UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SEBASTIAN P. LABELLA
United States Air Force

ACM 37679

15 February 2013

Sentence adjudged 9 April 2010 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $477.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Daniel E. Schoeni; and Major Ja Rai A. Williams.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Joseph J. Kubler; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officers sitting as a general court-martial convicted him of one specification of wrongful and knowing possession of visual depictions of minors engaging in sexually explicit conduct and one specification of wrongful and knowing possession of "what appear to be" minors engaging in sexually explicit conduct, both in violation of Clause 1 or 2 of Article 134, UCMJ, 10 U.S.C. § 934. The members sentenced the appellant to a dishonorable discharge, confinement for 6 months, forfeiture $447.00 pay per month for 3 months, and reduction to E-1. The

convening authority approved a bad-conduct discharge, and the remainder of the sentence as adjudged.

On appeal, the appellant raises the following assignments of error for our review: (1) the military judge abused his discretion when he admitted photographs of young girls in underwear as "actual" child pornography to support Specification 1, (2) the military judge abused his discretion when he admitted "cartoon" images to support Specification 2, and (3) the military judge erred when he gave a findings instruction for Specification 2 that included language from a different underlying statute than the one charged by the Government. Having found no error that prejudices a substantial right of the appellant, we affirm.

Background

The appellant lived in a dormitory on Keesler Air Force Base, Mississippi. On 11 January 2009, Airman First Class (A1C) NS borrowed the appellant's external computer hard drive to copy some television shows onto his personal computer. After he finished copying the television shows, A1C NS went through the hard drive to make sure he did not miss anything. In the process, he came across files containing "suggestive images" of small young children. A1C NS returned the external hard drive to the appellant. He then sought guidance from his parents, a chaplain, and his acting first sergeant on what to do about the photographs. On 14 January 2009, A1C NS informed the Air Force Office of Special Investigations (AFOSI) about the photographs on the appellant's hard drive. The AFOSI interrogated the appellant the same day, during which he consented to have them search and seize his computer and external hard drive. The AFOSI found numerous photographs and videos on the external hard drive that formed the basis for the underlying charges against the appellant.

Prior to trial, the Government submitted a Bill of Particulars stating how the prosecution intended to use the evidence at trial. The Bill of Particulars stated that several still photographs and seven of the videos would be offered to support Specification 1, and 18 virtual images would be offered to support Specification 2.

At trial, the appellant filed a motion to exclude one video and several photographs on the grounds they failed to meet the definition of "sexually explicit conduct" as charged in Specification 1. The appellant also filed a motion to dismiss Specification 2 on the grounds it violated his First and Fifth Amendment rights[1] and failed to state an offense. The military judge denied both motions. In denying the first motion, the military judge relied on the factors in *United States v. Dost,* 636 F. Supp. 828, 832 (S.D. Cal. 1986), to find that the material constituted sexually explicit conduct. In denying the second motion, the military judge relied on 18 U.S.C. § 1466A(b)(2)(A)-(B) to find that the virtual depictions lacked "serious literary, artistic, political, or scientific value." During

[1] U.S. CONST. amends. I, V.

findings and over defense objection, the military judge admitted the still photographs, the videos, and the virtual images.

Admissibility of Evidence: Actual Child Pornography

The appellant argues that the military judge erred when he admitted, over defense objection, photographs of young girls in underwear as "actual" child pornography to support Specification 1. The appellant asserts that nudity or partial nudity alone does not rise to the level of child pornography, because there is not a "lascivious display of the genitals or pubic area." We disagree.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). An abuse of discretion occurs when the findings of fact are clearly erroneous or if the military judge's conclusions of law are influenced by an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). The abuse of discretion standard is a "strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *White*, 69 M.J. at 239.

We find the military judge did not abuse his discretion when he admitted some photographs of minor children in underwear as actual child pornography. Combining the *Dost*[2] factors with an overall consideration of the totality of the circumstances, the military judge ruled that the photographs "constituted lascivious exhibition of the genitals or pubic area and are therefore relevant." *See United States v. Roderick*, 62 M.J. 425, 429-30 (C.A.A.F. 2006). The military judge concluded that the focal point of the photographs "is on the child's genitalia or pubic area"; that "almost all" of the photos show "young girls in suggestive poses"; that a court member could "reasonably find" that the girls wearing thong underwear, stockings, or both were inappropriately attired, "considering this type of clothing is generally worn by older women"; that none of the children were fully clothed; and that the unclothed pubic areas are "clearly visible" in certain photographs, noting that although "the vaginal opening is not visible, the vaginal

[2] In *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), the court outlined some factors for a trier of fact to consider when determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area":

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 832. The court also noted that a visual depiction need not involve all of these factors to be a "lascivious exhibition of the genitals or pubic area." Instead, the court stated that "the determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor." *Id.*

area within an inch of either side of the opening is clearly visible." The military judge also concluded that "[t]here is no question that the photos taken as a whole are designed to elicit a sexual response in the viewer. Certainly the photos did elicit a sexual response by the accused as he stated he masturbated to them or similar photos." Applying a balancing test, the military judge ruled that the probative value of the photographs "is not substantially outweighed by the danger of unfair prejudice."

