IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,
Appellee

v.

Colonel (O-6)
Robert J. Rice,
United States Army,
Appellant

APPELLANT'S BRIEF ON REMAND

Docket No. ARMY 20160695

Tried at Fort McNair, District of Columbia, on 6 October 2015 and 5 January, 25 August, and 24 October 2016, before a general court-martial appointed by the Commander, Headquarters, Fort Bragg, Lieutenant Colonel Tyesha Smith and Colonel Andrew Glass, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Remanded Issue

WHETHER APPELLANT'S FEDERAL DISTRICT COURT CONVICTION FOR POSSESSING CHILD PORNOGRAPHY IS A LESSER INCLUDED OFFENSE OF THE DISTRIBUTION SPECIFICATION IN HIS COURT-MARTIAL CASE.

Statement of the Case

On 6 October 2015 and 5 January, 25 August, and 24 October 2016, at Fort McNair, District of Columbia, a military judge sitting as a general court-martial convicted appellant, COL Richard J. Rice, pursuant to his conditional pleas, (R. at 99-101, 113), of two specifications of possessing child pornography and one specification of distributing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2006) [hereinafter UCMJ].

Panel No. 4

(R. at 193). The military judge sentenced appellant to five years' confinement and dismissal from the service. (R. at 328). Pursuant to a pretrial agreement, the convening authority approved the dismissal and four years' confinement. (Action).

This Court affirmed the findings and sentence on 28 November 2018, and again affirmed after reconsideration on 18 December 2018, finding with respect to two specifications, and assuming without deciding with respect to a third, that appellant's court-martial convictions on charges overlapping with an earlier federal civilian trial had violated the prohibition against double jeopardy, but that the violation had been cured by remedial action in appellant's civilian case. *United States v. Rice*, 78 M.J. 649 (Army Ct. Crim. App. 2018).

Appellant petitioned the U.S. Court of Appeals for the Armed Forces (CAAF), which granted his petition on 1 May 2019. On 21 May 2020, the CAAF ruled that the protection against successive prosecutions required dismissal of the later-in-time court-martial charges. *United States v. Rice*, 80 M.J. 36 (C.A.A.F. 2020). The court above dismissed appellant's possession convictions and remanded the case to this Court for "further review under Article 66, UCMJ, 10 U.S.C. § 866, and specific consideration and resolution of the question of whether the federal district court conviction for possessing child pornography is or is not a lesser included offense of the [court-martial] distribution specification." *Id*. at 46.

Statement of Facts

The United States government simultaneously pursued criminal charges against appellant in two court systems. On 17 September 2015, a convening authority referred charges, and appellant was arraigned on 6 October 2015. (R. at 1-9). The specification remaining before this Court was originally specification 2 of Charge II:

> In that Colonel Robert J. Rice, U.S. Army, did, at or near Carlisle Barracks, Pennsylvania, on divers occasions between on or about 30 November 2010 and on or about 6 December 2010 knowingly and wrongfully distribute 19 images of child pornography, as defined in 18 U.S.C. Section 2256, on a HP Pavilion Laptop computer, such conduct being of a nature to bring discredit upon the armed forces.

(Charge sheet).

While the military charges were pending, the U.S. District Court for the Middle District of Pennsylvania empaneled a jury on 2 May 2016, and on 6 May 2016, appellant was found guilty of two counts:

> (Count One) "knowing possession of child pornography transported in interstate or foreign commerce, from on or about August 2010[1] to January 29, 2013," and
>
> (Count Two) "knowing receipt or distribution of child pornography transported in interstate or foreign commerce, from on or about January 23, 2013 to January 29, 2013."

[1] The day of the month was specified only for the end of the period.

(App. Ex. XXIII, Encl. 1).

On 20 June 2016, at the court-martial, appellant's counsel moved for dismissal of the three pornography specifications, because all the charged conduct fell within the date range covered by appellant's conviction on Count One in federal district court. (App. Ex. XXII).

