UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOHN J. LAZARD
United States Air Force

ACM 36430

18 October 2006

Sentence adjudged 31 May 2005 by GCM convened at Yokota Air Base, Japan. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Christopher D. May.

Before

BROWN, JACOBSON, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

Consistent with his plea, the appellant was convicted of one specification of knowingly and wrongfully possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for 18 months, and reduction to E-1. The appellant asserts before this Court two errors:

I. Whether his plea that his receipt and possession of "child pornography" was service discrediting, under Article 134, UCMJ, was improvident.

II. Whether his sentence is inappropriately severe.[1]

Background

The appellant accessed the sexually explicit images at issue in his trial via a paid subscription to an online, computer-based website. That website became the target of an investigation by a multi-agency civilian law enforcement task force investigating websites containing images of minors engaged in sexually explicit conduct.[2] A search warrant executed by the task force on a Florida-based credit card processing company uncovered information that allowed the Air Force Office of Investigations (OSI) to link the appellant to the website by his credit card payment of the website subscription fee.

During the *Care*[3] inquiry at the appellant's trial, the military judge asked him to explain his belief as to the service discrediting nature of his conduct. The appellant replied: "Sir, because if [sic] found out that a military member was accessing or saving child pornography, that would be an issue with the world population. That would discredit [sic] upon not only the Air Force but upon DoD and the rest of the military forces, sir."

The appellant now claims there is insufficient evidence to conclude that his behavior was service discrediting under Article 134, UCMJ, because the appellant did not disclose any facts that could objectively support a conviction. The appellant asserts that something more is required than a "hypothetical scenario involving a fictional civilian who might, were he or she to become aware of the offense, think less of the military." We disagree.

Providency of the Plea

We may reject the appellant's guilty plea only where the record of trial shows a substantial basis in law and fact for questioning the plea. *United States v. Jordan*, 57 M.J. 236, 238. (C.A.A.F. 2002); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). We consider the entire record of trial, which in this case

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] The task force was codenamed Operation Falcon, and included investigators from Immigration and Customs Enforcement, the Internal Revenue Service, the Federal Bureau of Investigation, the United States Postal Inspection Service, and the United States Attorney's Office for the District of New Jersey.
[3] *United States v. Care*, 40 C.M.R. 247 (1969).

includes the military judge's *Care* inquiry with the appellant and the stipulation of fact. The stipulation of fact includes the appellant's signed confession made to the OSI and a compact disc containing copies of the images charged in the Specification. The stipulation of fact establishes that 92 of the 300 images on the appellant's computer were of known victims of child sexual abuse. The appellant admitted that it was obvious the images were of children, and he agreed they were engaged in sexually explicit conduct. A review of the images on the compact disc leaves no doubt that the images were of minors engaging in sexually explicit conduct. The appellant admitted that he wrongfully and knowingly possessed the images.

The military judge advised the appellant that he would consider the stipulation of fact to determine whether the appellant was in fact guilty. That stipulation clearly indicates the fact that the appellant's misconduct came to the attention of civilians, albeit criminal investigators, who identified him as an Air Force member as a result of their ongoing investigation into the website to which the appellant subscribed. The stipulation, its attachments, and the accused's statements together satisfy us that the appellant's plea is factually supported. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004).

Any question with respect to whether there must be proof of public awareness of the conduct, coupled with the appellant's military status, in order to sustain a finding that the appellant's conduct was service discrediting has been resolved. This Court has concluded there is no such requirement. In *United States v. Mead*, 63 M.J. 724, 729 (A.F. Ct. Crim. App. 2006), we relied on *United States v. Roderick*, 62 M.J. 425, 428-29 (C.A.A.F. 2006), in holding that the gravamen of the offense under Clause 2 of Article 134, is conduct "*of a nature to* bring discredit upon the armed forces because of its *tendency* to bring the service into disrepute or lower it in public esteem." *Mead*, 63 M.J. at 729 (emphasis in original). The appellant's statement alone is sufficient to underscore his understanding that his conduct was service discrediting. Accordingly, finding no basis in law or fact for questioning the appellant's plea, we hold it was provident and we affirm the findings.

Sentence Appropriateness

Article 66(c), UCMJ, 10 U.S.C. § 866(c), provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." In *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957), the Supreme Court considered the legislative history of Article 66, UCMJ, and concluded it gave the (then) Boards of Review the power to review not only the legality of a sentence, but also whether it was appropriate. Our superior court has also determined that

the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955). *See also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

"Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Sentence comparison is generally inappropriate, unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). There is no basis to engage in sentence comparison in this case.

We have given individualized consideration to this particular appellant and carefully reviewed the facts and circumstances of this case. The sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during either the findings or the sentencing proceedings. Nonetheless, we find that a lesser sentence of a bad-conduct discharge, confinement for 18 months, and reduction to the grade of E-1 should be affirmed.

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). However, we affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 18 months, and reduction to E-1. Accordingly, the findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court