UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT F. LINDSEY
United States Air Force

ACM 37894

18 June 2013

Sentence adjudged 07 January 2011 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Terry A. O'Brien.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the appellant: Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Jason S. Osborne; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

At a general court-martial, the appellant was convicted, consistent with his pleas, of wrongfully possessing one or more visual depictions of minors engaged in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Officer members adjudged a sentence of a bad-conduct discharge, confinement for 3 years, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends the military judge erred in admitting a Senate report as sentencing evidence through judicial notice and by denying the defense request to refer to the burden of sexual offender registration during sentencing. Although not raised by the appellant, we also evaluated whether the appellant's guilty plea was provident and whether the military judge applied the correct maximum punishment. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

In his guilty plea inquiry, the appellant stated that on 14 November 2009, he was in possession of 10 video files containing visual depictions of minors engaging in sexually explicit conduct. He was using a peer-to-peer file sharing program to search for adult pornography, using search terms that he could not recall by the time of his court-martial. This program allows a user to link to and then search the computers of other users ("peers") for content those peers have agreed to share. When the user types a search term into the program, it provides a list of file names containing that term.

In order to download the files, the user has to select the file and take an affirmative step to start the download. After a list of file names appeared on his computer, the appellant clicked on them and initiated their download, while "definitely knowing" by the file name that the files likely contained videos of children engaging in sexual activity. After the files downloaded, the appellant viewed several of them, seeing individuals under the age of 18 engaging in sodomy and sexual intercourse together and with adults. A later forensic analysis of the appellant's hard drive verified that fact.

According to a statement he gave under rights advisement to agents with the Air Force Office of Special Investigations (AFOSI), the appellant downloaded approximately 4-5 child pornography videos every 1-2 months and he had done this approximately 10 times. He told the agents he did this for sexual gratification and, after downloading the files, he would move them to a separate folder so others could not download them from him, and then he would delete the files after several days.

Guilty Plea

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322. *See also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (A plea of guilty should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea.). "An accused

must know to what offenses he is pleading guilty," *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008), and a military judge's failure to explain the elements of the charged offense is error, *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Accordingly, "a military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)).

Here, the military judge accepted the appellant's pleas of guilty to knowingly possessing "one or more visual depictions of minors engaging in sexually explicit conduct." In doing so, she defined minor as "any *person* under the age of 18 years." (Emphasis added.). In her explanation of the elements of the possession offense, the military judge stated that the Specification did not require "that the images include images of actual minors" as "possession of . . . sexually explicit images of persons indistinguishable from minor children, whether actual or virtual . . . is an offense" under the UCMJ.[1]

She also instructed him that the offense required knowing possession of depictions "of minors engaged in sexually explicit conduct." After acknowledging his understanding of the elements, the appellant admitted that he possessed "videos of minors engaging in sexual activity," that he "perceived the images to be of minors under the age of 18," and that "they looked like actual people and . . . not like cartoons," thus he was "sure they were real physical human beings." After he told the military judge that no one had ever provided him with proof that the minors were, in fact, actual people, he agreed that the images he possessed "appeared to be minors engaging in sexually explicit conduct." He also admitted he had no authority to possess images of minors or "what appear[ed] to be minors" engaging in this conduct. In the context of discussing the terminal element for Article 134, UCMJ, the appellant agreed with the military judge that "[e]ven if the images were not [of] actual minors, . . . [his] possession of virtual or computer morphed images that were indistinguishable from real minors w[as] also to the prejudice of good order and discipline and the type of conduct which is service discrediting." At the conclusion of the inquiry, the military judge asked the appellant if he believed and admitted that he wrongfully and knowingly possessed one or more "*visual depictions of minors* engaging in sexually explicit conduct." (Emphasis added.). The appellant replied that he did.

Given the totality of the guilty plea inquiry, we find the appellant's plea to possession of "visual depictions of minors engaging in sexually explicit conduct" to be

[1] As charged, this crime is analogous to a federal code subsection which criminalizes the possession of "child pornography." *See* 18 U.S.C. § 2252A(a)(2), (5). There, the term "child pornography" includes any visual depiction of sexually explicit conduct where (1) the "visual depiction involves the use of *a minor* engaging in sexually explicit conduct," or (2) the visual depiction is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of *a minor* engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A), (B) (emphasis added).

provident. Although the military judge and the appellant used the phrase "appears to be" at several times during the guilty plea inquiry, the inquiry as a whole shows that the appellant understood he was pleading guilty to possessing sexually explicit images of minors or images indistinguishable from minor children.[2]

As the charged offense was not specifically listed in the *Manual for Courts-Martial, United States* (*Manual*), at the time of trial, the parties agreed that the maximum punishment included confinement for 10 years, apparently using the punishment authorized for possession of child pornography under 18 U.S.C. § 2252A(a)(5). *See* Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii) (an offense not specifically listed, included within, or closely related to an offense listed in the *Manual* is punishable as authorized by the United States Code). We find this to be the correct maximum punishment for this offense. *Slagle*, slip op. at 2; *United States v. Finch*, ACM 38081 (A.F. Ct. Crim. App. 25 January 2013), *petition granted*, No. 13-0353/AF (C.A.A.F. 16 May 2013).

