UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ROBERT F. WADE
United States Air Force

ACM 35458

25 February 2005

Sentence adjudged 24 October 2002 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MALLOY, Senior Judge:

We have examined the record of trial, the three assignments of error, and the government's response thereto. We agree with the appellant that a dishonorable discharge is too severe under the circumstances of this case. The appellant was charged with and pleaded guilty to possessing child pornography as conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, in violation of clause 1 or 2 of Article 134, UCMJ, 10 U.S.C. § 934. Although the military judge included the two definitions of child pornography found unconstitutional in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) when advising the appellant of the elements of the offense, this did not render the appellant's pleas improvident. *United States v.*

Mason, 60 M.J. 15 (C.A.A.F. 2004). We have reviewed the plea colloquy, as well as the child pornography, and conclude that there is no "substantial basis" in law or fact to question the providence of the appellant's guilty pleas. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The appellant was correctly advised of the elements under clauses 1 and 2 of Article 134, UCMJ, and admitted that his misconduct met those elements.

We also conclude that the second addendum to the staff judge advocate's recommendation (SJAR) did not contain "new matter" and, therefore, the failure to serve it upon the appellant was not error. Rule for Courts-Martial (R.C.M.) 1106(f)(7). In his second addendum, the staff judge advocate (SJA) advised the convening authority: "Of note, the accused, in his unsworn statement at trial admitted that he has been viewing this form of child pornography for many years. Thus, he has been supporting this illegal industry for many years." If this were the first or only time this statement had been made, we might agree with the appellant that the statement does not accurately reflect what he had said in his unsworn statement and that it would have been unfair not to have given him the opportunity to comment on it before the case was submitted to the convening authority for action.[*] But this was not the first time the SJA had made this statement in advising the convening authority.

In fact, the above statement is almost identical to a statement contained in the first addendum to the SJAR. There, the author of the recommendation wrote: "The Accused also stated during his unsworn statement that he has been viewing this kind of material for years. Thus, by his own admission, the Accused has been supporting this vile trade for a long period of time." The appellant did not challenge the accuracy of this statement in his comments on the first addendum. Thus, we conclude that the appellant had the opportunity to challenge or explain the SJA's characterization of the extent of his involvement with child pornography and chose not to do so. The fact that the SJA repeated this comment a second time did not, under the circumstances of this case, render it new matter requiring the further opportunity to respond. R.C.M. 1106(f)(7) and its Discussion. In any event, the appellant's failure to comment on the matter when he had the opportunity to do so constitutes waiver of the issue on appeal. R.C.M. 1106(f)(6). *See also United States v. Scalo*, No. 04-0250/AR (8 Feb 2005)*; United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

We also conclude that the SJA's comment in the second addendum, that the sentenced was imposed by the chief judge of the Western Circuit, was not new matter and did not deprive the appellant of the "independent and fresh look by command authorities required by Article 60, UCMJ, 10 U.S.C. § 860." *United States v. Gilbreath*, 57 M.J. 57,

[*] In his unsworn statement, the appellant actually said the following: "Your Honor, I am ashamed of what I have done. I have been collecting adult material for years. My first encounter with child pornography was in Japan. This material is freely available at the corner adult shops there." The appellant was stationed in Japan immediately prior to his assignment at the time of his court-martial.

61 (C.A.A.F. 2002). Rather than suggesting that the convening authority defer to the military judge's conclusion, the SJAR, when read in toto, clearly advised the convening authority of his obligation to exercise his independent judgment and approve a sentence that he found appropriate after considering all the matters submitted at trial and in clemency. Thus, this case is not like the situation in *Gilbreath* where the SJA's advice erroneously suggested that the convening authority defer to the judgment of the court members when, in fact, the accused in that case had been tried by a military judge sitting alone.

Finally, we have considered the appellant's assertion that the sentence was inappropriately severe. This Court may only affirm those findings and sentence that we find are correct in law and fact and determine, based on the entire record of trial, should be affirmed. Article 66(c), UCMJ, 10 U.S.C. § 866(c). Our duty is to ensure that the appellant received a fair and just punishment based on our independent determination. *United States v. Baier*, No. 04-0340/MC (3 Jan 2005). Performing this function does not allow us to grant clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this duty is to give individualized consideration to an appellant on the basis of the nature and seriousness of the offense and the character of the appellant. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). After carefully considering the entire record, and applying this standard, we conclude that only so much of the sentence as provides for a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1 is appropriate and should be affirmed.

The findings and the sentence, as modified, are correct in law and fact and no other 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 findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court