UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DEWEY K. CLAWSON
United States Air Force

ACM 37723

20 February 2013

Sentence adjudged 13 July 2010 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

ROAN, SARAGOSA and HECKER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

SARAGOSA, Judge

In accordance with his pleas, the appellant was convicted of one specification of possession of visual depictions of minors engaging in sexually explicit conduct, one specification of possession of visual depictions of what appear to be minors engaging in sexually explicit conduct, and one specification of violating a general order by possessing pornographic and sexually explicit images, in violation of Articles 134 and 92, UCMJ, 10 U.S.C. §§ 934, 892. A military judge sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. On appeal, the appellant raises three issues for our consideration: (1) Whether the appellant's guilty pleas to two Article 134, UCMJ, charges were improvident, because they were preempted by a specific punitive

Article; (2) Whether the military judge abused her discretion by admitting a Untied States Senate Report concerning child pornography into evidence; and (3) Whether the staff judge advocate's (SJA) recommendation to the convening authority provided a legally incorrect analysis regarding admission of the Senate Report.

Background

General Order 1B, entitled "Prohibited Activities for U.S. Department of Defense Personnel within the United States Central Command Area of Responsibility," was in effect at the time the appellant deployed to Qatar. The order prohibited the possession of "any pornographic or similar sexually explicit photograph, video tape, or CD, movie, drawing, book, magazine, or similar representation."

After the appellant left a computer thumb drive on his bed, his roommate viewed the drive and noticed several pictures of child pornography. The appellant's computer was subsequently seized and images of both adults and children engaging in various sexual activities were found on the computer's hard drive. Some of the minors depicted were later identified as known children by the National Center for Missing and Exploited Children. After a providency inquiry, the military judge accepted the appellant's guilty plea to all charges and specifications.

Military Preemption Doctrine

The appellant asserts that his guilty pleas to possessing visual depictions of minors and "what appear to be minors" engaging in sexually explicit conduct were improvident because they were preempted by the charge that he violated a lawful general order by possessing pornographic and sexually explicit images. He asks this Court to approve only the findings of guilt for violation of a lawful general order and then remand the case for a new sentencing hearing due to the change in the maximum allowable punishment. We disagree.

The military preemption doctrine prohibits application of Article 134, UCMJ, to conduct covered by the specific punitive articles. *Manual for Courts-Martial, United States*, Part IV, ¶ 60.c.(5)(a) (2008 ed.). However, "simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). Instead, for the preemption doctrine to apply, two questions must be answered in the affirmative:

> The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, [UCMJ, 10 U.S.C.

> §§ 933, 934,] which, because of their sweep, are commonly described as the general articles.

United States v. McGuinness, 35 M.J. 149, 151-52 (C.M.A. 1992)).

We find the preemption doctrine is not applicable in this instance. At the time of trial, none of the UCMJ's punitive articles specifically prohibited possession of pornography, whether of adults or children. Furthermore, we do not find within the legislative language or history of Articles 92 and 134, UCMJ, that Congress intended to limit prosecution for possessing pornography to violations of general orders. *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (for preemption to apply "it must be shown that Congress intended . . . [an]other punitive article to cover a class of offenses in a complete way") (quoting *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)). Finally, the charged offenses of possessing child pornography are not a residuum of elements of violating a lawful general order, as they are composed of additional and different elements from the Article 92, UCMJ, specification and address different types of criminal conduct.

The record makes clear the prosecution was asserting distinct instances of criminal misconduct in each charge and specification. Charge I alleged possession of depictions of actual children engaging in sexually explicit conduct, Charge II alleged possession of adult pornography in violation of the general regulation, and the Additional Charge dealt with "what appeared to be" children engaged in sexual activities. Moreover, the prosecution intentionally segregated the evidence into different categories during its findings case to correspond with the particular charge. The Government did not attempt to intermingle the possession of the child pornography with Charge II, nor did they attempt to include the possession of the adult pornography with Charge I or the Additional Charge.

Accordingly, we conclude that the doctrine of preemption is inapplicable, and the appellant was properly charged with the offenses in issue.[1]

Admission of Senate Report

During the prosecution's sentencing case-in-chief, the trial counsel offered a four-page document entitled "Senate Rpt. 104-358 -- Child Pornography Prevention Act of 1995." Over trial defense counsel's hearsay objection, the military judge admitted the report into evidence, finding it admissible "for purposes of a bench trial" and stating she

[1] In light of the decision in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2012), we note that the maximum punishment for the Additional Charge (possessing "what appears to be" child pornography), should have been that for a simple disorder, which has a maximum authorized punishment of four months of confinement and forfeiture of two-thirds pay per month for four months. However, because all parties agreed that Charge I and its Specification and the Additional Charge and its Specification were multiplicious for sentencing purposes, these specifications were merged, leaving the maximum authorized punishment unaffected.

had performed a balancing test under Mil. R. Evid. 403. The appellant renews his objection before this Court, arguing the military judge abused her discretion.