Senate Report

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the prosecution moved the military judge to take judicial notice of a four-page document entitled, "Senate Report 104-358 – Child Pornography Prevention Act of 1995," contending this report constituted "legislative facts" which can be judicially noticed as "domestic law" pursuant to Mil. R. Evid. 201A(a). The trial defense counsel, stating he had read this Court's decision in *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), objected on relevancy grounds, arguing it was not directly related to the charged offense of possession, and that it would be unduly prejudicial in a members case.

The military judge found portions of the Government's proposed exhibit to be admissible through judicial notice of legislative facts. She also found it relevant and proper aggravation evidence under *Anderson* and *United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985), and that its probative value was not substantially outweighed by the danger of unfair prejudice or confusion of the issues, citing Mil. R. Evid. 403. She also noted that she would limit the panel's consideration to the portions that specifically address the impact of child pornography on the children in the pictures.

In the sentencing phase, the court-martial panel was informed by the military judge that she had taken judicial notice of certain portions of a Senate report. This document included statements that (a) the use of children in the production of pornographic images can cause them to suffer current and future physical and psychological harm, (b) the images create a permanent record of their abuse and invade their privacy in years to come, (c) child pornography is often used as part of a method to

[2] Having reviewed the videos ourselves, we are also convinced these images are of minors engaging in sexually explicit conduct.

seduce other children to engage in sexual activity, and (d) technology can be used to alter innocent images of children to create visual depictions of them engaging in sexual activity.

The military judge instructed the panel that she had taken judicial notice of this Senate report and it "contains findings that Congress determined supported passage of the [Child Pornography Prevention Act of 1995]," and the panel is "now permitted to recognize and consider these facts without further proof as evidence of why Congress passed the act. It should be considered . . . as evidence with all other evidence in the case." She also told them the Government is allowed to present information about the consequences and repercussions of the appellant's offense so they can discern a proper sentence, including evidence about the impact on the victims involved in the child pornography, so long as such evidence is directly related to or results from his offense. The panel was therefore instructed, "you are permitted to consider the impact the child pornography possession has on the individual victims contained in the child pornography as discussed in the Senate report but you may not consider the impact on society as a whole." Lastly, she told them they may but are not required to accept as conclusive any matter she judicially noticed.

In his unsworn statement, the appellant apologized to the members and said he now recognized his actions brought further harm to the children in the videos and continued their pain. In his sentencing argument, the trial counsel referenced the Senate report's statements about these images being a permanent record of the abuse that will haunt the children for years to come.

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). We test the admission of evidence by the military judge based on the law at the time of appeal. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011); *see also United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be plain at the time of appellate consideration") (quotation marks and citations omitted)). In a recent decision, this Court held this document to be inappropriate for judicial notice under the Military Rules of Evidence. *United States v. Lutes*, 72 M.J. 530 (A.F. Ct. Crim. App. 2013).

Thus, admitting this document though judicial notice was error and an abuse of discretion. However, we must also test for prejudice. That is, "[w]e test the erroneous admission . . . of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citation omitted). Here, we find the erroneous admission of the document did not have a substantial influence on the adjudged sentence

in the present case, and thus there was no material prejudice to the appellant's substantial rights.

The trial counsel only briefly referenced the Senate report in his sentencing argument. The report did not materially add to the counsel's argument nor make points not readily understood by a court-martial panel, and we find the appellant was not prejudiced by its errant admission. Given this and the images the appellant possessed, we are confident the erroneous admission of this document did not substantially influence the panel's judgment on the appellant's sentence. Furthermore, having considered the character of this offender, the nature and seriousness of his offenses, and the entire record of trial, we find his sentence appropriate. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Sex Offender Registration

Prior to trial, the prosecution filed a motion to preclude the trial defense counsel from referencing sex offender registration during the sentencing case, arguing it was "unclear" whether the appellant would have to register in his ultimate state of residence and that registration is a collateral consequence of his conviction and not something the panel members should consider. Furthermore, if the appellant referenced sex offender registration in his unsworn statement, the prosecution asked for an instruction pursuant to *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998), to limit the panel's ability to consider that information. The defense disagreed, noting that registration was an absolute certainty and, at a minimum, the defense should be able to reference it during the appellant's unsworn, citing to *United States v. Macias*, 53 M.J. 728, 732 (Army Ct. Crim. App. 1999).

