UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY R.L. VAN NESS
United States Air Force

ACM 37683

18 April 2012

Sentence adjudged 7 April 2010 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Beth A. Townsend (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Michael S. Kerr.

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

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant, in accordance with his pleas, of two specifications of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934, and sentenced him to a bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged except for the forfeitures. Pursuant to a conditional guilty plea, the appellant renews his argument that the discovery of the charged child pornography on his computer resulted from an illegal

search. He also asserts that the military judge committed plain error by admitting portions of a Senate Report in sentencing which describe the impact of child pornography on its victims.[1] We find no error that materially prejudiced the rights of the appellant and affirm.

I

We review a ruling on a motion to suppress for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We review findings of fact under the clearly-erroneous standard and conclusions of law de novo. *Id*. On mixed questions of law and fact we will find an abuse of discretion if the "findings of fact are clearly erroneous or the conclusions of law are incorrect." *Id*. Lastly, we consider the evidence in the light most favorable to the prevailing party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citations omitted). Here, the evidence produced on the motion strongly supports the findings of the military judge.

After deploying to Al Udeid Air Base, Qatar, in October 2008, the appellant asked his wife to ship his laptop computer to him, which both he and his wife used. She delivered the laptop to the appellant's mobility section for shipment where, in accordance with established procedure, the unit inspected it for contraband. During the inspection of the laptop, unit personnel discovered suspected child pornography files.

In detailed findings of fact and conclusions of law, the military judge determined that the discovery of child pornography on the appellant's computer resulted from a lawful inspection under Mil. R. Evid. 313. Finding that both the appellant and his wife knew that all packages sent to Al Udeid were subject to search, the military judge concluded that the appellant had no reasonable expectation of privacy which would preclude further search of the computer after contraband was discovered during the inspection. Finally, the military judge found by clear and convincing evidence that the appellant's wife lawfully consented to the search of the computer when she delivered it to the appellant's unit for shipment.

The military judge did not abuse her discretion in admitting the child pornography found on the appellant's laptop computer. Mil. R. Evid. 313 permits admission of evidence obtained from inspections "conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Technical Sergeant W described the inspection procedure for shipment of personal items to deployed members and testified that all unit members were informed that items shipped to Al Udeid would be inspected for contraband, to include pornography. The inspection procedures were narrowly focused, clearly identified, and not used to obtain evidence for trial but to ensure the security and good order and discipline of the unit.

[1] The appellant raises both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Having reviewed the legal conclusion de novo, we find that the military judge did not err in concluding that the contraband was discovered during a valid inspection.

Nor do we find error in the conclusion that the appellant's spouse lawfully consented to the search of the computer. Valid consent may be obtained from a third-party when the third party possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007). The evidence supports the military judge's conclusion that the appellant and his wife exercised joint authority and control over the laptop based on a history of shared, unrestricted use. When she brought the computer for shipment to Al Udeid, the appellant's wife was informed that the computer would be searched for contraband to include pornography and she expressed confidence that a search would reveal no contraband. The record amply supports the findings of the military judge, and we find no abuse of discretion in the conclusion that the appellant's spouse lawfully consented to a search of the computer prior to its shipment to Al Udeid.

II

The appellant objected at trial to the admission of certain portions of a Senate Report on the impact of child pornography. Specifically, he objected to those portions that related to seduction of children "and all that sort of language" but apparently conceded the admissibility of other portions with the proper balancing under Mil. R. Evid. 403: "And, again, we don't necessarily need—we think that, Your Honor, is certainly qualified to give the weight to the report that is necessary without full redaction." In line with the defense counsel's objection, the military judge considered only paragraphs 1, 2, 7, 10a, and 11-13 of the report and did not consider other paragraphs that related to child seduction and molestation. The military judge also conducted the required balancing test under Mil. R. Evid. 403 for those paragraphs that she did consider.

Assuming arguendo that the issue is not waived by the appellant's concession at trial that the portions of the report considered by the military judge were admissible, we analyze the military judge's decision for plain error which requires (1) that error occurred, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). We find no plain or obvious error in the military judge's decision to take judicial notice of the facts related in the admitted portions of the report.

The military judge admitted the evidence as aggravation during sentencing. Rule for Courts-Martial 1001(b)(4) allows for the admission of "evidence as to any aggravating circumstances *directly relating to or resulting from the offenses* of which the accused has been found guilty." (Emphasis added). In another case involving possession of child pornography and the use of a Senate Report to show the impact on its victims, we held that the "impact upon the children used in the production of the pornography is

sufficiently direct and could properly assist the sentencing authority in evaluating the consequences of the appellant's criminal behavior." *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). Here, we find no plain error in the limited use of the Senate Report to assist the military judge in assessing the impact on victims portrayed in child pornography. We further note that the military judge imposed less than one third of the confinement requested by the Government and rejected the Government's argument for a dishonorable discharge. Under these circumstances, we see no evidence that the appellant suffered material prejudice from the judge's consideration of this report.

III

We note that the overall delay of over 18 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. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. 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 and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] We note that the findings for Specification 1 of the Charge listed on the court-martial order (CMO) include reference to the excepted language, but fail to include the substituted language. We order the promulgation of a corrected CMO.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court