UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID L. KOEBELE
United States Air Force

ACM 37381

19 May 2010

Sentence adjudged 11 September 2008 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Ronald A. Gregory and Nancy J. Paul.

Approved sentence: Dishonorable discharge, confinement for 3 years and 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Marla J. Gillman, and Major Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officer members sitting as a general court-martial found him guilty of two specifications of attempted aggravated assault of a child under 16 years of age, two specifications of attempted sodomy with a child under 16 years of age, and one specification of communicating indecent language to a child under 16 years of age, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. His adjudged and approved sentence consists of a dishonorable discharge, confinement for three years and eight months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, the appellant asks this Court to set aside the findings and sentence and to disapprove that portion of the sentence that calls for a dishonorable discharge and replace it with a bad-conduct discharge. As the basis for his request, the appellant asserts that: (1) the military judge erred in denying the defense motion to suppress because the incriminating nature of the item seized in plain view was not immediately apparent; (2) the military judge erred in denying the defense motion to suppress because the search exceeded the scope of consent; and (3) that portion of his sentence which includes a dishonorable discharge is inappropriately severe.[*] Finding no prejudicial error, we affirm the findings and sentence.

Background

In July 2007, the appellant initiated an on-line chat with "Brenda," someone whom he believed was a 15-year-old girl in a distant town. In reality, "Brenda" was an agent with the Iowa Internet Crimes against Children Task Force (IICCTF). Over the course of several days, the appellant asked "Brenda" about her sexual experience, asked whether he could visit her, and offered to engage in oral sex with her. "Brenda" arranged a meeting with the appellant at a school playground in her hometown and when the appellant arrived IICCTF agents arrested him. Upon arresting the appellant, IICCTF agents seized from the appellant a handwritten note of directions to the playground. After a proper rights advisement, the appellant: waived his rights; confessed to traveling to the town to meet and possibly have sex with "Brenda;" confessed to viewing and possessing child pornography; and gave IICCTF agents and Air Force Office of Special Investigations (AFOSI) agents consent to search his on-base dormitory room, his computer, and his cell phone.

During the course of searching the appellant's dormitory room, AFOSI agents seized a handwritten note that contained directions to a distant address. AFOSI agents subsequently contacted the residents of the distant address and discovered that the appellant had engaged in a sexually explicit conversation with JG, a 15-year-old girl living at the residence, and that he had arranged or attempted to arrange a meeting to have sex with JG and her 15-year-old friend.

At trial, the appellant moved to suppress the admission of the handwritten note and evidence derived therefrom, asserting that the search exceeded the scope of his consent and was not based on probable cause. The government opposed the motion, opining that the search was consensual and, in the alternative, that AFOSI agents seized the note in plain view and that JG's identity and the appellant's interactions with her would inevitably have been discovered. After hearing argument from counsel, the military judge found that the search was consensual and, in the alternative, concluded that the note

[*] The second and third assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

was seized in plain view and that JG's identity and the appellant's interactions with her would inevitably have been discovered. The military judge accordingly denied the appellant's motion.

Shortly thereafter, the military judge was replaced because of a scheduling conflict. The appellant moved for reconsideration of his motion to suppress and the new military judge denied the appellant's motion to suppress, finding that the search was consensual and concluding that the seizure was made in plain view.

Rulings on the Defense Motion to Suppress

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006). The abuse of discretion standard is a strict one, involving more than a difference of opinion. *United States v. Luster*, 55 M.J. 67, 73 (C.A.A.F. 2001). The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. *Id.* (citations omitted).

"Law enforcement officials conducting a lawful search may seize items in plain view if '[the officials] are acting within the scope of their authority, and . . . they have probable cause to believe the item is contraband or evidence of a crime.'" *United States v. McMahon*, 58 M.J. 362, 367 (C.A.A.F. 2003) (alterations in original) (quoting *United States v. Fogg*, 52 M.J. 144, 149 (C.A.A.F. 1999)). A finding of probable cause is a legal question that we review de novo based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)). "The touchstone of probable cause is the official's 'reasonable ground for belief.'" *McMahon*, 58 M.J. at 367 (quoting *United States v. Powell*, 7 M.J. 435, 436 (C.M.A. 1979)).

In the case at hand, the military judges made thorough and detailed findings of fact and their findings were amply supported by the evidence. The evidence clearly supports their findings that the appellant gave IICCTF and AFOSI agents consent to search his dormitory room, computer, and cell phone for child pornography and evidence associated with child enticement, crimes which the appellant had confessed to committing. Moreover, with respect to the military judges' application of the law, after de novo review, we concur with their conclusions that the agents, having found the note next to the appellant's computer, had reasonable grounds to believe that the note was associated with the appellant's child enticement activities. On this point, we note that the handwritten note was similar in writing and scope to the handwritten note the IICCTF agents had seized from the appellant after arresting him for enticing "Brenda." Put simply, the agents had authority to conduct the search and the evidence at issue was

seized in plain view. Accordingly, the military judges did not abuse their discretion in denying the appellant's motion to suppress.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The evidence makes it clear that the appellant is a sexual predator. His crimes rank among the most heinous offenses recognized by society and his actions severely compromise his standing as a military member and a member of society. After carefully examining the submissions of counsel, the appellant's otherwise exemplary military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find that the appellant's sentence, one which includes a dishonorable discharge, is inappropriately severe.

Conclusion

The approved 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court