The military judge held sex offender registration is a likely collateral consequence here, based on the appellant's conviction for possession of child pornography. Relying on *United States v. Briggs*, 69 M.J. 648 (A.F. Ct. Crim. App. 2010), the military judge ruled that any defense counsel argument about sex offender registration would be improper. She also ruled that the accused could reference it in his unsworn, but that she would provide a limiting instruction to the members.

In his unsworn statement, the appellant told the panel about his trial defense counsel's advice that most, if not all, states will require him to register as a sex offender and that he still decided to plead guilty. He also said he was worried about the burden that registration may place on him in the years ahead and that he hoped they would consider it in coming to his sentence. Following that unsworn statement, the military judge instructed the panel:

> In his unsworn statement, the accused indicated he may be required to register as a sex offender due to this conviction. Sex offender registration requirements vary

> between states based on the nature of the conviction. Sex offender registration is a collateral consequence resulting from the accused's actions that led to his conviction. The registration requirement that any state imposes on a person convicted of certain crimes is a consequence that is separate and distinct from the court-martial process. You, of course, should not and cannot rely on whether he may or may not have to register as a sex offender when determining what is an appropriate punishment for this accused for the offense of which he stands convicted.

"We review a military judge's decision to give a sentencing instruction for an abuse of discretion" and she "has considerable discretion in tailoring instructions to the evidence and law." *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002) (citing *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997)). The abuse of discretion standard is strict and involves "more than a mere difference of opinion." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). "The challenged action must be 'arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous.'" *Id.* (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

"[C]ourts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'" *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (alteration in original) (citation omitted). The accused's right to allocution through an unsworn statement "is broad, and largely unfettered, but it is not without limits." *United States v. Barrier*, 61 M.J. 482, 486 (C.A.A.F. 2005). If an accused's unsworn statement includes information about collateral matters that are beyond the scope of R.C.M. 1001 because it is not relevant to mitigation, extenuation, or rebuttal, the military judge can properly advise panel members that the proffered information is irrelevant. *Id.*; *see also United States v. McNutt*, 62 M.J. 16, 19-20 (C.A.A.F. 2005) (even when it may be appropriate for a military judge to instruct the panel on collateral matters, the panel must be told they cannot consider these matters in deciding on an appropriate sentence); *United States v. Duncan*, 53 M.J. 494, 499-500 (C.A.A.F. 2000).

The appellant argues that sex offender registration is a proper matter in mitigation and therefore the military judge abused her discretion by telling the members they could not consider this information when fashioning an appropriate punishment, especially in light of our superior court's decision in *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013). In *Riley*, the accused was not advised by her trial defense counsel that pleading guilty to kidnapping of a child subjected her to registration as a "sex offender" pursuant to federal law and our superior court held that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea." *Id.* at 121. That language, however, is used in the context of whether the

accused understood the "meaning and effect" of her guilty plea, as required by Article 45(a), UCMJ, 10 U.S.C. § 8 45(a), which includes the consequence of sex offender registration. With that context, we do not find this language transforms sex offender registration into a matter in extenuation that would bring it outside of the parameters set forth in *McNutt* and *Duncan*.

Given that, we find the military judge did not abuse her discretion in telling the panel they cannot consider sex offender registration consequences when deciding what sentence is appropriate for the appellant and by prohibiting trial defense counsel from referencing sex offender registration in his argument.[3] *See United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011) (no abuse of discretion where a military judge precluded the trial defense counsel from discussing sex offender registration during his sentencing argument); *Barrier*, 61 M.J. at 486.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] We note, however, that the military judge's instruction to the panel made the likelihood of this consequence appear less certain than it actually is under federal law. As a military member convicted of an Article 134, UCMJ, 10 U.S.C. § 934, offense covering "pornography involving a minor," the appellant is an offender who must "register, and keep the registration current, in each jurisdiction where [he] resides, . . . is an employee, [or] . . . is a student" and appear in person periodically to "allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered." 42 U.S.C. §§ 16911(1), (5)(A)(iv) and 16913(a)-(c), 16916 (2006); Department of Defense Instruction (DoDI) 1325.7, Enclosure 27 (17 July 2001), *cancelled and reissued by* DoDI 1325.07, Enclosure 2, App 4 (11 March 2013) ; *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012); *Carr v. United States*, 130 S. Ct. 2229, 2241-42 (2010). If he fails to register as statutorily required, he faces federal prosecution with a penalty that includes ten years imprisonment and a fine of up to $250,000. 18 U.S.C. § 2250(a); *Reynolds*, 132 S. Ct. at 978; *Carr*, 130 S. Ct. at 2238, 2240. We also note that the paperwork provided to the appellant by the defense counsel regarding sex offender registration cites to the Wetterling Act, 42 U.S.C. §§ 14071-073, which was repealed effective 27 July 2009, following passage of the Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16901-991.

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).