduct was within the special maritime and territorial jurisdiction of the United States is without merit. *See United States v. Bartole*, 16 M.J. 534, 535 (A.C.M.R. 1983), *aff'd*, 21 M.J. 234 (C.M.A. 1986).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner