**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class CHAD R. SCHROEDER**
**United States Air Force**

**ACM 37475**

**15 August 2011**

Sentence adjudged 10 April 2009 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Nancy J. Paul.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Reggie D. Yager; Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Captain Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and SARAGOSA
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a and one specification of receipt of child pornography, one specification of possession of child pornography on a laptop computer, one specification of possession of child pornography on an external hard drive, one specification of possession of child pornography on a desktop computer, one specification of distribution of child pornography, and one specification of transportation of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a dishonorable

discharge, 4 years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

On appeal, the appellant asks the Court to set aside a portion of the finding of guilt on Specification 2 of Charge II by excepting out the words "and at or near Ellsworth Air Force Base, South Dakota" and provide any other appropriate relief. He asserts the plea to this language in Specification 2 of Charge II is improvident. He further asks this Court to affirm only so much of the sentence that provides for a bad-conduct discharge and three years of confinement. He opines that the convening authority erred by approving a sentence in excess of what was agreed upon in the pretrial agreement and that the portion of his sentence which provides for a dishonorable discharge and 4 years of confinement is inappropriately severe. Furthermore, if appellant does not receive meaningful relief with respect to his approved sentence, then he requests new post-trial processing based on an error in the AF Form 1359, *Report of Result of Trial*, which incorrectly lists Specification 3 of Charge II as "on divers occasions."

*Background*

The appellant was assigned to Royal Air Force (RAF) Fairford, England, his first duty station, in February 2006. While in England, the appellant downloaded a program called Lime Wire to his laptop computer and utilized this program to download child pornography on numerous occasions between 1 April 2006 and 31 October 2007 to a laptop computer. In June 2006, the appellant was chatting with someone online via MSN Instant Messenger. He identified himself as a member of the Air Force, gave the individual file names of known child pornography to assist this individual in searching for child pornography, and sent the individual a single video file containing child pornography. In the summer of 2007, the appellant purchased an external hard drive. He used this hard drive to store child pornography in a hidden folder named "f0rg0t."

In October 2007, the appellant's laptop computer stopped working. The appellant was no longer able to access files stored on his laptop computer or use the computer. He attempted to reformat the computer, but the reformatting process malfunctioned prior to completion. The appellant was unable to access the computer again and did not know whether or not the reformatting process had deleted the child pornography files. The appellant purchased a desktop computer in December 2007. He downloaded the Lime Wire program again for the desktop computer and resumed downloading files containing child pornography.

In February 2008, the appellant PCS'd to Ellsworth AFB, South Dakota. He sent his desktop computer containing the child pornography images and videos from England to Ellsworth AFB, South Dakota with his household goods shipment. He hand-carried the external hard drive containing the child pornography images and videos from England

to Ellsworth AFB, South Dakota. While stationed at Ellsworth AFB, South Dakota, the appellant continued to download child pornography.

In searching for child pornography, the appellant used search terms including: "10yo," "11yo," "12yo," "13yo," "pthc-Preteen hardcore," and "ptsc-Preteen softcore." The files he possessed contained images or videos of male and female children having sex with other children, having sex with adults, using sex toys, and children in various sexual poses and states of undress. The appellant admitted that he knew the individuals depicted in the images and videos were children because their bodies were undeveloped. Some of the young girls depicted had no breast development or genital hair at all.

In March of 2008, while home on leave near Sioux City, Iowa, the appellant admitted that he knowingly and wrongfully smoked marijuana with his step-sister and her friend.

*Providence of the Plea to Possessing Child Pornography on the Laptop Computer at Ellsworth Air Force Base, South Dakota*

Specification 2 of Charge II states: "In that AIRMAN FIRST CLASS CHAD R. SCHROEDER, United States Air Force, 28th Munitions Squadron, Ellsworth Air Force Base, South Dakota, did, at or near RAF Fairford, England, and at or near Ellsworth Air Force Base, South Dakota, between on or about 1 April 2006 and on or about 8 May 2008, wrongfully and knowingly possess a laptop computer containing visual depictions of minors engaging in sexually explicit conduct, which conduct was of a nature to bring discredit upon the armed forces."

Appellant asserts and the Government concedes that appellant did not providently plea to the portion of Specification 2 of Charge II containing the language "and at or near Ellsworth Air Force Base, South Dakota". We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). After review of the entire record of trial, this Court finds the plea to the portion of Specification 2 of Charge II quoted above is not provident and approves the findings of guilty of all the Charges and Specifications except the words "and at or near Ellsworth Air Force Base, South Dakota" in Specification 2 of Charge II.