The military judge denied appellant's motion, despite acknowledging that "[a] finding of guilty for a lesser included offense constitutes an acquittal of the greater offense and precludes trial on the greater offense," (App. Ex. XXXII), because he mistakenly believed that "the images alleged in specification II of Charge II [distribution in 2010] are [not] the same as those that were the subject of Count I in the federal trial," (App. Ex. XXXII, page 3).[2] In fact, the record shows that when appellant pleaded not guilty in the civilian trial, the civilian prosecutors admitted every scrap of available evidence in their effort to prove appellant was the person using the devices and the computer accounts in question. (App. Ex. XXXI).

Government appellate counsel and this court have noted this critical fact:

> the government admirably conceded that evidence of both appellant's laptop, and his external hard drive—which was also referred to as a "Seagate" and "Rocketfish" hard drive—was offered at his trial before the District Court.

---

[2] This artifice of dividing the possessed and distributed images between the military and civilian prosecution would not have survived appellate review in light of the CAAF's subsequent decision in *United States v. Forrester*, 76 M.J. 389, 396-97 (C.A.A.F. 2017), at least with regard to possession.

Rice, 78 M.J. at 654 n.6. In other words, the same images from the same devices in appellant's possession on the same dates formed the entire factual proffer supporting both the civilian possession conviction and the military distribution conviction.

After the military judge denied appellant's motion to dismiss, appellant pleaded guilty subject to the condition that he preserved the right to appeal the issue of double jeopardy as stated in his motion. (R. at 99-101, 181).

Following appellant's conviction and same-day sentencing in the court-martial, appellant's counsel in federal district court filed a "Motion to Dismiss Count One or Otherwise to Bar Sentencing on Count One for Violation of Double Jeopardy." (Def. App. Ex. A). On 22 November 2016, the court granted that motion, which was not opposed by counsel for the United States in that court. (Def. App. Ex. A). For the remaining count, appellant was sentenced to 142 months' imprisonment. (Def. App. Ex. B).

In appealing the military case, appellant raised his claim of double jeopardy, but this Court affirmed the findings and sentence on 28 November 2018, finding that a double jeopardy violation had occurred, but that it had been cured by the federal district court's dismissal of the earlier-in-time possession count. 78 M.J. at 656. Appellant moved for reconsideration on the grounds that the decision had not addressed appellant's argument that the possession conviction in federal district

court precluded his subsequent prosecution at a court-martial for the greater offense of having distributed the same material during that time. On the same day appellant moved for reconsideration, this Court granted its own motion for reconsideration. The Court denied the defense motion, but stated it would consider appellant's reasons for requesting reconsideration in the course of its own reconsideration.

On 18 December 2018, this Court on reconsideration again affirmed the findings and sentence without deciding whether the federal district court conviction for possession was a lesser included offense of the court-martial distribution specification:

> We need not, however, decide this question in appellant's case. Even assuming appellant's District Court conviction for possession was a lesser-included offense of his court-martial conviction for distribution, appellant received his remedy when the possession count of his District Court indictment was dismissed on appellant's motion.

Rice, 78 M.J. at 655 n.10.

Appellant petitioned the U.S. Court of Appeals for the Armed Forces, which ruled that the double jeopardy protection against successive prosecution required dismissal of the later in time charges. *Rice*, 80 M.J. 36. The court above dismissed appellant's possession convictions and remanded the case to this Court to employ its Article 66 fact-finding powers to determine whether the federal district court

conviction for possessing child pornography was a lesser included offense of the court-martial distribution specification. *Id*. at 46

Standard of Review

Whether one offense is a lesser included offense of another offense is a question of law. *United States v. Gonzalez*, 70 M.J. 480, 483 (C.A.A.F. 2019). When an appellant has preserved an issue by objecting at trial, appellate courts review the matter de novo. *Id*.

