

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman HEINZ C. KUNDEL
United States Air Force

ACM 37164

23 December 2008

Sentence adjudged 18 September 2007 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Christopher Santoro (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Bryan A. Bonner, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Michael T. Rakowski.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial found him guilty of two specifications of divers possession of child pornography and one specification of divers distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934.¹ The appellant pled not guilty to one specification of using his computer to engage in sexually explicit conduct with someone he believed was less than 18 years of age (*hereinafter* computer specification). The adjudged and approved

¹ The appellant conditionally pled guilty to and was found guilty of one of the two specifications of possession of child pornography.

sentence consists of a dishonorable discharge, four years confinement, total forfeitures of pay and allowances, and reduction to the grade of E-1.² This case is before the Court on its merits; however, we note one issue with the finding on the computer specification. Finding no prejudicial error, we affirm.

Military Judge's Failure to Dismiss the Computer Specification

After the announcement of findings on the possession and distribution of child pornography specifications, trial counsel, pursuant to a pretrial agreement, moved to dismiss the computer specification. The military judge took trial counsel's motion "under advisement," but unfortunately adjourned the trial without ruling on the motion. On 27 December 2007, the military judge authenticated the record of trial.

On 5 February 2008, the convening authority took initial action on the appellant's case. At no time during or subsequent to trial did the military judge rule on trial counsel's motion to dismiss the computer specification. Moreover, at no time did the convening authority direct a post-trial hearing to correct this error. To date, the computer specification hangs in limbo – properly pled but not properly withdrawn, dismissed, or otherwise disposed.

Since findings were never announced on the computer specification, we are without authority to take corrective action as to that specification. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c) (stating that this Court may only act with respect to the findings and sentence approved by the convening authority). However, the convening authority may withdraw a charge or specification anytime before findings are announced. Rule for Courts-Martial 604(a). Since findings were not announced on the computer specification, the convening authority retains the power to withdraw and dismiss this specification. We recommend the convening authority, in keeping with the pretrial agreement, withdraw and dismiss the computer specification.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.³ Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

² The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to two specifications of divers possession of child pornography and one specification of divers distribution of child pornography in return for the convening authority's promise to: (1) dismiss the specification charging the appellant with using his computer to engage in sexually explicit conduct with someone he believed was under 18 years of age and (2) not approve confinement in excess of five years.

³ We note the Court-Martial Order (CMO), dated 5 February 2008, erroneously states the sentence was adjudged on "15 August 2007" rather than "18 September 2007." We order the promulgation of a corrected CMO.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



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