We review the military judge's ruling on the admissibility of evidence for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995); *United States v. Lake*, 36 M.J. 317, 322 (C.M.A. 1993). If the military judge conducts a balancing test under Mil. R. Evid. 403, her ruling will not be overturned unless there is a "clear abuse of discretion." *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998). However, if the judge does not articulate her balancing analysis on the record, she receives "less deference." *Id.* at 36 (quoting *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

In determining the admissibility of evidence presented during the presentencing phase of a court-martial, there are two primary considerations. First, is it admissible under the Military Rules of Evidence? And second, is it a proper matter to be presented by the prosecution under Rule for Courts-Martial (R.C.M.) 1001(b)? There exists a common misunderstanding amongst trial counsel that the Military Rules of Evidence are automatically relaxed for the prosecution during sentencing. Such a view is incorrect. The military judge may, in accordance with R.C.M. 1001(c)(3), relax the rules with respect to matters in extenuation or mitigation or both. It is only in rebuttal that the military judge may relax the evidentiary rules for the prosecution.

The Senate Report in question details specific Congressional findings involving the societal impact of child pornography. The defense counsel objected to its admission, arguing the report constituted non-admissible hearsay. The military judge then asked, "Well, trial counsel, could the court not take judicial notice of a public law?" After hearing argument from both sides, to include the applicability of *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), the military judge announced, "I'm going to allow it. I think for purposes of a bench trial, it's admissible, and I can give it the weight that it deserves." The military judge did not identify the basis for admission nor specifically indicate whether she was taking judicial notice of the document. The defense further objected under Mil. R. Evid. 403, arguing that the unfair prejudice of not being able to cross-examine the authors of the opinions contained in the document outweighed any probative value. The military judge replied, "And I will note, I did do a balancing test under 403, as well, in admitting the document. But the objections of the defense are noted for the record."

Mil. R. Evid. 803(8) sets forth criteria for determining whether a public record or report qualifies as an exception to the general hearsay rule. First, records, reports, statements, or data compilations setting forth "the activities of the office or agency" are admissible. Mil. R. Evid. 803(8)(A). The Senate Report at issue in this case does not fall into this category. Second, records, reports, statements, or data compilations setting forth

"matters observed pursuant to duty imposed by law as to which matters there was a duty to report" are admissible. Mil. R. Evid. 803(8)(B). Again, this particular report does not reflect observations of the sort that would authorize its admission under this subsection. The third category of public records or reports is specifically limited to those setting forth factual findings resulting from an investigation and offered *against the Government*. Mil. R. Evid. 803(8)(C) (emphasis added). As the prosecution was offering this exhibit and the findings contained within were not against the Government, it could not be properly admitted under this section of the rule.

Finding no valid basis for the document's admission under Mil. R. Evid. 803(8), we turn to whether the military judge could take judicial notice of the document. In a recent decision, this Court held this document to be inappropriate for judicial notice under the Military Rules of Evidence. *United States v. Lutes*, __ M.J. ___, ACM 37665 (A.F. Ct. Crim. App. 31 January 2013).

We find, however, that the erroneous admission of the document did not have a substantial influence on the adjudged sentence in the present case, and thus there was no material prejudice to the appellant's substantial rights. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). The trial counsel made only limited references to the report and the military judge sustained one defense objection to the trial counsel's use of the report. First, trial counsel argued that the images involved in the case were more than just photos and that, by possessing the child pornography he was participating in the market for child pornography. Second, trial counsel argued the children depicted are re-victimized every time their photos are copied, viewed, or shared. A third comment regarding the Senate Report was in fact objected to by defense counsel and sustained by the military judge, demonstrating her ability to limit her consideration of the document. The report did not materially add to the counsel's argument nor make points not readily understood by an experienced military judge, and we find the appellant was not prejudiced by its errant admission. We presume the military judge knows the law regarding the appropriate use of aggravation evidence and followed it, as there is no clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Given this and the images the appellant possessed, we are confident the erroneous admission of this document did not substantially influence the military judge's judgment on the appellant's sentence. Furthermore, having considered the character of this offender, 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, 384-85 (C.A.A.F. 2005); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

SJA's Recommendation

In his addendum to the convening authority, the SJA addressed the appellant's assertion that the military judge erred by admitting the aforementioned Senate Report into

evidence. The SJA advised the convening authority that, even if the military judge erred, the appellant suffered no prejudice as a result because "trial counsel could have easily waited until the defense asked for the evidentiary rules to be relaxed to reoffer the Senate Report. [Counsel's] argument is quickly relegated to one of form over substance." The appellant argues on appeal that he was prejudiced by the SJA's inaccurate legal advice.

In determining whether an error occurred in post-trial processing, an appellant must make "some colorable showing of possible prejudice." *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 1998). An "appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority." *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996) (citations omitted).

It is important to note that the SJA did not advise the convening authority that the admission of the document was appropriate. Instead, he told the convening authority, "That decision, even if technically erroneous, was unlikely to prejudice the rights of the Accused" because the document could have been reoffered during the Government's rebuttal case, after the rules of evidence had been relaxed. We agree with the appellant's assertion that the SJA's speculation as to what the military judge may have done in a different factual scenario was error. The decision on whether to relax the rules of evidence even during rebuttal is discretionary, and it is not clear that this document was proper rebuttal to information presented during the sentencing case. R.C.M. 1101(c)(3)(d). However, we find the appellant has not suffered any prejudice for the same reasons we found no prejudice at trial, given the erroneous admission of the document. The appellant has not made a colorable showing that the error would have caused the convening authority to take corrective action or change the approved sentence.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. [2] Articles 59(a) and 66(c),

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

UCMJ, 10 U.S.C. §§ 859(a), §866(c). Accordingly, the findings and the sentence are AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court