UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ALEXANDER SCHODOLSKI CAREY
United States Air Force

ACM 37605

04 May 2012

Sentence adjudged 8 December 2009 by GCM convened at Beale Air Force Base, California. Military Judge: Dawn R. Eflein.

Approved sentence: Dishonorable discharge, confinement for 1 year and 6 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Major Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Deanna Daly; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

ORR, Chief Judge:

Consistent with his pleas, a military judge found the appellant guilty of one specification of knowing and wrongful possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant elected to be sentenced by a panel of officers. The adjudged and approved sentence consisted of a dishonorable discharge,

confinement for 1 year and 6 months, and forfeiture of all pay and allowances.[1] The appellant raises five issues for our consideration: 1) whether the sentence must be set aside because the members determined the sentence based on an incorrect understanding of the maximum punishment; 2) whether the appellant's sentence, which included a dishonorable discharge and 18 months of confinement, was inappropriately severe; 3) whether the appellant is entitled to a new Staff Judge Advocate's Recommendation and Action where the staff judge advocate erroneously doubled the maximum authorized confinement period and forfeitures in advising the convening authority; 4) whether the trial judge erred by denying the appellant's implied bias against Major H; and 5) whether the trial judge's erroneous denial of appellant's challenge against Major H for implied bias and her application of Rules for Courts-Martial (R.C.M.) 912(f)(4) violated the appellant's statutory right to a meaningful peremptory challenge under Article 41(b), UCMJ, 10 U.S.C § 841(b). After considering the record of trial and the briefs of counsel, we find no error that materially prejudices a substantial right of the appellant and affirm.

I. Background

The appellant was a Multisource Intelligence Analyst assigned to the 13th Intelligence Squadron at Beale Air Force Base, California. In June of 2008, the appellant opened a residential high speed internet service account with Comcast. Later that month, the appellant started downloading videos of minors engaged in sexually explicit activity using the LimeWire system, a peer-to-peer computer program. In October of 2008, Air Force Office of Special Investigations (AFOSI) Special Agent (SA) MT was working with the Wyoming Division of Criminal Investigations Task Force formed to investigate and collect evidence of child pornography. As part of his investigation, SA MT discovered that someone using the appellant's Internet Protocol (IP) address was downloading what he believed to be child pornography via a peer-to-peer file sharing program. Based upon this information, SA MT asked the AFOSI agents at Beale AFB, CA, to assist him with his investigation. On 6 November 2008, AFOSI agents at Beale AFB, CA, obtained a warrant to search and seize the appellant's computer. AFOSI agents at Beale seized around twenty items from the appellant's dormitory room, including the appellant's two laptop computers, and called him in for questioning. After a proper rights advisement, the appellant agreed to answer the agents' questions and to provide a statement. In his statement, the appellant told the agents that he downloaded and viewed child pornography. He said he would use search terms such as "preteen" to find pornography involving children between the ages of eight and twelve. He would use other terms such as "pedophile" and "pedo" to find pornography involving children under the age of six.

[1] In accordance with a pretrial agreement, the convening authority agreed not to approve any confinement in excess of 24 months.

II. Maximum Punishment

In his first assignment of error, the appellant asserts that the military judge gave officer members an incorrect maximum punishment for the Specification of the Charge. The specification reads:

> In that [the appellant] did, at or near Beale Air Force Base, California, between on or about 18 June 2008 and on or about 8 November 2008, knowingly and wrongfully possess child pornography, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

The appellant contends that the military judge abused her discretion by instructing the members that the maximum punishment for this offense includes 20 years of confinement. We agree.

During the *Care* inquiry, *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), the appellant acknowledged understanding of all the elements of the offense and told the military judge that his conduct was prejudicial to good order and discipline and service discrediting. Near the conclusion of the *Care* inquiry, the military judge asked the trial counsel and the appellant's trial defense counsel what they believed was the maximum punishment authorized in the case based solely on the appellant's guilty plea. In response, counsel for both sides stated that the maximum punishment included confinement for 20 years. Because the military judge was not convinced that the counsels' answers were correct, she asked:

> MJ: All right, trial counsel, tell me where you're getting 20 years from.
>
> ATC: It's the U.S. Code that covers child pornography, ma'am.
>
> MJ: Really? Which one?
>
> DC: Your Honor, its [18 U.S.C. § 2252A], I believe.

In further discussions of the Charge and its Specification with counsel, she stated:

> MJ: . . . I am still intrigued by counsels' calculation of the maximum sentence, based upon the way the charge is drafted. So I'm going to defer that particular inquiry. The next question is supposed to be what I think the findings--what I think the max sentence is, and see if everybody agrees with me, but I think I need to do a little bit more looking at that over the lunch hour. So I'm going to defer that one. It's certainly not more than the 20 years that counsel agreed on before, I'm just not certain it's 20 years.