Admissibility of Evidence: Virtual Child Pornography

The appellant next argues that the military judge erred when he admitted "cartoon" images to support Specification 2. This specification alleged that the appellant possessed images of "what appear to be minors" engaged in sexually explicit conduct. The appellant asserts that the depictions are fictional and not "factual recordings of actual children engaged in actual sexually explicit conduct or sexual abuse."

In accordance with the previously discussed standard of review – abuse of discretion – we have reviewed the military judge's decision to admit visual depictions of "what appear to be" minor children engaged in sexual conduct. We find no abuse of discretion.

The military judge relied on 18 U.S.C. § 1466A(b)(2)(A)-(B)[3] to deny the defense pretrial motion to dismiss Specification 2 and then admit the visual depictions during findings.[4] The Government argues that the military judge properly relied on this statute

[3] 18 U.S.C. § 1466A states, in pertinent part:

> (b) Any person who, in a circumstance described in subsection (d), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—
> (2) (A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and
> (B) lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in [18 U.S.C. §] 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

[4] The military judge's ruling reads, in part, as follows:

> In order to prove Specification 2 of the Charge, the government need only prove that the Accused did a certain act and that the act was prejudicial to good order and discipline or of a nature to bring discredit on the Armed Forces. However, the law requires that the Accused be *placed on notice that his conduct violated the law. With regard to Article 134, UCMJ, [10 U.S.C. § 934,] federal law* has, among other sources, been recognized as providing fair notice.
> 3. On 30 April 2003, 18 U.S.C. section 1466[A], Obscene Visual Representations of the Sexual Abuse of Children became law. This law at 1466[A](b)(2) holds that any person who knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting that depicts an image that is or appears to be of a minor engaged in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital to genital, or oral to genital, anal to genital, or oral to anal, whether between person of the same or opposite sex, and lacks

to admit the virtual depictions and craft instructions for the members. The Government also posits that the military judge did not act contrary to our superior court's holding in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). Based on the unique facts of this case, we agree.

In *Beaty*, our superior court held that "possession of child pornography, whether actual or virtual, may constitutionally be prosecuted under clauses 1 and 2, Article 134, UCMJ." *Id.* at 41 (citations omitted). In that case, the appellant was charged under Article 134, UCMJ, with "wrongfully and knowingly possess[ing] one or more visual depictions of what appears to be a minor engaging in sexually explicit conduct," which was prejudicial to good order and discipline or service discrediting. *Id.* at 40. The Court held it was error for the military judge to reference 18 U.S.C. § 2252A when calculating the maximum punishment. *Id.* at 44. The Court ruled that, because the "[a]ppellant's offense is (1) not listed in the [*The Manual for Courts-Martial, United States* (*MCM*)], (2) not included in or closely related to any other offense listed in Part IV of the [the *Manual*], and (3) not provided for in the United States Code, the maximum punishment is that 'authorized by the custom of the service.'" *Id.* Under these circumstances, the Court opined that the maximum punishment for a charge of possessing "what appears to be" child pornography is that for a simple disorder, which has a maximum authorized punishment of four months confinement and forfeiture of two-thirds pay per month for four months. *Id*. at 45.

We find the case sub judice distinguishable from *Beaty*. Like *Beaty*, the appellant in this case was charged under Article 134, UCMJ, with "wrongfully and knowingly

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serious literary, artistic, political, or scientific value, shall be subject to the penalties provided in section 2252[A](b)(2).

18 U.S.C. 1466[A](c) specifically states that it is not a required element of any offense under this section that the minor depicted actually exists. The statute specifically criminalizes possession of any visual depiction, including cartoons, satisfying the criteria of 18 U.S.C. section[s] 1466[A](a) and (b) that has been shipped or transported in interstate commerce by any means, including a computer.

4. In the Article 32[, UCMJ, 10 U.S.C. § 832,] report, the investigating officer specifically refers to this statute. The plain language of the Specification gives notice to the Accused of the crime with which he's charged. Section 1466[A] provides statutory notice as to the fact this same conduct is illegal for both civilians and military members. A specification must provide notice to an Accused of the criminal offense against which he must defend and must provide a bar against a second trial for the same offense. The language of the specification and the existence of the federal statute put the Accused on notice as to which conduct is prohibited.

