UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRYAN W. HEARN
United States Air Force

ACM 37867

19 March 2013

Sentence adjudged 02 November 2010 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Michael J. Coco (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn; Major Robert D. Stuart; Major Anthony D. Ortiz.

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

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of possessing and transporting child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 10 months, and reduction to E-1. In accordance with a pretrial agreement, the convening authority lowered the confinement to 8 months and approved the remainder of the sentence as adjudged.

On appeal, the appellant contends that his right to due process was violated when the prosecution failed to obtain the Secretary of the Air Force's approval prior to his court-martial; that the military judge erred by finding possession of child pornography to be a lesser included offense of transportation of child pornography, but did not find the charges multiplicicious or an unreasonable multiplication of charges; that the military judge erred by considering a Senate report as sentencing evidence; and, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his conviction violated his right against double jeopardy in light of his prior Canadian conviction for possession of child pornography. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

On at least two occasions between 24 April 2009 and 15 May 2009, while living in North Carolina, the appellant used a peer-to-peer file sharing program to search for and download music, movies, and adult pornography. One of the search terms he used was the word "teen," knowing he would likely receive child pornography as a result. After he reviewed the images and video recordings he received, he saw some of them involved visual depictions of minors engaging in sexually explicit conduct. He deleted some of the images.

On 9 May 2009, the appellant was in the process of a Permanent Change of Station move from Seymour Johnson Air Force Base in North Carolina to Elmendorf Air Force Base in Alaska. Driving a rental truck containing various personal effects (including a laptop and desktop computer), he attempted to enter Canada from an entry point in North Dakota on 15 May 2009. As part of Canadian customs procedure, his rental truck was searched by Canadian border agents. When those agents saw his laptop in plain view in the back of the truck, they asked him about it. He first indicated it was his but the agents believed he was being evasive. He then told the agents the computer belonged to his wife and provided them two false phone numbers to prevent them from reaching her. When the agents did contact her, she denied owning the computer.

When asked for his password, the appellant became nervous and said he was afraid the agent would think he was a "freak" or "pervert." He then admitted downloading child and adult pornography, and provided his password. As one of the agents examined the laptop, he observed several dozen file names indicative of child pornography. When the agent opened one of the files, he saw a video-recording that was consistent with child pornography. Following customs protocol, the agents powered down the laptop and arrested the appellant for smuggling child pornography.

The appellant was jailed in the Canadian system for several days. On 19 May 2009, he appeared in court and, with the assistance of a Canadian attorney, entered a

guilty plea to possessing child pornography on 15 May 2009. According to a declaration by the Canadian prosecutor, the Canadian judge did not see any of the images from the computer and the factual basis for the appellant's conviction was a charging document. That document stated the appellant had in his possession "child pornography, to wit a laptop containing video . . . [and] several titles that suggested . . . child pornography. Facing a maximum sentence of five years, the appellant was sentenced to 35 days of confinement and was required to forfeit his laptop and desktop computers.

The appellant's laptop was sent to the Defense Computer Forensics Laboratory (DCFL) in June 2009 for a forensic analysis. Although the appellant does not specifically recall which images or video-recordings were on his laptop, he admitted knowing some child pornography was on his computer. He agreed 11 of the images found by the DCFL met the definition of child pornography, two other images were from a child pornography series with a confirmed victim but did not depict sexually explicit conduct, and one image depicted a person who could be under the age of 18.

At his court-martial, the appellant contended his prosecution under the UCMJ for possession and transportation of child pornography constituted double jeopardy. He further argued his right to "due process" was violated when the prosecution failed to obtain the Secretary of the Air Force's approval prior to prosecuting him for an offense previously tried by a foreign government. Lastly, he argued the military judge should find the two specifications multiplicious or an unreasonable multiplication of charges for findings.

When the military judge denied all three motions, the appellant entered a conditional guilty plea, preserving his ability to raise these issues on appeal. He then pled guilty to possessing child pornography between 24 April 2009 and 15 May 2009, and knowingly transporting it on his computer "in or affecting foreign or interstate commerce" on 15 May 2009.

Canadian Conviction

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant continues his argument that prosecution for possessing and transporting child pornography was barred by former jeopardy, based on the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), dated 19 June 1951. The United States and Canada are both parties to that SOFA, of which paragraph 8 of Article VII states, in pertinent part, "where an accused has been tried . . . by one Contracting Party and has . . . been convicted and . . . has served [] his sentence . . . he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party." The appellant contends he has now been tried by the military for the "same offense" he faced in Canada, as the Canadian charge encompassed the conduct covered by the court-martial specifications and the same evidence was used to support

both prosecutions. He thus argues the military specifications should be barred by double jeopardy. We disagree.

Whether two offenses are the same for double jeopardy purposes is a question of law we review de novo. *United States v. Campbell*, 71 M.J. 19, 27 (C.A.A.F. 2012). Constitutional and statutory restrictions on former jeopardy are not at issue when, as here, charges are pursued by separate sovereigns, including foreign nations. *See United States v. Delarosa*, 67 M.J. 318, 321 (C.A.A.F. 2009); *United States v. Stokes*, 12 M.J. 229, 230 (C.M.A. 1982) (declaring a prosecution by court-martial is not barred by double jeopardy if the earlier trial was by a foreign court). This concept is based in the dual sovereignty doctrine, which permits successive prosecutions for the same offense under the laws of different sovereigns since the same act has transgressed the laws of both. *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Clearly, the United States and Canada are two different sovereigns and thus the appellant can be prosecuted by both for violating their laws, even if both charges stem from the exact same misconduct.

