

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Senior Airman OLEG V. VARNIYCHUK  
United States Air Force

ACM 37490

19 March 2010

Sentence adjudged 16 April 2009 by GCM convened at Aviano Air Base, Italy. Military Judge: William E. Orr, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 26 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of wrongfully and knowingly possessing visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a bad-conduct discharge, confinement for 26 months, and reduction to E-1.<sup>1</sup>

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<sup>1</sup> The adjudged sentence consisted of a bad-conduct discharge, confinement for two years and six months, and reduction to E-1. In addition to reducing the period of confinement, the convening authority also deferred the mandatory forfeitures until the date of Action and waived the mandatory forfeitures for a period of six months, expiration of term of service, or release from confinement, whichever is sooner.

The issue on appeal is whether the military judge abused his discretion when he denied the defense request for a forensic psychologist. Finding no error, we affirm.

### *Background*

Between 15 July 2007 and 12 August 2007, while the appellant was on temporary duty to Korea, he downloaded child pornography through a program called LimeWire, a peer-to-peer file sharing network. All of the downloaded child pornography using LimeWire was saved to a LimeWire folder on his personal computer. The appellant admitted during the providency of his plea that he specifically remembers downloading two videos containing child pornography, one on his Dell computer which he sold to a co-worker, and the other one on his Compaq computer, which he purchased after selling the Dell computer.

### *Motion to Compel*

#### *A. Facts*

On 2 April 2009, the appellant, through counsel, requested that the convening authority appoint a confidential expert consultant in the field of forensic psychology. The appellant provided the following reasons for the appointment of the expert forensic psychologist: (1) to “understand the complex dynamic of the individual’s psychological development in order to put forth the appropriate evidence in findings and, should this matter proceed to sentencing, in extenuation and mitigation;” (2) to assist the defense counsel in understanding the implications of the presence of large amounts of bestiality and other types of pornography on the appellant’s computers, primarily for sentencing; and (3) because it had recently come to the attention of the defense that there may be some history of abuse impacting the psychological makeup of the appellant. On 6 April 2009, the convening authority denied this request.

On 8 April 2009, shortly before trial, the trial defense counsel filed a motion to compel the appointment of an expert consultant in the field of forensic psychology. The trial defense counsel provided two reasons for the expert’s assistance. The first reason was that the government had given notice of intent to introduce search terms the appellant used to locate pornography, as well as to introduce various types of pornographic images found on the appellant’s computers, to include images of the appellant’s wife and bestiality. Therefore, the trial defense counsel asserted that he needed the assistance of a forensic psychologist to “fully understand the meaning of this type of evidence in order to counter the [g]overnment’s proffer of the evidence and to combat it should it be admitted into evidence.” The second reason was that due to new information that the appellant may have been abused in the past, the trial defense counsel needed the expert’s assistance to understand his psychological makeup to properly defend him. The government

opposed the motion averring that the defense had failed to show necessity for the appointment of an expert consultant.

At trial, the military judge denied the motion to compel. In his ruling, the military judge stated:

The [d]efense has primarily based their request . . . on the possibility that the accused may have been . . . abused in the past and the [g]overnment's evidence of bestiality or other pornography. Given the fact that the [c]onvening [a]uthority has withdraw[n] [S]pecification 2 of the Charge<sup>2</sup> and the defense states that the accused intends to plead guilty to the remaining specification, the request for assistance would only relate to the sentencing portion of the trial. While such expert assistance may be relevant to the defense case, the defense has not provided [an] explanation as to why it is necessary to prevent a fundamentally unfair trial.

At trial, the government did not retain the services of an expert forensic psychologist for the prosecution of its case. Additionally, the appellant presented no evidence of any history of sexual abuse during his trial.

#### *B. Law*

“‘[S]ervicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense.’ The mere possibility of assistance is not sufficient to prevail on the request. Instead, the accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. To establish the first prong, the accused ‘must show (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.’ We review the military judge’s decision for an abuse of discretion.” *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (alteration in original) (internal citations omitted).

#### *C. Discussion*

After reviewing the Record of Trial, we concur with the military judge that even if the requested expert could have aided the defense in developing relevant evidence, the denial of the expert did not result in a fundamentally unfair trial. Since the appellant pled guilty, the expert would have only been able to assist the defense in its sentencing case.

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<sup>2</sup> The appellant was initially charged with a second specification of wrongfully and knowingly possessing visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

Additionally, the government's sentencing case primarily focused on the testimony of a computer forensics expert concerning videos found on the appellant's computers that were outside the appellant's guilty plea.<sup>3</sup> During the providency of his plea, the appellant stated that on several occasions he saw what appeared to be child pornography beginning to download on his computer, which he then generally deleted. In sentencing, the government's computer forensic expert testified that he found approximately 29 videos containing child pornography on the appellant's Dell computer, and 4 videos on his Compaq hard drive. In a lengthy cross-examination, the trial defense counsel was able to show that most of these files were only previewed by the appellant while they were being downloaded, but were not completely downloaded and saved by the appellant. The expert also testified about the search terms he found on the appellant's computers that the appellant used to find child pornography on the Internet. Most of the search terms were self-evident and did not require expert assistance. An expert forensic psychologist was neither necessary to assist the defense in refuting the testimony of the government's expert in computer forensics, nor was an expert forensic psychologist necessary to explain the meaning of the search terms used by the appellant to locate child pornography on the Internet.

Finally, the appellant avers on appeal that the military judge erred when he admitted a six-page Senate Report on the Child Pornography Prevention Act of 1995 without addressing the appellant's renewed motion to compel production of the expert forensic psychologist. In admitting the document, the military judge stated:

I have had an opportunity to review the document. I had seen it before previously as an appellate judge, so I've seen this and read through it before. I am confident that I can put it in a proper context and having reviewed it and glancing through it again today, I will say under [Mil. R. Evid.] 403 that the probative value is not outweighed by the danger of unfair prejudice and I'm going to admit that document as is and I am still going to deny the defense motion to reconsider the motion to compel.

As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). In this case, we are confident the military judge properly considered the Senate Report.

After having fully examined the entire Record of Trial, the appellant has failed to show how the denial of an expert in the area of forensic psychology resulted in a fundamentally unfair trial. Accordingly, the military judge did not abuse his discretion.

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<sup>3</sup> The defense was provided an expert consultant in the area of computer forensics.

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

AFFIRMED.

OFFICIAL



  
CHRISTINA E. PARSONS, TSgt, USAF  
Deputy, Clerk of the Court