UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM J. ST. BLANC, JR.
United States Air Force

ACM 37206

21 October 2009

Sentence adjudged 14 December 2007 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Nancy J. Paul (sitting alone).

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

Appellate Counsel for the Appellant: Major Matthew C. Hoyer (argued), Major Shannon A. Bennett, Major Lance J. Wood, Major Imelda L. Paredes, Captain Nicholas McCue, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Captain Michael T. Rakowski (argued), Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

HELGET, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of one specification of attempt to communicate indecent language to a person believed to be under age 16, and one specification of wrongful and knowing possession of 15 images and 4 videos which depict persons who appear to be minors engaging in sexually explicit conduct, in violation of Articles 80 and 134, UCMJ,

10 U.S.C. §§ 880, 934. The approved sentence consists of a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant asserts two assignments of error before this Court: (1) the sentence must be set-aside because the military judge determined the maximum sentence based on the incorrect maximum punishment; and (2) the findings must be set-aside because the appellant would have elected a panel of members rather than a military judge alone had he been advised of the actual maximum punishment.

Background

In early May 2006, while working undercover investigations online, Detective SC, Washington State Patrol Missing and Exploited Children Task Force, received an instant message from "boredinspokane509," later identified as the appellant. Detective SC's screen name was "swtmandygal13." Detective SC was pretending to be Mandy Brady, a 13-year-old girl from Olympia, Washington. Between May and August 2006, she engaged in at least three conversations with the appellant in an adult romance chat room on Yahoo. Although there was a requirement to be 18 years old to have access to the chat room, Detective SC informed the appellant that she was only 13 years old. During their online conversations, the appellant repeatedly made sexually explicit comments to Detective SC.

On 31 July 2006, Detective SC notified the Air Force Office of Special Investigations (AFOSI), Detachment 322, at Fairchild Air Force Base, Washington, that she was investigating the appellant. On 28 September 2006, Special Agent (SA) WG interviewed the appellant. During the interview, the appellant stated that when he started chatting with "swtmandygal13," he did not believe she was 13, but as the chats continued, he started to believe she actually was 13. Prior to the conclusion of the interview, the appellant wrote an apology letter to "swtmandygal13." After the interview, AFOSI conducted a search of the appellant's off-base residence. AFOSI seized two laptop and three desktop computers and several compact discs, which were sent to the Defense Computer Forensics Lab (DCFL) for analysis. DCFL found 18 photographs and 4 videos containing suspected child pornography.

At trial, the defense called Dr. SB, an expert in pediatric and adolescent gynecology and pediatrics. She testified that she reviewed all of the images DCFL found that contained suspected child pornography. Dr. SB was unable to make an affirmative age determination for only three of the photographs, meaning she could not determine if the individuals were under or over 18 years of age.

Maximum Punishment

The appellant asserts that his sentence must be set-aside because the military judge erred in adopting the 10-year maximum punishment from the Child Pornography Prevention Act of 1996 (CPPA). 18 U.S.C. §§ 2252(a)(1), (a)(4)(A), (b)(2). The CPPA criminalizes knowing possession of one or more visual depictions of a minor engaging in sexually explicit conduct. 18 U.S.C. §§ 2252(a)(1), (a)(4)(A). The appellant claims that since the government did not assimilate every element of the offense from Title 18, the closest related offense under the *Manual for Courts-Martial, United States (MCM)* (2005 ed.) is service-discrediting disorderly conduct, which carries a maximum punishment of four months. *MCM*, Part IV, ¶ 73.e.(1)(a).

Prior to announcing the sentence, the military judge stated that the maximum sentence was confinement for 12 years, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. Since the maximum punishment for the charge of attempted indecent language with a child under 16 years is two years confinement, it appears the military judge adopted the 10-year maximum punishment from the CPPA.

In *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007), our superior court held that a military judge may properly calculate the maximum punishment for an offense charged under clauses 1 and 2, Article 134, UCMJ, by reference to the maximum punishment for a violation of a federal statute that proscribes and criminalizes the same criminal conduct, even in the absence of a jurisdictional element. *Leonard*, 64 M.J. at 384. Our superior court further noted that so long as "[t]he criminal conduct and mens rea set forth in the specification satisfy the requirements of clauses 1 and 2 of Article 134, UCMJ, and describe the gravamen of the offense" proscribed by the analogous federal statute, the military judge may reference the federal statutory maximums to determine the maximum authorized sentence that could be adjudged by a court-martial. *Id*.

In the appellant's reply brief, he argues that the "appears to be minors" language in the charged specification is not essentially the same as the CPPA requirement that the victims be actual minors, which was alleged in *Leonard.* The appellant contends that the charged offense requires a lesser degree of proof; therefore, the government should not be allowed to adopt the maximum offense for images that depict "actual" minors.

In this case, we find that the charged offense is essentially the same offense as the federal statute. Although the government included the language "what appears to be minors," in the specification, the criminal conduct and mens rea set forth in the specification describe the gravamen of the offense proscribed by 18 U.S.C. § 2252(a)(4)(A). Additionally, the 10-year maximum still applies because under 18 U.S.C. § 2252(b)(2), the 10-year maximum applies to both actual violations and "attempted" violations of 18 U.S.C. § 2252(a)(4). Further, in compliance with Rule for Courts-Martial 307(c)(3), the specification sufficiently informed the appellant of the conduct

charged, i.e., the 18 images and 4 videos, to enable him to prepare a defense and to protect against double jeopardy. The appellant defended himself against the 18 photographs and 4 videos containing suspected child pornography at trial, and the military judge ultimately found the appellant guilty of possessing 15 images and 4 videos of actual minors engaged in sexually explicit conduct. Accordingly, under the facts and circumstances of this case, we hold that the military judge did not err in adopting the maximum punishment from the federal statute. Concerning the second assignment of error, having answered the first assignment of error in the negative, the second assignment of error is moot.

Action

On 27 December 2007, pursuant to Articles 57(a)(2) and 58b(b), UCMJ, 10 U.S.C. §§ 857, 858b, the convening authority deferred the adjudged forfeitures and waived the mandatory forfeitures for a period of one month. However, the Action fails to properly memorialize the convening authority's grant of clemency on 27 December 2007. Accordingly, we order a corrected Action to reflect that the adjudged forfeitures were deferred and the mandatory forfeitures were waived for a period of one month, under Articles 57(a)(2) and 58b(b), UCMJ.

Conclusion

We conclude the approved findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Therefore, on the basis of the entire record, the findings are *affirmed*. Because the Action fails to properly state the convening authority's deferral and waiver of forfeitures on 27 December 2007, the Action is incorrect. Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous Action and substitute a corrected Action. Further, we order the promulgation of a corrected court-martial order reflecting the correct Action. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

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