The SOFA also fails to provide the appellant with an avenue for relief. First, the provision he cites only applies if he is convicted of the "same offense" in both forums, and we do not agree with his conclusion that both convictions directly overlap with each other. Even if they do, however, the SOFA provision only applies if he was tried in Canada under the SOFA itself, and, here, Canadian authorities quickly prosecuted the appellant without, among other deficiencies, discussing with military authorities the potential for concurrent jurisdiction. Thus, it cannot be said that the prosecution occurred under the SOFA's auspices.

Regardless, even if he was prosecuted by Canada in a manner that implicates the SOFA's provisions and the military was charging him for the exact same misconduct, such a prosecution would be permissible with the approval of the Secretary of the Air Force. *See* Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 2.6.3 (25 October 2012) (only the Secretary of the Air Force "may approve initiation of court-martial . . . action against a member previously tried by a . . . foreign court for substantially the same act"). At the time of trial, when all parties were under the impression no such approval had been granted, the military judge held the AFI conferred no rights upon the appellant and he had no standing to complain about the Government's failure to follow its own instruction. On appeal, however, the Government submitted documents that demonstrate the Secretary of the Air Force did, in fact, authorize the prosecution of the appellant several days before his court-martial convened. As such, the appellant's argument is moot.

Multiplicity and Multiplication of Charges

The appellant filed a motion asking the military judge to dismiss the possession specification as being multiplicious with the transportation specification, or, in the

alternative, to dismiss it as an unreasonable multiplication of charges. The appellant argued dismissal was appropriate because possession is a lesser included offense of transportation and the same images were at issue in both specifications. The military judge found the offense not to be multiplicious because the possession specification contained the words "on divers occasions" and covered a broader time period, but he did find the two specifications to be an unreasonable multiplication of charges and merged the offenses for sentencing purposes. This lowered the appellant's maximum punishment exposure from 30 years to 20 years. Following his conditional guilty plea, the appellant continues to assert that Specification 1 should be dismissed, and that the military judge erred when he failed to do so.

We review issues of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). Multiplicity is an issue of law that enforces the Double Jeopardy Clause. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See Teters*, 37 M.J. at 376; *see also* Rule for Courts-Martial 907(b)(3), Discussion. Where legislative intent is not expressed in the statute or legislative history, "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77 (citation omitted). Thus, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one [] is whether each provision requires proof of [an additional] fact which the other does not." *Blockburger*, 284 U.S. at 304 (citation omitted); *see also Teters*, 37 M.J. at 377 (The *Blockburger* rule "is to be applied to the elements of the statutes violated."). Accordingly, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

Applying *Blockburger*, we find these specifications are not multiplicious. The two specifications have several elements that are different and thus each offense requires proof of an element which is different than the other. Here, the offense of transportation requires the materials to have moved "in or affect[ed] foreign . . . commerce" and the offense of possession required proof of "divers" occasions of possession. As the appellant admitted during his guilty plea inquiry, he downloaded images on at least two occasions and retained them in his possession for several weeks before attempting to cross the border with them. During that time period, he was able to access the materials in his possession. The language of the specifications and the facts contained within the record sufficiently demonstrate that the appellant's possession of these materials was independent from his wrongful transportation of the materials, such that the possession is not a lesser included offense of the transportation and the offenses are not multiplicious. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Young*, 64 M.J. 404, 408 (C.A.A.F. 2007). As there are elements of each offense which are not

contained within the other and as there is no congressional or presidential guidance to the contrary, we find the specifications are not multiplicious and that the military judge did not err at trial.

We similarly find against the appellant in the area of unreasonable multiplication of charges. The military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004); *see also United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). When a military judge finds charges to be unreasonably multiplied, dismissal is one remedy available to him. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). However, even if we agreed that the charges here were unreasonably multiplied, dismissal is not mandatory as it is within a military judge's discretion to instead merge the specifications for sentencing purposes and adjust the maximum sentence accordingly, as this military judge did. *Campbell*, 71 M.J. at 25.

Senate Report

During the Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, where sentencing evidence was discussed, the prosecution moved the military judge to admit a four-page document entitled "Senate Report 104-358 – Child Pornography Prevention Act of 1995," citing *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). The Senate Report included statements that the children used in the pornographic images will suffer current and future physical and psychological harm; all children will suffer current and future harm due to its representation of children as sexual objects; child pornography presents an even greater threat to the child victim than sexual abuse or prostitution and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of their children; and "child pornography is a particularly pernicious evil, something that no civilized society can or should tolerate." Over a defense objection, the military judge admitted the exhibit. Prior to announcing the sentence, he advised the parties he had not considered certain portions of the exhibit, to include any portions that related to pedophilia, child molestation or the impact these offenses have on the community. In response to a query from the trial counsel, the military judge clarified he would only consider the portions that relate to direct impact on the individual children as victims.

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003) (citation omitted). In the context of a plain error analysis, an appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *See United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). We test the admission of evidence by the military judge

for plain error based on the law at the time of appeal. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011); *see also United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration") (citations omitted)).

The military judge did not say what rule of evidence he was relying on to admit this hearsay document. The trial counsel did not establish that the Senate Report qualified for admission as an exception to the hearsay rule. *See United States v. Eads*, 24 M.J. 919, 921 (A.F.C.M.R. 1987); *United States v. Kuhnel*, 30 M.J. 510, 511-12 (A.F.C.M.R. 1990). Furthermore, 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*, ACM 37665 (A.F. Ct. Crim. App. 31 January 2013) (unpub. op.). Thus, admitting this document was error that was clear and obvious.

Under the plain error test, after finding plain or obvious error, we test for prejudice. That is, "[w]e test the erroneous admission . . . of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citation omitted). Here, we find 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.

The trial counsel did not reference the report during the sentencing argument. 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).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[1] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[1] 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).