5. The court concludes that the Accused downloaded these files from the internet and then loaned a portable hard drive containing these files to another military member. As such possession of these files was not private possession and therefore was not protected under the First and Fourth Amendment to the United States Constitution.

6. The law on which the government relies to give notice to the Accused of the unlawfulness of his actions does not require that the visual depictions be obscene. However, the law does require that the depictions lack serious literary, artistic, political, or scientific value. The court will incorporate this language into the instructions that I will be providing to the members.

possess[ing] one or more visual depictions of what appears to be a minor engaging in sexually explicit conduct," which was prejudicial to good order and discipline or service discrediting. Like *Beaty*, the appellant's offense is not listed in the *Manual* and is not included in or closely related to any other offense listed in Part IV of the *Manual*. Unlike *Beaty*, however, the appellant's offense is, in fact, provided for in the United States Code via 18 U.S.C. § 1466A(b)(2)(A)-(B).[5] We find the military judge properly relied on this statute to find that Specification 2 stated an offense under Article 134, UCMJ; and that federal law – 18 U.S.C. § 1466A – provided notice to the appellant of his prohibited conduct. Accordingly, we find the military judge did not abuse his discretion.

In light of our decision, we also find that the military judge did not err when he calculated the maximum punishment in this case as a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.[6] The trial defense counsel argued that Specification 2 was a military specific offense more analogous to "some type of willful dereliction." The military judge, however, agreed with trial counsel that the maximum sentence was calculated by looking at the "most analogous federal statute[]," that being 18 U.S.C. § 1466A for Specification 2, which references 18 U.S.C. § 2252A for punishment. Because the appellant's offense was provided for in the United States Code, the punishment was not limited to that "authorized by the custom of service." *Beaty*, 70 M.J. at 44.

Even if the military judge did err, we find the sentence nevertheless appropriate. The appellant still stands convicted of Specification 1, which carried a maximum punishment of a dishonorable discharge, ten years confinement, forfeiture of all pay and allowances, and reduction to E-1. When reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude absent the error," it must order a rehearing. *Id*. at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

In our opinion, the evidence upon which the members determined the appellant's sentence is unchanged. We are confident that the members would have adjudged at least

[5] We note that these sections are contentious, but our superior court has not declared them unconstitutional and we are not inclined to do so. *See, e.g., United States v. Handley*, 564 F. Supp. 2d 996 (S.D. Iowa 2008); *but see United States v. Dean*, 635 F.3d 1200, 1206 n.5 (11th Cir. 2011). For our analysis on this issue, it is sufficient that the sections were in effect and known to the appellant when the Government cited it as a sentencing basis at the time of trial.

[6] The trial counsel agreed to merge Specifications 1 and 2 for sentencing, which capped the confinement at 10 years.

a bad-conduct discharge, confinement for six months, forfeiture of $447.00 pay per month for three months, and reduction to E-1. We find, after considering the appellant's character, the nature and seriousness of the offense, and the entire record, that the reassessed sentence is appropriate.

Instructions

Finally, the appellant argues that the military judge erred because he improperly instructed the members on Specification 2 by using language from 18 U.S.C. § 1466A. We disagree.

Whether a military judge properly instructs the members is a question we review de novo. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). The military judge did not add or change any elements to the Article 134 offense set forth in Specification 2, as the appellant asserts. The appellant was charged with possession of what appears to be child pornography under Article 134, UCMJ; the military judge instructed the members on the elements; and provided relevant definitions for the members to use during their deliberations. The military judge not only defined the terms conduct prejudicial to good order and discipline and service discrediting, but also defined other terms consistent with 18 U.S.C. § 1466A(b)(2)(A)-(B). He defined "sexually explicit conduct" consistent with the statute as a "visual depiction of any kind, including a drawing, cartoon, sculpture, or painting that depicts an image which is, or appears to be, of a minor engaged in graphic bestiality, sadistic or masochistic abuse, sexual intercourse, including genital to genital, oral to genital, anal to genital, or oral to oral, whether between persons of the same or opposite sex." Additionally, he instructed the members that to be "unlawful," the "visual depiction must lack serious literary, artistic, political, or scientific value," again consistent with the statute. In our opinion, the military judge did not err, and the appellant suffered no prejudice.

Conclusion

The approved findings and the sentence,[7] as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains. Article 66(c),

[7] Although not raised as an issue by the appellant, we will also address the delay in appellate processing. In this case, the overall delay between the date this case was docketed with the Court and completion of review by this Court is facially unreasonable. Because the delay is 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." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error 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. The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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, as reassessed, are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist