UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant KEITH M. HALL
United States Air Force

ACM 37901

30 April 2012

Sentence adjudged 17 February 2011 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Donald R. Eller (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Darrin K. Johns; Major Michael S. Kerr; Major Daniel E. Schoeni; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Charles G. Warren; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, a military judge sitting as a general court-martial convicted the appellant of one specification of wrongful and knowing possession, on divers occasions, of one or more visual depictions of "what appear to be" minors engaging in sexually explicit conduct, in violation of Clause 1 or 2 of Article 134, UCMJ, 10 U.S.C.

§ 934.[1] The appellant was sentenced to a dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.[2] On appeal, the appellant asserts that his sentence exceeds the maximum authorized punishment. We agree and reassess the sentence.

The appellant argues that, in light of the decision in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F.), *reconsideration denied*, 70 M.J. 134 No. 10-0494/AF (Daily Journal 19 May 2011), the approved sentence exceeds the authorized maximum punishment.[3] *Beaty* holds that the maximum punishment for a charge of possessing "what appears to be" child pornography is that for a simple disorder which has a maximum authorized punishment of four months confinement and forfeiture of two-thirds pay per month for four months. *Id*. at 45. Contrary to the Government's argument, we do not find that the appellant's case is distinguishable from *Beaty*.[4] We find that the maximum punishment articulated by our superior court in *Beaty* is controlling and applicable to the Article 134, UCMJ, offense for which the appellant stands convicted, that is, possessing one or more visual depictions of "what appear to be" minors engaging in sexually explicit conduct. We also find that "[b]ecause the imposed sentence exceeded the maximum lawful sentence, it materially prejudiced Appellant's substantial rights." *Id*. (citations omitted).

The appellant requests that we authorize a rehearing on sentence. We find, however, that we are able to reassess the sentence. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this 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.

[1] The appellant was found not guilty of a second specification alleging wrongful and knowing distribution of one or more visual depictions of what appear to be minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

[2] In accordance with our superior court's holding in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F.), *reconsideration denied*, 70 M.J. 134 No. 10-0494/AF (Daily Journal 19 May 2011), on 31 May 2011, this Court granted the appellant's request for extraordinary relief in the nature of a writ of mandamus, ordering the Government to recalculate the appellant's release date from confinement based upon a four-month sentence to confinement, and if such date had already passed, then to release the appellant immediately. *United States v. Hall*, Misc. Dkt. No. 2011-03 (A.F. Ct. Crim. App. 31 May 2011) (order granting extraordinary relief).

[3] At trial, both trial counsel and defense counsel agreed with the military judge's calculation of the maximum punishment as a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1. The military judge asked the trial counsel, "[a]nd you are basing that on Article 134 and closely related offense being the Federal Statute prohibiting the possession of child pornography?" To which the trial counsel responded, "[y]es, Your Honor. The statute number is 18 U.S.C. [§] 2252(a)."

[4] The Government argues in its brief that 18 U.S.C. § 1466A(b)(2)(A) is a closely related offense for determining the correct maximum authorized punishment (10 years of confinement) in the appellant's case; however, as the defense reply brief indicates, the Government previously referenced this statute in its petition for reconsideration in *Beaty*, and that rationale was apparently rejected. *See Beaty*, 70 M.J. at 134. We also note that our superior court reaffirmed its *Beaty* holding in *United States v. St. Blanc*, 70 M.J. 424 (C.A.A.F. 2012).

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). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude," it must order a rehearing. *Id*. at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

Although the maximum punishment is substantially reduced as a consequence of the error, the evidence upon which the sentence was determined is unchanged, and we are confident that, absent the error, the military judge would have adjudged the maximum punishment authorized for a simple disorder based on the facts presented in this case. The appellant is a senior non-commissioned officer with over 20 years of service. The evidence shows that an Internet Crimes Against Children Task Force, a law enforcement entity that investigates child pornography activity, indentified the appellant's computer internet protocol address as using a peer-to-peer internet file sharing program which evidenced involvement with suspected images of child pornography. This led to a search of the appellant's home and seizure of his computer media. A seized flash drive contained 45 separate videos, of a combined duration of about 16 hours, depicting what appear to be minors engaged in sexually explicit conduct. Included in these videos are images of adults engaging in assorted sexual acts with what appears to be very young children. Testimony offered by a retired detective who personally investigated the case of a child who appears in one of the videos taken from the appellant, confirmed the identity of the child and that she was only four to five years old at the time she was engaged in sexually explicit conduct in the video.

Considering the evidence in the record, we find that a reassessed sentence of confinement for 4 months, forfeiture of $978.00 pay per month for 4 months, and reduction to the grade of E-1 cures the error. We also find, after considering the appellant's character, the nature and seriousness of the offense, and the entire record, that the reassessed sentence is appropriate.

Conclusion

The approved findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court