Because we modified the findings we must reassess the sentence or remand the case for a sentencing rehearing. Before reassessing a sentence, the 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). If we cannot determine that the sentence would have been at least of a certain magnitude we must order a rehearing. *United States v. Harris* 53 M.J. 86, 88 (C.A.A.F. 2000) (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

After modifying the findings, the maximum sentence remains the same – a dishonorable discharge, 92 years confinement, forfeiture of all pay and allowances, and a reduction to the grade of E-1. Additionally, the facts presented to the court-martial panel by way of the stipulation of fact remain the same, in pertinent part. The appellant possessed 124 visual depictions of minors identified by the National Center for Missing and Exploited Children (NCMEC) engaging in sexually explicit conduct. Ninety of these visual depictions were images or JPEG files and 34 of these visual depictions were videos or MPEG files. Additionally, the appellant possessed over 500 visual depictions of minors, not identified by NCMEC, engaging in sexually explicit conduct. 485 of these visual depictions were images or JPEG files and 72 of these visual depictions were videos or MPEG files. All of the visual depictions were possessed on either the laptop computer, the external hard drive, or the desktop computer. The laptop computer, which is the subject of Specification 2 of Charge II, was located at RAF Fairford, England, beginning 1 April 2006 and was located at Ellsworth AFB, South Dakota, beginning February/March 2008, after his permanent change of station. The stipulation of fact admitted as Prosecution Exhibit 1 specifically apprised the court-martial panel that, "In October 2007, A1C Schroeder's laptop computer malfunctioned, and he was no longer able to access his files or use his computer." As these were the facts from which the court-martial panel based its sentence, this Court is satisfied that the penalty landscape in this case has not changed dramatically. *Riley*, 58 M.J. at 312. Applying the criteria set forth in *Sales*, we conclude that we are able to determine what sentence would have been imposed based on the modified findings. After reviewing the evidence presented in this case, we conclude that we can reliably determine that the court-martial panel would have sentenced the appellant to the sentence announced in Court, a dishonorable discharge, 4 years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. We reassess the sentence accordingly.

*Pretrial Agreement Interpretation*

On appeal, and for the first time, the appellant alleges that the convening authority erred by approving a sentence in excess of what was agreed upon in the pretrial agreement. Interpretation of a pretrial agreement is a question of law, which this Court reviews de novo. *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006); *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). Basic contract principles apply when interpreting pretrial agreements. *Acevedo*, 50 M.J. at 172. First, we must determine whether the pretrial agreement provision in this case is ambiguous. Whether a pretrial agreement is ambiguous on its face is a question of law we review de novo. *Id.* (citing *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992)).

The Appendix A to the pretrial agreement in this case states, in pertinent part:

> 1. As consideration for the offer of the accused to plead guilty as set forth in the Offer for Pretrial Agreement, dated 30 January 2009, the Convening Authority will undertake that:
>
> The approved sentence will not exceed five (5) years confinement, if confinement is adjudged.
>
> 2. There are no limitations on the sentence other than that provided in paragraph 1.

We find that the pretrial agreement provision is unambiguous and the intent of the parties can be discerned from the four corners of the agreement. The agreement places no limitations on the Convening Authority with respect to approval of any form of punitive discharge. The approved sentence of a dishonorable discharge, 4 years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand did not violate the unambiguous terms of the pretrial agreement. The appellant is therefore not entitled to any relief.

*Sentence Severity*

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 exercise 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).

This Court has carefully examined the submissions of counsel, the entire record of trial, the character of the appellant, the appellant's military record, the appellant's cooperation during the investigation, the nature and seriousness of the offenses, and taken into account all the facts and circumstances surrounding the offenses of which he was found guilty. We do not find that the appellant's reassessed sentence, one which includes a dishonorable discharge and 4 years of confinement, is inappropriately severe.

*Post-Trial Processing*

We have reviewed the AF Form 1359, *Report of Result of Trial*, and concur with appellate defense counsel that Specification 3 of Charge II erroneously contains that language, "on divers occasions."[1] We also note that the Court-Martial Order correctly reflects the finding of the Court. As such, we find no error prejudicial to the substantial rights of the appellant occurred.

*Appellate Delay*

We note that the overall delay of 25 months between the time the case was docketed at the Air Force Court of Criminal Appeals 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. *See 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. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

*Conclusion*

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.

[1] We order the correction of the AF Form 1359, *Report of Result of Trial*.

Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL


STEVEN LUCAS
Clerk of the Court