Counsel referred the military judge to *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007). After further discussions with counsel, the military judge determined that the maximum sentence for the Charge and its Specification included a term of confinement for 20 years.

Law

"The maximum punishment authorized for an offense is a question of law, which we review de novo." *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011) (citing *United States v. Ronghi*, 60 M.J. 83, 84-85 (C.A.A.F. 2004); *United States v. Ingham*, 42 M.J. 218, 229-30 (C.A.A.F. 1995)). In *Leonard*, our superior court determined that the criminal conduct and mens rea set forth in the child pornography specification there satisfied the requirements of Clauses 1 and 2 of Article 134, UCMJ, and described the gravamen of the offense proscribed by 18 U.S.C. § 2252(a)(2), for which the maximum sentence was fifteen years.[2] *Leonard*, 64 M.J. at 382. Accordingly, the Court held that the military judge did not err by referencing a directly analogous federal statute to identify the maximum punishment in that case, when every element of the federal crime, except the jurisdictional element, was included in the specification. In a more recent case, *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012), the Court indicated that when an appellant is charged with simple possession of child pornography, the analogous federal statute is § 2252A(b)(2) of the Child Pornography Prevention Act, 18 U.S.C § 2252A, which imposes a maximum confinement period of ten years. *Id*. at 426 n.3.[3]

Discussion

The military judge calculated an incorrect maximum punishment, based upon the recommendation of, and in reliance on the advice of, counsel for both sides that 18 U.S.C. § 2252(a)(2) was the directly analogous federal statute. However, consistent with our superior court's decision in *Leonard*, as later modified by *St. Blanc*, that error was plain and obvious. *See United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (applying plain error analysis in the absence of an objection by defense counsel when the law changed while the case was on appeal). Because we find that the maximum confinement authorized is 10 years, the Staff Judge Advocate's Recommendation is also incorrect, as asserted in the appellant's third assignment of error.

Having found error, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. Our Court "must be able to discern the extent of the error's effect on the sentence [and the] reassessment must be

[2] 18 U.S.C. § 2252 was amended 30 April 2003 and the maximum term of imprisonment is now 20 years.

[3] 18 U.S.C. § 2252A(b)(2) sets the maximum punishment for a violation of § 2252A(a)(5), prohibiting the possession of "an image of child pornography," whereas 18 U.S.C. § 2252(a)(4) prohibits the possession of "any visual depiction . . . involv[ing] the use of a minor engaging in sexually explicit conduct." The maximum term of imprisonment for simple possession under both statutes is 10 years.

based on a conclusion that the sentence that would have been imposed at trial, absent the error would have been at lease of a certain magnitude." *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). This conclusion about the sentence that would have been imposed must be made "with confidence." *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F 1999). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). In short, a reassessed sentence must be purged of prejudicial error and also must be "appropriate" for the offense involved. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1988).

Therefore, we reassess the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit.* Even with the disparity between the maximum sentence of 20 years calculated by the military judge and the actual maximum sentence of 10 years, we are confident that this error did not substantially influence the sentence and materially prejudice the appellant's substantial rights. The appellant knowingly and wrongfully possessed eighteen videos, varying in length, containing over two hours of child pornography. After the panel members viewed the videos, they sentenced the appellant to a dishonorable discharge, confinement for 18 months, and total forfeitures. Although the sentence was imposed by a panel of officers, this sentence is well within the construct of individualized sentencing based on this offense and the range of punishments regularly reviewed by this Court. Additionally, the prosecution argued for confinement for 3 years while the appellant's trial defense counsel asked the panel not to impose any confinement. As a result, we believe that the maximum allowable amount of confinement announced by the military judge had very little, if any, impact on the panel's decision. Under the facts and circumstances of this case, and considering the relative severity of the charge, we are confident that the panel of officers would have imposed at least a dishonorable discharge, confinement for 18 months, and forfeiture of all pay and allowances, even if they were told that the maximum amount of confinement authorized was 10 years.

In his second assignment of error, the appellant asserts that his sentence was inappropriately severe. We disagree. As previously stated, his punishment is well within the range of punishments for possession of child pornography regularly reviewed by this Court. After reviewing the record of trial, we find the convening authority's approved sentence to be appropriate, as required by Article 66(c), UCMJ, and reject the appellant's argument that he should not receive a dishonorable discharge. Moreover, the terms of the pretrial agreement contemplated the imposition of up to 24 months of confinement. The appellant's adjudged sentence included 18 months of confinement. As result, we are not convinced the appellant suffered substantial prejudice even though the convening authority received erroneous advice from his staff judge advocate concerning the amount of confinement authorized. In short, we believe that even with the knowledge that the

panel could only impose a sentence that included confinement for 10 years, the convening authority would have imposed the adjudged sentence.

III. Member Challenge for Cause

We now turn to the appellant's fourth assignment of error – that the military judge erred by denying the defense's challenge for cause against Major H, a member who was a new commander on the base with two minor children.

Major H was a new commander who sought advice on military justice matters from the legal office. Specifically, he recalled receiving advice over the phone from the trial counsel approximately ten times over a three month period. In response to questioning during voir dire, Major H stated that the majority of his interaction with the trial counsel revolved around the imposition of nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, to an Airman for minor misconduct. Upon further inquiry, Major H acknowledged that he made the decision to impose the nonjudicial punishment and the trial counsel's advice was mostly on procedural matters.

The defense challenge for cause was premised on the proposition that, because Major H was a brand new commander and has an ongoing working relationship with the trial counsel, he would be predisposed to follow the trial counsel's recommendations on a sentence. Defense counsel also argued that it was inappropriate for Major H to sit on this case because he had a 4-year-old daughter and a 7-year-old son, given the fact that the trial counsel intended to show the "horrific videos." Defense counsel were also concerned that Major H's 7-year-old son was in the same elementary school classroom with one of the trial counsel's children. The military judge denied the defense challenge for cause and found nothing that would create an appearance that either Major H or the proceedings would be unfair or biased. She found that no apparent bias existed because Major H's "relationship" with the trial counsel was unrelated to this case; his inexperience as a commander is not a ground for challenge; and the fact that he had young children is simply a fact. Moreover, she found that Major H indicated he could follow the military judge's instructions and evaluate the case solely on the evidence presented. After the military judge's ruling, the appellant's trial defense counsel used his peremptory challenge on Major H, who was then excused by the military judge.

Law

We review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000) (citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.M.A. 1997)). "Actual and implied bias are separate legal tests, not separate grounds for challenge." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (citation and internal quotation marks omitted). We test for implied bias using the totality of the factual circumstances. *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (citing *United States v. Strand*, 59 M.J.

455, 459 (C.A.A.F. 2004)). We test for actual bias by determining if any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (citation and internal quotation marks omitted).

We test for implied bias using an objective standard: "whether, in the eyes of the public, the challenged member's circumstances do injury to the perception of appearance of fairness in the military justice system." *United States v. Albaaj*, 65 M.J. 167, 171 (C.A.A.F. 2007) (citation and internal quotation marks omitted). We review a military judge's ruling on a challenge for implied bias "under a standard less deferential than abuse of discretion but more deferential than *de novo*." *Id.* (citation and internal quotation marks omitted). Because the determination of actual bias is a question of fact driven by the military judge's observations during trial, we are generally deferential to a military judge's determinations of actual bias. *Id.*

Discussion

The military judge in this case correctly applied the tests for both actual and implied bias and noted her analysis of the facts and law for the record. She expressly mentioned "liberal grant mandate," and the record demonstrates her proper application of the doctrine. The liberal grant mandate is tailored to the public's perception of the trial and should govern defense challenges. *See United States v. Townsend*, 65 M.J. 460, 463-64 (C.A.A.F. 2008). She also addressed her observations of Major H's answers and demeanor at trial as factors she used in making her determination.

Considering the record as a whole, we find that the appellant did not meet his burden of establishing grounds for challenge against Major H based on implied bias. There was no evidence presented that Major H could not separate his professional relationship with the trial counsel or his personal circumstances from the facts of this case. There is also no indication in the record that Major H had any personal stake in the outcome of this case. We find that most people in the members' position would not be prejudiced and that any reasonable member of the public would not have doubt as to the fairness of the military justice system or the impartiality of the appellant's court-martial panel. During voir dire, Major H clearly demonstrated his willingness to judge the appellant's case based on the evidence presented at trial in accordance with the military judge's instructions. There was neither actual nor apparent bias demonstrated by this member and his service on this court-martial did not serve to undermine the appearance of fairness or otherwise "diminish [ ] public perception of a fair and impartial court-martial panel." *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006), *aff'd*, 64 M.J. at 384. Accordingly, we hold that the military judge did not err by denying the appellant's challenge for cause.

We also find that the appellant's fifth assignment of error is without merit. As previously stated, the appellant's trial defense counsel used his peremptory challenge on Major H. R.C.M. 912(f)(4), in pertinent part, states, "When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review." *Id*.

IV. Appellate Delay

The overall delay of more than 540 days 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. *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. *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.[4]

V. Conclusion

The approved findings and the 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 MJ. 37, 41 (C.A.A.F. 2000).

[4] We note this Court approved seven requests from the appellant for an enlargement of time in this case.

Accordingly, the findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court