UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANDREW L. KANE
United States Air Force

ACM 37800

18 January 2013

Sentence adjudged 20 September 2010 by GCM convened at Ramstein Air Base, Germany. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr; Major Daniel E. Schoeni; Major Anthony D. Ortiz; Captain Robert D. Stuart; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Lauren N. DiDomenico; Captain Erika L. Sleger; 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, receiving, and distributing child pornography and of using indecent language, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a dishonorable discharge, confinement for 4 years and 2 months, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the

convening authority lowered the confinement to 4 years and approved the remainder of the sentence as adjudged. On appeal, the appellant asserts four errors: (1) the specifications of communicating indecent language fail to state offenses because each omits the required terminal element for Article 134, UCMJ, offenses; (2) the staff judge advocate erred by failing to forward to the convening authority an attachment to the defense's clemency petition; (3) he is entitled to modest but meaningful relief pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), because the Government did not forward the record of trial for appellate review within the 30-day post-trial processing standard established by *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); and (4) he is entitled to relief under *Tardif* due to the delay of more than 18 months in completion of the first level of appellate review. Finding no merit to the appellant's assignments of error, we affirm the findings and sentence.

Background

In 2008, while the appellant was assigned to Ramstein Air Base, Germany, his username came under the scrutiny of civilian law enforcement officials in the United States who were conducting an investigation into online distribution of child pornography. After his account was traced to Germany, agents from the Air Force Office of Special Investigations opened an investigation and interviewed the appellant under rights advisement in early July 2008.

The appellant admitted to using his laptop to distribute, receive, and view images of children engaged in sexually explicit acts or posing in sexually suggestive poses, including oral sex and sexual intercourse between children and adults, as well as sexual acts between children. This conduct began when he arrived in Germany in September 2007 and was living in a dormitory on base. While using Yahoo and Google chat rooms to communicate about sexual matters, the appellant began associating with individuals who were interested in child pornography. Using the username "kane_usaf_2007," the appellant requested and received child pornography images from them and also used search terms such as "lolita, underage sex, and underage nude girls" to find other images of child pornography, which he would then trade and exchange with others through the chat rooms. The appellant would become aroused and sometimes masturbate during these file-sharing sessions. He viewed the images on his laptop computer and saved them into a computer folder he called "young." The appellant admitted saving as many as 1,300 images of pornography, including hundreds of images of potential child pornography. Although he eventually deleted the images from his computer, a forensic examination found approximately 300 images of child pornography on the laptop.

Based on this conduct, the appellant pled guilty to eight specifications of receiving child pornography on eight different days, fifteen specifications of distributing child pornography on fifteen different days, and one specification of viewing child pornography on divers occasions. Each of these specifications contained language that

his conduct "was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces," and thus contained the required language for the terminal element of Article 134, UCMJ. During his guilty plea inquiry, the appellant admitted his conduct tended to harm the reputation of the service or lower it in public esteem because civilians would think less of the Air Force if they learned of his involvement with child pornography. He also admitted that his use of a screen name that contained the phrase "USAF" while obtaining some of the images indicated to others that an Air Force member was involved and thus brought discredit to the Air Force.

The appellant was also charged with eight specifications of communicating indecent language, in violation of Article 134, UCMJ. These specifications did not specifically allege a violation of either Clause 1 or 2. The appellant pled guilty to these specifications, based on his communications over the Internet on eight different days. He did this through an Internet program that allowed users to interface with one another while exchanging digital images. The users could suggest images to others, see in real time what images their counterparts were viewing, and engage in a running dialogue about those images via a chat feature. On eight separate occasions, the appellant engaged in this type of Internet conversation with other individuals. Each conversation was about sexual matters, with most being about adults having sexual encounters with children. The appellant and the other individual would exchange images of child pornography during these sessions, and would discuss them.

Terminal Element

Whether a charged specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). The indecent language specifications' failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Id*. at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offense at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct was service discrediting, given the subject matter of the conversations. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Defense Clemency Submission

This Court reviews post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). Following the trial, the appellant submitted clemency matters, which included a memorandum from his trial defense counsel. This memorandum listed an "anger management letter" as an attachment. However, the document was not in the record of trial.[*] The appellant argues that the convening authority did not consider all the matters he intended to present and that he should receive new-post trial processing.

We have considered the record and the appellate filings. These filings include a declaration from a paralegal with the base legal office responsible for prosecuting the appellant. She states that, at the time the appellant submitted his clemency matters, this document was missing from his submission and that the legal office's efforts to get a copy from the defense were unsuccessful. That declaration is corroborated by an examination of the addendum to the staff judge advocate's recommendation, which lists the other two attachments to the defense counsel memorandum but not the "anger management letter." The convening authority signed an indorsement to the addendum, in which he stated he had considered "the attached matters" prior to taking action. Therefore, we find that the convening authority considered everything actually submitted by the appellant. *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989) (citing Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2); Rule for Courts-Martial 1107(b)(3)(A)(iii)). We can rely on the "presumption of regularity" with regard to a convening authority's exercise of his responsibilities on clemency. *United States v. Foy*, 30 M.J. 664, 666 (A.F.C.M.R. 1999). We hold that the appellant is not entitled to new post-trial processing.

Post-Trial Processing Delays

In *Moreno*, our superior court established guidelines that trigger a presumption of unreasonable delay in certain circumstances, including where the record of trial is not docketed with the service court within 30 days of the convening authority's action and where appellate review is not completed within 18 months of that docketing. *Moreno*, 63 M.J. at 142. Furthermore, Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers the service courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. §859(a). *Tardif*, 57 M.J. at 224.

[*] The appellant submitted the missing document to this Court. It consisted of a letter from the Chief of the Correctional Treatment Branch for the Army Regional Correctional Facility where the appellant was confined following his trial. The letter indicated that the appellant had expressed an interest in receiving behavioral health services and had, at the time of the letter, participated in one anger management therapeutic group session, at which he appeared to understand the introductory concepts discussed. Given the contents of the letter relative to the serious offenses committed by the appellant, even if the letter had been included in the clemency submission, it would have been unlikely to impact the convening authority's sentencing decision.

The appellant's record of trial was forwarded to this Court for appellate review 60 days after the convening authority took action. Recognizing he has suffered no prejudice, the appellant cites *Tardif* and argues that, because the delay is facially unreasonable under the *Moreno* standards, we should grant "modest but meaningful relief" to the appellant in the form of a 30-day reduction in his sentence, in part to send a message to the numbered Air Force which, according to the appellant, has "regularly exceeded the 30-day action-to-docketing *Moreno* standard." In a supplemental assignment of error that again cites *Tardif*, the appellant argues that the overall delay of more than 18 months between the time the case was docketed at this Court and the completion of our review merits a reduction in his confinement by one day for each day by which his case exceeds that *Moreno* standard.

Because these delays are facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135-36. When we assume error but are able to directly conclude it was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *See United States v. Harvey*, 64 M.J. 13, 24-25 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court