UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JASON A. RADER
United States Air Force

ACM 36133

20 June 2006

Sentence adjudged 17 August 2004 by GCM convened at Hill Air Force Base, Utah. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, in accordance with his conditional pleas, of three computer-related pornography offenses. Specifically, the appellant was convicted of one specification each of knowingly receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2); knowingly using an interactive computer service for carriage of obscene material, in violation of 18 U.S.C. § 1462; and conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces by knowingly receiving depictions of minors engaging in sexually explicit conduct. All three specifications were charged under Article 134, UCMJ, 10 U.S.C. § 934.

The appellant's conditional guilty plea preserved the following issue for appeal:

> WHETHER THE MILITARY JUDGE CORRECTLY RULED THAT ALL EVIDENCE OBTAINED FROM [THE] SEARCH AND SEIZURE OF THE [APPELLANT'S] COMPUTER ON 30 SEPTEMBER 2003 IS ADMISSIBLE PURSUANT TO THE 4TH AMENDMENT OF THE CONSTITUTION AND [MIL. R. EVID.] 314.

The appellant's pleas were provident, and were accepted by the military judge. After finding the appellant guilty on all three specifications, the military judge agreed to treat Specifications 1 and 3 as one offense for the purpose of determining an appropriate sentence. The military judge sentenced the appellant to a bad-conduct discharge, confinement for nine months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant before us has renewed his objection to the computer evidence seized by the government, contending that his off-base roommate, in whose bedroom the appellant's computer was stored, did not have authority to give law enforcement officials access to the computer's contents. We find no error and affirm.

The appellant testified at trial that he allowed his roommate access to the computer only to perform routine maintenance of its hardware and software, and occasionally to play games, and that he never gave his roommate permission to access his computer files unless he, the appellant, was present. The roommate, on the other hand, testified that there was no such restriction. The military judge found that the appellant "did nothing" to communicate the purported restriction to anyone, and concluded that the appellant had neither a subjective nor an objective expectation of privacy as to the computer's contents. He therefore denied the appellant's motion to suppress.

We review the military judge's ruling on a suppression motion for an abuse of discretion. *United States v. Richter*, 51 M.J. 213, 220 (C.A.A.F. 1999). We accept his findings of fact, unless they are clearly erroneous or are unsupported by the record. *Id.* We review the military judge's conclusions of law de novo, reversing when they are influenced by an erroneous view of the law. *Id.* (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)).

The military judge's rulings were well-grounded in the facts developed on the record and were in accord with existing law. The government presented testimony by the appellant's roommate and a special agent with the Air Force Office of Special Investigations (AFOSI) concerning a pretext telephone call placed by the roommate from the AFOSI office on base. During the call, the appellant's roommate told the appellant he had been looking at the appellant's files. The appellant expressed neither surprise that his roommate was looking at the files, nor dismay over his roommate's disregard for the

purported restriction on access to them. Like the military judge, we conclude that the roommate's version of events was truthful, and the restriction testified to by the appellant never existed.

Because the appellant's roommate had unrestricted access to the files on the appellant's computer, he exercised "control over such property" as to render his consent to search valid under Mil. R. Evid. 314(e). The roommate's authority was analogous to the roommate in *United States v. Matlock*, 415 U.S. 164 (1974), and in the absence of a countervailing command from the appellant, the AFOSI agents were entitled to search the appellant's computer files with the roommate's consent. *See* Mil. R. Evid. 314. *See also Georgia v. Randolph*, 126 S.Ct. 1515, 1527-28 (2006).

The appellant further contends that Specification 1, alleging a violation of Title 18, is multiplicious for findings with Specification 3, which alleges receipt of depictions of minors engaging in sexually explicit conduct. In the alternative, the appellant asserts that those specifications represent an unreasonable multiplication of charges. We disagree. Each specification involves different elements and are therefore not multiplicious and we see no evidence of prosecutorial overreach.[*]T *See United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001). *See also United States v. Teters*, 37 M.J. 370, 376-77 (C.M.A. 1993). We further find that the appellant waived his multiplicity claims by failing to raise them at trial or preserve them in his conditional plea. *See* Rule for Courts-Martial 907(b)(3)(B) and 910(a)(2) and (j); *See also United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997). We therefore resolve these assignments of error adversely to the appellant.

The 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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[*] Specification 1, which alleges a violation of Title 18, is focused on the protection of minors, whereas Specification 3 concerns itself with the preservation of military discipline and the reputation of the armed forces. We see no abuse of the prosecutor's discretion in bringing charges that seek separately to vindicate both of these societal interests. *See United States v. Albrecht*, 43 M.J. 65, 67 (C.A.A.F. 1995).