UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL D. BAUMGARDNER
United States Air Force

ACM 37241

30 March 2009

Sentence adjudged 08 April 2008 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: Jennifer L. Cline (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 26 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Bryan A. Bonner, and Captain Tiaundra D. Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Neal B. Frazier.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of wrongfully possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, 30 months confinement, and a reduction to the grade of E-1. The convening authority approved the dishonorable discharge, 26 months of confinement, and the reduction to E-1.[1] On appeal the appellant, pursuant to *United*

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the Charge and Specification in return for the convening authority's promise to not approve confinement in excess of 28 months.

States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), asserts that his sentence is inappropriately severe. We disagree and, finding no error, affirm.

Background

On 24 April 2007, the appellant visited an adult sex shop in London, England. While there, he asked the proprietor for alternative sex items and advised the proprietor that he, the appellant, had a large amount of child pornography that he would like to share with like-minded individuals. The proprietor, unknown to the appellant, was a confidential informant with the London Metropolitan Police Department. The proprietor reported the appellant to the London Metropolitan Police Department who, in turn, reported the appellant to agents with the Air Force Office of Special Investigations (AFOSI).

On 1 August 2007, AFOSI agents summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, confessed to telling the sex shop proprietor that he had child pornography he was willing to share with others, and consented to a search of his on-base residence. That same day, AFOSI agents seized two laptop computers and storage media from the appellant and forwarded the items to the Defense Computer Forensic Laboratory for analysis. A forensic examination of one of the appellant's computers revealed two videos – one depicting a prepubescent female engaging in sexual intercourse with an adult male[2] and another video depicting a prepubescent male and female engaging in oral and sexual intercourse with each other and engaging in oral intercourse with an adult male.[3] The appellant had downloaded these videos onto his computer using LimeWire, a peer-to-peer file sharing program.

Inappropriately Severe Sentence

The appellant asserts that his sentence to a dishonorable discharge is inappropriately severe. In support he points to the sentences received by the appellants in *United States v. Ellis*, ACM 37129 (A.F. Ct. Crim. App. 22 Oct 2008) (unpub. op.), *United States v. Novicki*, ACM 36706 (A.F. Ct. Crim. App. 20 Jul 2007) (unpub. op.), and *United States v. Moultrie*, ACM 36372 (A.F. Ct. Crim. App. 31 May 2007) (unpub. op.).[4]

---

[2] The video file is known child pornography in the National Center for Missing and Exploited Children database.
[3] The video file is known child pornography in the National Center for Missing and Exploited Children database.
[4] In *United States v. Ellis*, ACM 37129 (A.F. Ct. Crim. App. 22 Oct 2008) (unpub. op.), the military judge sentenced Senior Airman Ellis to a bad-conduct discharge, 30 months confinement, and a reduction to E-2. Pursuant to a pretrial agreement, the convening authority approved the bad-conduct discharge, 17 months confinement, and the reduction to E-2. In *United States v. Novicki*, ACM 36706 (A.F. Ct. Crim. App. 20 Jul 2007) (unpub. op.), the military judge sentenced Technical Sergeant Novicki to a dishonorable discharge, 36 months confinement, and a reduction to E-1. The convening authority approved a bad-conduct discharge, 24 months confinement, and the reduction to E-1. Finally, in *United States v. Moultrie*, ACM 36372 (A.F. Ct. Crim. App. 31 May 2007) (unpub.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). However we are not authorized to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Moreover, while we are required to examine sentence disparities in closely related cases, we may, but are not required to, do so in other cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)).

Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.* In the case at hand, not only is there no evidence that the appellant was a co-actor with the appellants in the cited cases, there has also been no showing of a direct nexus between the appellant's case and the cases of those he cites. Put simply, the appellant has fallen woefully short in demonstrating that the cited cases are closely related to his case. Accordingly, a sentence comparison is not required or warranted.

We next consider whether the appellant's sentence was appropriate judged by "'individualized consideration' of the particular appellant 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *Mamaluy*, 27 C.M.R. at 180-81). The appellant, through his actions, perpetuates a market that wreaks havoc on the lives of the youngest and most vulnerable members of our society. His actions are a clear departure from the norms of society and expected standards of conduct in the military. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and

---

op.), Airman Basic Moultrie's adjudged and approved sentence consisted of a bad-conduct discharge, 48 months confinement, forfeiture of all pay and allowances, and a reprimand.

circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence, a sentence that includes a dishonorable discharge, to be inappropriately severe.

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; *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