UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DAVID L. FREDERICK
United States Air Force

ACM 36388

15 September 2006

Sentence adjudged 14 June 2005 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Jeri K. Somers (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Teresa L. Davis, and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

PER CURIAM:

We reviewed the record of trial, the appellant's assignment of error, and the government's reply thereto. The appellant complains that the two specifications to which he entered unconditional pleas of guilty are multiplicious, or, in the alternative, represent an unreasonable multiplication of charges. Finding no error, we affirm.

The appellant was charged under Article 134, UCMJ, 10 U.S.C. § 934, with possessing child pornography, in violation of 18 U.S.C. § 2252A, and possessing

visual depictions of minors engaged in sexually explicit conduct. At trial, the parties stipulated that some 20 images depicted actual, identifiable children, and that possession of those images violated the Title 18 statute. The parties further stipulated that the appellant possessed an additional 2,500 images depicting minors, and that possession of *those* images was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces.

Offenses are multiplicious if one is a lesser-included offense of the other, *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002), or if the offenses are "facially duplicative," i.e. factually the same. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). Ordinarily, an unconditional guilty plea waives a multiplicity issue, unless it rises to the level of plain error. The appellant bears the burden of showing that such an error occurred. *Id.* We find that the appellant has not met his burden.

The specification alleging a violation of Title 18 required proof that the images in question were transported in interstate or foreign commerce, but did not require proof that their possession was prejudicial to good order and discipline or was service discrediting. The remaining specification required proof that the images were prejudicial or service discrediting, but did not call for evidence concerning their transportation. Because the offenses each contain at least one element unique to itself, neither is a lesser-included offense of the other. *See United States v. Cendejas*, 62 M.J. 334, 340 (C.A.A.F. 2006); *United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993). Additionally, we find the record insufficient to conclude that the specifications are factually the same offense.

Applying all of the factors commended to us by our superior court in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), we further conclude that the appellant was not subjected to an unreasonable multiplication of charges. We note in particular that while the government could have elected to try the appellant for each individual image, thus greatly magnifying his potential criminal liability, he was instead charged with only two specifications differentiated by the varying evidence available to the government. We simply see no evidence of unconscionable piling on here. *Cf. United States v. Erby*, 46 M.J. 649, 651 (A.F. Ct. Crim. App. 1997). On the contrary, the charging decision reflected "a fair and reasonable exercise of prosecutorial discretion." *See United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner