UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Lieutenant Colonel DANIEL R. BACKHUS
United States Air Force

ACM 38134

26 November 2013

Sentence adjudged 27 March 2012 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Terry O'Brien (sitting alone).

Approved Sentence: Dismissal and confinement for 2 months.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Brent N. Jones; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, SARAGOSA, and MARKSTEINER
Appellate Military Judges

PER CURIAM:

The appellant was tried by a military judge sitting alone at a general court-martial. In accordance with his pleas, he was found guilty of one charge and one specification of wrongfully possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence was a dismissal and confinement for 6 months. However, pursuant to the terms of a pretrial agreement, only so much of the sentence that provided for a dismissal and confinement for 2 months was approved by the convening authority.

On appeal, the appellant asserts: 1) The approved sentence is inappropriately severe; and 2) The record of trial is incomplete because the attachment to Prosecution Exhibit 1 is blank.

Sentence Severity

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We must consider the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial in order to assess sentence appropriateness. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

This Court has carefully examined the submissions of counsel, the entire record of trial, the character of the appellant, the appellant's military record, the nature and seriousness of the offense, and taken into account all the facts and circumstances surrounding the offense of which he was found guilty. We have specifically considered the fact that the child pornography images were first acquired when the appellant was in a retired status and collecting retired pay. We have considered the length of time the appellant maintained or possessed these images prior to deleting them. We have considered the number of images containing child pornography, the nature of the explicitly sexual conduct depicted, and the fact that 23 of the images depicted known child victims identified by the National Center for Missing and Exploited Children. We also considered the sentencing expectations of the parties as set forth in the pretrial agreement and the financial impact on the appellant as a result of the dismissal. Finally, we have considered the appellant's appellate submissions including examples of other courts-martial involving child pornography that did not result in a punitive discharge. After consideration of all of these factors, we do not find that the appellant's sentence is inappropriately severe.

Record of Trial

A complete record of the proceedings must be prepared for any general court-martial resulting in a dismissal. Article 54(c)(1)(A), UCMJ, 10 U.S.C. § 854(c)(1)(A). This Court must review the complete record in order to perform its review of the findings and sentence. Article 66, UCMJ, 10 U.S.C. § 866. A complete record of trial must include the exhibits that were received in evidence and any appellate exhibits. Rule for Courts-Martial 1103(b)(2)(D). A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). We review the issue of whether a record of trial is complete de novo. *Id.* at 110.

In the instant case, the appellant asserts the attachment to Prosecution Exhibit 1 (a CD ROM containing the digital images of minors engaging in sexually explicit conduct seized from the appellant's laptop computers) is blank and unavailable for appellate review. As such, he argues the record of trial is incomplete.

During review of the record of trial, this Court accessed the CD ROM and was able to view its content. The CD ROM was not blank, but in fact contained images consistent with those described in Prosecution Exhibit 1, the Stipulation of Fact. Therefore, this Court was able to review the entire record of trial, including the images, and have appropriately performed our review pursuant to Article 66(c), UCMJ.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court