UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KENNETH J. BETTS
United States Air Force

ACM 35288

12 November 2003

Sentence adjudged 1 July 2002 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 9 months.

Appellate Counsel for Appellant: Philip D. Cave.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of possessing child pornography on property under the control of the United States, contrary to 18 U.S.C. § 2252A, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved was a bad-conduct discharge and confinement for 9 months.

The appellant moves this Court to remand the case to the convening authority for a "full" clemency review. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant also asserts that his sentence is inappropriately severe, and that his plea was not provident. We find no merit to these contentions and affirm.

I. Background

Military authorities investigated the appellant for indecent acts with a child. As part of the investigation they sought and received the appellant's consent to search his dormitory room on McGuire Air Force Base, and his personal computer. Examination of the contents of the computer revealed 22 images of children under the age of 18 engaged in sexually explicit conduct.

The government charged the appellant with committing indecent acts upon a child under the age of 16 years. Before trial, the prosecution gave notice of its intent to offer evidence of the child pornography found on the appellant's computer. However, the military judge excluded the evidence in a preliminary ruling. The government preferred an additional charge alleging the possession of child pornography and attempted to join the charge with the earlier offense, but was unable to do so over defense objection. The second allegation was tried separately, and is now before this Court for review under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

II. Remand for Clemency Consideration

The appellant asks that this Court return the case to the convening authority for an additional clemency review. We deny the request.

Trial concluded on 1 July 2002. The appellant and counsel received copies of the record of trial and the staff judge advocate's recommendation (SJAR) not later than 22 July 2002, and were notified that clemency matters were due within 10 days. On 7 August 2002, the defense counsel requested a 20-day extension to submit clemency matters. The convening authority granted the extension only until 16 August 2002.

On 15 August 2002, the civilian defense counsel submitted a three-page letter to the convening authority. In it, the defense counsel requested an additional 45 days to submit clemency matters. Counsel indicated the delay was needed because the U.S. Navy Bureau of Personnel might release some of the appellant's confinement records, which might show that he was progressing well in rehabilitation counseling, which might cause the trial judge to make a favorable recommendation for clemency, which might be relevant to the convening authority in deciding whether to grant clemency. The civilian defense counsel also requested clemency, noting the appellant's plea of guilty, his remorse, his efforts at rehabilitation counseling, and extenuating factors surrounding the offense. He asked that the sentence in this case run concurrently with the sentence in the earlier court-martial.

On 22 August 2002, the staff judge advocate prepared an addendum to the SJAR. He summarized the defense request for delay and clemency, and advised the convening

authority that he must consider the matters submitted by the defense. On that same day, the convening authority took formal action approving the findings and sentence.

The appellant now asks this Court to send this case back to the convening authority for additional clemency consideration. He argues that the record does not reflect that the convening authority considered the appellant's 15 August 2002 clemency submission. However, a glance at the record of trial clearly shows this contention is without merit. The addendum to the SJAR specifically discusses the 15 August 2002 letter. It is listed as an attachment to the addendum and a copy is included in the record of trial. On the date the convening authority approved the findings and the sentence, he signed a separate letter indicating that he fully considered the defense submission before taking action on the case. Finally, on that same date the convening authority signed a separate letter denying the request for an additional 45 days; the letter specifically cited the defense counsel's 15 August 2002 submission.

The appellant asserts that he "raised matters in accordance with UCMJ art. 38(c)," and alleges somewhat cryptically, "The record is silent on appellant's . . . legal error matters." We note that in the addendum to the SJAR, the staff judge advocate declared, "Defense counsel notes no errors in the [record of trial] . . . ." Although not argued by the appellate defense counsel, we recognize that erroneous advice by the staff judge advocate can be a basis for setting aside the post-trial processing. *United States v. Welker*, 44 M.J. 85, 88 (C.A.A.F. 1996); *United States v. Craig*, 28 M.J. 321, 324 (C.M.A. 1989); *United States v. Hill*, 27 M.J. 293, 296-97 (C.M.A. 1988).

Reviewing the civilian defense counsel's 15 August 2002 submission, it appears to be devoted to his request for enlargement of time and clemency, as discussed above. However, among the mitigating and extenuating factors the defense counsel included a comment relating to the appellant's claimed attempt to delete some of the images. He noted parenthetically that, "the military judge did not address the affirmative defense allowed for in the federal statute when an accused makes a good faith effort to destroy images." In order to assure the appellant received a proper post-trial review, we will consider this more closely.

