UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ROBERT A. BAXTER
United States Air Force

ACM 37973

29 January 2013

Sentence adjudged 23 May 2011 by GCM convened at Joint Base Charleston, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant in accordance with his plea of divers possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and a reduction to E-1. On appeal, the appellant argues that the military judge erred by judicially noticing a Senate Report as a fact and then admitting it as aggravating evidence. Finding no prejudice to a substantial right of the appellant, we affirm.

Background

On or about 18 June 2010, Senior Airman JM, while looking for pictures on the appellant's computer, discovered what he believed to be pictures of minors engaged in sexually explicit conduct. Subsequently, the Air Force Office of Special Investigation executed a search authorization and discovered that the appellant's computer contained 10 child pornography images. Seven additional images were in the Volume Shadow Service, meaning they had been deleted.

As part of its sentencing case, the Government asked the military judge to take judicial notice, pursuant to Mil. R. Evid. 201A(a), of portions of a report prepared by the Senate Judiciary Committee in conjunction with the proposed Child Pornography Prevention Act of 1995, later modified and enacted into law as the Child Pornography Prevention Act of 1996. *See* S. REP. NO. 104-358 (1996). The Government argued the Senate Report should be judicially noticed as "domestic law" and that it was substantively admissible as aggravation evidence based on this Court's decision in *United States v. Anderson*, 60 M.J. 548, 555 (A.F. Ct. Crim. App. 2004).

The appellant's trial defense counsel objected to the military judge considering the Senate Report arguing that it was largely political rhetoric and not proper for judicial notice under Mil. R. Evid. 201 or 201A. Additionally, trial defense counsel argued that the Senate Report was not proper aggravation evidence under Rule for Courts-Martial 1001(b)(4). In her findings of fact and conclusions of law, the military judge admitted six paragraphs from the "Findings" portion of the report. She stated, in part: "In arriving at that conclusion, I looked at [Mil. R. Evid.] 201 and 201A and [Drafters' Analysis, *Manual for Courts-Martial, United States*, A22-4 (2008 ed.)] and I find it to be part of the legislative facts; those which have relevance to legal reasoning in lawmaking process as you find in the appendix."

Judicial Notice of the Committee Report

We will review a military judge's decision whether to take judicial notice for an abuse of discretion. *See United States v. Moore*, 55 M.J. 772, 781 (N.M. Ct. Crim. App. 2001); *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 424 (2d Cir. 2008); *Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010); *Person v. Miller*, 854 F.2d 656, 660 (4th Cir. 1988). "[T]hat discretion is abused when evidence is admitted based upon an erroneous view of the law." *United States v. Holt*, 58 M.J. 227, 231 (C.A.A.F. 2003). We find that the military judge abused her discretion by using judicial notice to admit the Senate Report excerpt into evidence in sentencing. The report in and of itself did not contain facts or law on which the military judge should rely. Rather, it was a report done in conjunction with a statute which was never enacted into law. As such, the military judge abused her discretion by considering the Senate Report as a prosecution exhibit.

Having determined that the military judge erred in judicially noticing and admitting the Senate Report, we must assess prejudice. We test the erroneous admission of sentencing evidence by assessing whether the error "substantially influenced the adjudged sentence. . . . If so, the result is material prejudice to [the a]ppellant's substantial rights." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citations omitted).

We find the erroneous admission of the Senate Report did not have a substantial influence on the sentence received by the appellant in this judge alone trial. We are confident that the military judge's sentence would not have been different if the Senate Report had not been admitted as a prosecution exhibit in sentencing. The egregious nature of the child pornography, together with the appellant's knowing and intentional possession of images of minors engaged in grotesque sexual acts, served as the substantial basis for the appellant's sentence. The appellant knowingly and intentionally downloaded child pornography while searching for digital images on Internet websites. The appellant initially viewed the pictures in thumbnail form and, after confirming the images constituted child pornography, downloaded the images to his computer to view and store. Having considered the character of the appellant, the nature and seriousness of his offenses and the entire record of trial, we find his sentence appropriate. *United States v. Baier*, 60 M.J. 382, 384-385 (C.A.A.F. 2005).

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

LAQUITTA J. SMITH
Appellate Paralegal Specialist