Summary of Argument

The court above remanded the question of whether appellant's federal district court conviction for possessing child pornography was a lesser included offense of the enumerated Article 134 distribution specification tried at his later court-martial. It is certainly true, as this court and others have noted, that possession is not *always* a lesser-included offense of distribution—and that it is possible to distribute contraband without possessing it. The critical point here, however, is that the government's case against appellant collapsed any such distinction, proving distribution *by* proving possession. On the facts presented here, the federal district court possession charge is, legally and factually, a lesser included offense of the distribution specification, and so the distribution specification should also be dismissed in light of the CAAF's holdings.

Law and Argument

A. Possession of contraband material may be a lesser included offense of its distribution.

Although possession and distribution of the same contraband material can sometimes be charged and punished as separate offenses, possessing a certain material is often legally and factually a lesser included offense of having distributed it. Such is the case here. An accused may be convicted of possession in lieu of the more serious charge of distribution because of a failure of proof, a pretrial agreement to plead guilty to the lesser offense, or a government decision ab initio not to take on the greater burden of proving that a distribution actually occurred.

In the *Manual for Courts-Martial* (2012 ed.) [*MCM*], pt. IV, ¶ 68b.d(3)(b), the President opined that possession of child pornography is a lesser included offense of its distribution.[3] This guidance is consistent with military precedents that interpreted Article 79, UCMJ, 10 U.S.C. § 879 (2012), which authorized a court-martial to find the accused "guilty of an offense necessarily included in the

[3] The 2019 *MCM* includes, at Appendix 12A, a list of lesser included offenses "so designated" by the President in Executive Order 13825 (1 March 2018), under the authority of an amendment of Article 79 by the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5402 (2016), which purports to give statutory authority to the executive interpretation of what offenses are necessarily included in a charged offense. As in past Manuals since child pornography offenses were enumerated, the 2019 *MCM* opines that possessing child pornography is a lesser included offense of distributing child pornography.

offense charged." *See, e.g.*, *United States v. Zubko*, 18 M.J. 378, 385-86 (C.M.A. 1984); *United States v. Wilson*, 45 M.J. 512, 513 (Army Ct. Crim. App. 1996). The same standard of an offense being a lesser included offense of another if it is "necessarily included" in the other offense also applies in federal civilian trials. Fed. R. Crim. App. 31(c).

Although the CAAF has held that the *MCM*'s listing of lesser included offenses is not controlling, *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010), the *MCM* on this point reflected military precedents that possessing contraband material can be a lesser included offense of distribution if warranted by the evidence.

Whether a court may impose multiple convictions and punishments for the same act or course of conduct is guided by the "separate elements" test in *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). Military and civilian courts have held that whether elements align should not depend on artificial distinctions or slight variations of terminology. In *United States v. Alfisi*, 308 F.3d 144 (2d Cir. 2002), for example, the Second Circuit did not find that an element barring corrupt payment to an official differed from an element barring a quid pro quo payment in exchange for an official act: "Were we to define a lesser included offense as proposed by the dissent, therefore, a defendant such as Alfisi could be charged and convicted of

both bribery and paying an unlawful gratuity as separate offenses not subject to the bar against cumulative punishments for convictions on the same offense." *Id*. at 152 n.6.

At the conceptual level, courts differ on whether the power to distribute *necessarily* constitutes the power and dominion of "possession" because inventive people have created ways to distribute materials while minimizing conventional indicia of possession. Evidence establishing distribution, however, will tend to show that the accused had some degree of access and control over the material, and therefore must have physically or constructively possessed it. The fact that distribution may sometimes be accomplished without possession in any traditional sense does not preclude possession as a possible legal and factual lesser included offense of distribution:

> Juries must be instructed as to lesser-included offenses either when one simply cannot commit the greater crime without committing the lesser or when the evidence is such as to permit a finding that the lesser, but not the greater, offense had been committed. When the greater crime can be committed without committing the lesser *and when the evidence would support a conviction for the former but not the latter*, the lesser-included offense should not go to the jury.

Alfisi, 308 F.3d at 153 (citation omitted; emphasis added).

