UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JASON A. GRAY
United States Air Force

ACM 35964

9 May 2006

Sentence adjudged 8 April 2004 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major David P. Bennett, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, in accordance with his pleas, of attempting to commit carnal knowledge and communicate indecent language to a child, indecent exposure, and attempting to persuade a child to engage in sexual activity, in violation of Articles 80, and 134, UCMJ, 10 U.S.C. §§ 880, 934.[1] His approved sentence includes a dishonorable discharge, confinement for 3 years, and reduction to E-1. On appeal, he raises, inter alia, several challenges to the specifications based on multiplicity and an

[1] The Article 134, UCMJ, specification alleged a violation of 18 U.S.C. § 2422(b).

unreasonable multiplication of charges, and contends his guilty plea to indecent exposure was improvident. We find merit as to the indecent exposure specification only, dismiss that specification, reassess the sentence, and affirm.

Background

The appellant's story is one all too familiar in our modern age: he went online, looking to strike up a sexual relationship with someone in his area, and "met" a person who purported to be a 14-year-old girl. The appellant chatted with her online about her sexual experiences and related practices, including personal hygiene, and then propositioned her for sex. When she agreed, he obtained a package of condoms and drove to what he believed was her home. As it happened, however, the purported "14-year-old girl" was in fact a 37-year-old undercover police officer, who, along with other officers, arrested the appellant and turned him over to military authorities for prosecution.

During the course of the investigation, it was learned that the appellant had, some time prior to meeting the purported teenager on the Internet, posted a picture of his penis there. This act formed the basis for the indecent exposure specification.

Discussion

On appeal, the appellant complains that his convictions under Article 80, UCMJ, are multiplicious for findings and/or sentence with the Title 18 offense. Alternatively, he argues they represent an unreasonable multiplication of charges. Like the military judge, we disagree.

As our superior appellate court recently noted, 18 U.S.C. § 2422(b) represents Congress' "clear choice to criminalize persuasion and the attempt to persuade" minors to engage in sexual activity, "not the performance of the sexual acts themselves." *United States v. Brooks*, 60 M.J. 495, 498 (C.A.A.F. 2005) (quoting *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000). This offense was completed by the appellant's efforts to cajole the purported child to engage in sexual activity with him. The fact that the appellant subsequently tried to follow through on what he believed was a successful effort to entice a child to engage in sexual activity is of no consequence to this specification.

The Article 80, UCMJ, offenses are likewise separate. The offense of attempted communication of indecent language to a minor was completed when the appellant asked the purported child for details of her sex life, using graphic euphemisms for various acts and sexual practices. The attempted carnal knowledge specification required additional acts by the appellant: in this case, obtaining condoms and traveling to the girl's supposed home. The charges involve differing elements and are predicated on distinct and separate facts, and are therefore not multiplicious, and we see no evidence of prosecutorial

overreach.[2] *See United States v. Teters*, 37 M.J. 370, 376-77 (C.M.A. 1993); *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001). We further find that the appellant waived his multiplicity claims by pleading guilty unconditionally. Rule for Courts-Martial (R.C.M.) 907(b)(3) and 910(j). *See also United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997).

The appellant's conviction for indecent exposure presents us with an unusual factual scenario. Although the military judge found the appellant's guilty plea to this offense provident, he made this statement just after announcing sentence:

> MJ: Counsel, with regard to Specification 2 of Charge II, the indecent exposure, the accused pled guilty and I accepted his pleas and found him guilty. It certainly looks like an offense under the Code, but *on deliberations, I determined it's possibly not the offense of exactly indecent exposure.* Accordingly, I have given the accused the benefit of the doubt regarding that specification, and I did not consider that specification at all for any purpose in formulating the adjudged sentence in this case.

(Emphasis added). We are inclined to agree with the military judge's initial comment. The offense, as charged and as pled to by the appellant, appears to us to represent a legally and factually sufficient charge of indecent exposure under Article 134, UCMJ. The military judge did not explain why he had second thoughts about the appellant's plea, however, and we will not speculate on his thought processes at this point. We find ourselves unable to reconcile the military judge's analysis -- "possibly not the offense … exactly" -- with the legal requirement for a factual basis sufficient to support the plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Accordingly, we set aside the finding of guilty as to this specification and dismiss it.

Because we have modified the findings, we reassess the sentence. We conclude that the military judge would have awarded the same sentence as he did at trial. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990). Moreover, we find the sentence to be appropriate. *See Peoples*, 29 M.J. at 427; *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). The appellant's remaining assignments of error are without merit. R.C.M. 1106(f)(6). *See also United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999).

[2] The appellant was married at the time of these offenses, yet the government did not elect to charge him with the offense of attempted adultery. We express no opinion on the propriety of such a charge, but we are persuaded by its omission that the government did not overreach.

Conclusion

The findings, as modified, and sentence, as reassessed, 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, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator