UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CALEB B. BEATY
United States Air Force

ACM 37478

25 March 2010

Sentence adjudged 05 May 2009 by GCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Jamie L. Mendelson, 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:

The appellant pled guilty pursuant to a pretrial agreement to wrongfully and knowingly possessing visual depictions of what appears to be a minor engaging in sexually explicit conduct, in violation of clauses 1 and 2 of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and reduction to E-1. On appeal the appellant challenges the military judge's determination of the maximum punishment, arguing that the language of the specification precludes application of the analogous

federal law maximum of ten years under the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Article 134, UCMJ, permits charging conduct not specifically covered by other articles of the UCMJ. Clause 1 offenses involve prejudice to good order and discipline in the armed forces, clause 2 offenses involve conduct that brings discredit to the armed forces, and clause 3 offenses incorporate violations of federal law. Article 134, UCMJ. The maximum punishment for Article 134, UCMJ, offenses not included or closely related to an offense specified in the *Manual for Courts-Martial, United States (2008 ed.)*, is the maximum for an analogous offense under the United States Code. Rule for Courts-Martial 1003(c)(1)(B)(ii); *United States v. Leonard*, 64 M.J. 381, 384 (C.A.A.F. 2007). Specifications under clause 1 and clause 2 of Article 134, UCMJ, need not exactly match the elements of conduct prohibited under federal law so long as the conduct charged is essentially the same as that in the federal statute. *Leonard*, 64 M.J. at 383-84.

Article 134, UCMJ, is the appropriate vehicle for charging possession of child pornography since this crime is not covered by other articles of the UCMJ. The analogous federal offense for determining maximum punishment is the CPPA which prohibits knowing possession of visual depictions of minors engaged in sexually explicit conduct and sets the maximum punishment at ten years. The specification in this case alleges violations of clause 1 and clause 2 of Article 134, UCMJ, by possessing images of "what appears to be a minor" engaging in sexually explicit conduct. The military judge determined the maximum punishment by referring to that of the analogous CPPA. The appellant now argues that the language "appears to be" in the charged specification precludes application of the CPPA's maximum sentence since possessing images which *only appear* to be child pornography is not within the scope of the statute. We disagree.

Due process requires "fair notice" that conduct charged under Article 134, UCMJ, is forbidden and subject to criminal sanction. *United States v. Anderson*, 60 M.J. 548, 554 (A.F. Ct. Crim. App. 2004). The record shows that the charged specification in this case clearly informed the appellant of the misconduct that was prejudicial to good order and discipline as well as service discrediting under clauses 1 and 2 of Article 134, UCMJ. The appellant admitted during the plea inquiry that he possessed multiple images and videos of known child pornography victims, admitted that the images and videos were of real children, and admitted that his conduct was prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. The military judge advised the appellant that to be guilty of the offense, he must have known "the nature and character" of the material possessed, and he must have known the depictions were "of a minor engaged in sexually explicit conduct." The appellant entered into a stipulation of fact in which he admitted that the images he possessed were of actual children that included known victims of the child pornography industry. Finally, he

entered into a pretrial agreement that capped confinement at 12 months – three times that of the disorderly conduct offense which he now argues is the correct "closely related" offense.

In *Anderson*, we found the appellant's plea of guilty to transporting and possessing child pornography improvident where he was charged under clause 3, Article 134, UCMJ, with a violation of 18 U.S.C. § 2252A, and the military judge used constitutionally overbroad language to define child pornography as including an image that "appears to be" a minor rather than only an actual minor. We determined however, that the pleas were provident to a lesser included clause 2 violation of Article 134, UCMJ: "These graphic images remove any reasonable doubt that they are – *whether of actual or 'virtual' children* – of a nature to bring considerable discredit upon the armed forces." *Id*. at 555. In reassessing the sentence we found the maximum punishment to be the same as the analogous federal offense under 18 U.S.C. § 2252A. *Anderson*, 60 M.J. at 558.

Such is the case here. The specification notifies the appellant that he violated Article 134, UCMJ, by possessing what appears to be child pornography, and the proof shows exactly that. His argument that the language "appears to be" precludes application of the CPPA maximum ignores the plain language of the specification and the proof behind it. The specification does not allege that he violated Article 134, UCMJ, by only possessing images of cartoon characters, morphed photographs, or adults pretending to be children; rather, the specification tells him that he violated Article 134, UCMJ, by possessing images of what appears to be a minor engaging in sexually explicit conduct. This specification clearly informs the appellant that the conduct at issue is possession of child pornography.

The appellant did not move for a bill of particulars, nor did he move to dismiss the specification for failure to allege an offense on the basis that it criminalizes some constitutionally protected conduct, i.e., possession of virtual rather than actual images of child pornography. In *Anderson*, we considered this possibility of First Amendment[1] protection for images that might be charged under Article 134, UCMJ, and rejected it based on the proof offered at trial: "Our review of these images – whether actual or virtual – leaves us with no concern that these visual depiction[s] might occupy a protected constitutional 'gap' between *Miller*[2] and *Free Speech Coalition*[3]." *Id*. at 553. We reach the same conclusion here. The specification provided fair notice that the gravamen of the charged offense is possession of child pornography, the appellant admitted that he knowingly possessed images of minors engaged in sexually explicit conduct, and the military judge correctly determined the maximum punishment by

[1] U.S. CONST. amend. I.
[2] *Miller v. California*, 413 U.S. 15 (1973).
[3] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

referring to the analogous federal offense of knowing possession of child pornography, in violation of 18 U.S.C. § 2252A.

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, 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 are

AFFIRMED.

OFFICIAL

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