UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RICHARD A. USRY
United States Air Force

ACM 37449

30 April 2010

Sentence adjudged 03 April 2009 by GCM convened at Eglin Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 13 months.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Matthew F. Blue, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Judge:

Pursuant to a pretrial agreement, the appellant pled guilty to one specification of wrongfully possessing child pornography on divers occasions, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority approved the adjudged sentence of confinement for 13 months and a bad-conduct discharge.[1] On appeal, the appellant

[1] The convening authority waived mandatory forfeitures for the benefit of the appellant's dependents pursuant to Article 58b(b), UCMJ, 10 U.S.C. § 58b(b).

challenges the appropriateness of his sentence.[2] Finding no error to the substantial prejudice of the appellant, we affirm.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant asserts that his sentence is inappropriately severe, claiming that the military judge should have "further explored" evidence of the appellant's own sexual abuse offered by the appellant in extenuation of his possession of child pornography. The record, however, shows that the military judge heard ample evidence concerning the appellant's own sexual abuse as a motivation for his possession of child pornography. During the guilty plea inquiry, the appellant told the military judge that viewing child pornography "in some strange way" helped him cope with his own abuse. In sentencing, the appellant provided an unsworn statement in which he expanded upon the motivations raised in the guilty plea inquiry: "[D]ue to my own past abuse, it made me curious . . . if their experience was like mine. It sounds odd but it made me feel less alone and more normal."[3] The military judge ensured that the appellant did not intend to assert this as some kind of defense and confirmed with the trial defense counsel that no issue of mental responsibility existed based on the results of a sanity board as well as the trial defense counsel's own dealings with the appellant.

Contrary to the appellant's argument on appeal, we find that the military judge fully explored the appellant's motivations for possessing child pornography. The appellant possessed over 30 video files showing explicit sex acts with children, and both sides addressed the appellant's motivations in argument. The trial defense counsel told the military judge that the appellant was "simply curious because of his own abuse," and the trial counsel countered that viewing videos with names such as "Six Year Old

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] We note this is not the first time the appellant has used his childhood experiences as an explanation for adult misconduct. In his response to an Article 15, UCMJ, 10 U.S.C. § 815, action for absence without leave he told his commander: "When people talk to me about work and how important it was to be there, I tend to think about my childhood where my own parents worked me as a child in a restaurant. . . . This situation is a constant reminder of that memory and it is a situation I do not want to repeat again."

Bedtime Rape" is not some kind of therapy. After hearing the evidence and argument, the military judge returned a sentence which included two months less confinement than the cap in the pretrial agreement and almost nine years less than the maximum. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

Conclusion

The approved 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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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