Similarly, the strict nesting-dolls image sometimes read into *Blockburger* is not accurate, in that a lesser offense may be "included" in a greater offense even though not every imaginable lesser offense would nest within the greater offense:

"The fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011) (quoting *United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2004)).

B. *This* possession offense is a lesser included offense of *this* distribution.

The court above remanded this case precisely because possession *can* be a lesser included offense of distribution, and "answering the LIO question in the context of possession and distribution depends upon a fact-bound inquiry." *Rice*, 80 M.J. at 44. According to precedent, an offense is a lesser included offense if it is legally and factually contained within another. In the present case, appellant was charged at his court-martial with distributing certain images on "divers occasions between on or about 30 November 2010 and on or about 6 December 2010." (Charge sheet). The parties concur on appeal that the record shows that the distributed images were on appellant's personal electronic devices, and distributed from appellant's computer to others, as proved by the prosecution in his federal district court trial for possession of "child pornography transported in interstate or foreign commerce, from on or about August 2010 to January 29, 2013." (App. Ex. XXIII, Encl. 1; App. Ex. XXXI). Thus, the distribution specification in appellant's court-martial was based entirely on contraband that the civilian court had *already* convicted him of possessing.

The court above—having held that the jurisdictional element in the civilian offense does not make the possession offense legally distinct—resolved the legal component of this analysis. As for the factual inquiry, the intrinsic relationship between the two offenses is established by the record, and presents none of the complexity seen in cases where the method of distribution allowed quibbling about whether the distributor himself possessed the material. Put another way, there can be hard cases about whether a possession offense was *factually* a lesser-included offense of a distribution offense, but the way the government proved the charges here makes this case an easy one.

Faced with a fact pattern similar to this case, the U.S. Air Force Court of Criminal Appeals held that the Double Jeopardy Clause was implicated because

> the evidence at trial clearly indicated that the files the appellant was convicted of possessing were included within the files the appellant was convicted of receiving, and the files he was convicted of distributing were a subset of the same files he was convicted of possessing.

United States v. Williams, 74 M.J. 572, 575 (A.F. Ct. Crim. App. 2014).[4] In this case, as in *Williams*, the distributed images were a subset of those possessed by

[4] The *Williams* court distinguished *United States v. Craig*, 68 M.J. 399 (C.A.A.F. 2010), noting that *Craig* had been a plain-error case in which the "facially duplicative" standard had not been satisfied. The unwary reader of military cases on double jeopardy could be led astray by such false-cognate cases. Possession beyond that necessary to accomplish distribution is not "facially duplicative." *See, e.g.*, *United States v. Madigan*, 54 M.J. 518, 520-21 (N.M. Ct. Crim. App. 2000). That standard, however, does not apply in this case because the issue was preserved at trial.

appellant. That is therefore the end of the matter insofar as the question the CAAF remanded to this court.

C. The court above specified the remedy to be applied.

The protection against successive prosecutions necessarily includes greater or lesser offenses of those already prosecuted. *Brown v. Ohio*, 432 U.S. 161 (1977). "If the ACCA determines that [the federal district court count of possession] is a lesser included offense, it *shall* dismiss the remaining charge and specification." *Rice*, 80 M.J. at 46 (emphasis added).

Conclusion

WHEREFORE, the appellant requests that this honorable court dismiss the charge and specification.

CHRISTOPHER DANIEL CARRIER
LTC, JA
Appellate Defense Counsel
Defense Appellate Division

STEPHEN I. VLADECK
Civilian Defense Counsel
727 East Dean Keeton Street
Austin, Texas 78705
(512) 475-9198
SVladeck@law.utexas.edu

ZACHARY GRAY
CPT, JA
Appellate Defense Counsel
Defense Appellate Division

CATHERINE GODFREY
CPT, JA
Appellate Defense Counsel
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 7 August 2020.

ZACHARY A. GRAY
CPT, JA
Appellate Defense Counsel
Defense Appellate Division