Article 60(d), UCMJ, 10 U.S.C. § 860(d), requires the staff judge advocate to prepare a formal recommendation to the convening authority containing "such matters as the President may prescribe by regulation." The President promulgated Rule for Courts-Martial (R.C.M.) 1106, setting out the required content of the recommendation. With regard to allegations of legal error, the rule states in pertinent part:

> (4) Legal errors. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state

> whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

R.C.M. 1106(d)(4). The recommendation must be served upon the defense, who may submit comments, corrections or rebuttal. R.C.M. 1106(f). The staff judge advocate may supplement the original recommendation with an addendum. R.C.M. 1106(f)(7). Where the defense raises allegations of legal error at trial or in the formal recommendation, the staff judge advocate must provide an appropriate response and recommendation to the convening authority. *Welker*, 44 M.J. at 88; *Craig*, 28 M.J. at 324; *Hill*, 27 M.J. at 296-97.

We first consider whether the defense actually raised an allegation of legal error. The appellant's clemency submission included the following:

> As we indicated prior to referral and at trial, Airman Betts had attempted to destroy much [sic] of the images that he was aware of and had apparently done so before coming onto active duty. (This point came up in the trial several times and I would note that the military judge did not address the affirmative defense allowed for in the federal statute when an accused makes a good faith effort to destroy images.)

The isolated comment was included in a paragraph discussing matters in extenuation and mitigation. At first glance it may seem to suggest there was an affirmative defense left unresolved. However upon further review that would be illogical, because the preceding sentence indicates the appellant did not destroy all of the images in question, so that the affirmative defense would not apply. *See* 18 U.S.C. § 2252A(d). We also note the defense counsel who submitted the clemency request is the same counsel representing the appellant on appeal and did not raise this issue before this Court, even though he otherwise challenges the providence of the appellant's plea. Instead, the comment may have been simply an observation that, because the military judge did not explore the affirmative defense, the extenuating facts were not developed more completely on the record.

Even if we assume this was an allegation of legal error that the staff judge advocate failed to address, we must determine whether it was prejudicial. *See United States v. Hamilton*, 47 M.J. 32, 36 (C.A.A.F. 1997) ("erroneous advice by an SJA [staff judge advocate] as to a claim of legal error . . . can be corrected by appellate litigation of the claimed error"); *Welker*, 44 M.J. at 89 ("If there is no error in the first instance at trial, we will not find prejudicial error in the failure of the SJA to respond . . .").

The affirmative defense in 18 U.S.C. § 2252A(d) requires that the appellant: (1) possess less than three images of child pornography, and (2) destroy the images promptly. The record clearly shows the appellant meets none of these criteria. He possessed more than three images. He did not act promptly to destroy them; rather, he kept them from his college days, through his enlistment and basic training, and for several months after arriving at his first duty station. We find that the providence inquiry was sufficient to establish that the affirmative defense did not apply. Thus, we find no possible prejudice to the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Finally the appellate defense counsel asks us to order new clemency proceedings "out of an excess of caution." We find no basis to do so.

III. Sentence Appropriateness

The appellant contends his sentence is inappropriately severe. He repeats the arguments that he presented to the military judge and the convening authority concerning the relative severity of his offenses. We are not persuaded. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). He also suggests legal errors not otherwise raised; we find these arguments to be without merit.

IV. Providence of the Plea

The appellant contends his plea is improvident, because the military judge did not elicit a factual basis from the appellant demonstrating that his conduct was service discrediting or prejudicial to good order and discipline. We do not agree.

First, we are not convinced that charges brought under clause 3 of Article 134, UCMJ, include, as a required element, that the conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. Clearly those elements are required for charges brought under clauses 1 or 2 of Article 134. Clause 3, however, incorporates specifically designated federal offenses. It would be incongruous to suggest that to be prosecutable under the UCMJ a specified federal offense must also be prejudicial to good order and discipline or service discrediting.

The *Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 60b (2002 ed.), sets out the elements of offenses charged under Article 134, UCMJ, and distinguishes between offenses brought under clauses 1 and 2, and those brought under clause 3. That section provides, "If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law." *Id.* D.A. Pam. 27-9, *Military Judge's Benchbook*, ¶ 3-60-2c, similarly provides that the elements for offenses charged under clause 3, Article 134, UCMJ, are simply the

elements of the federal statute violated (or the state statute assimilated under the Assimilative Crimes Act, 18 U.S.C. § 13), along with any necessary jurisdictional element. In *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000), our superior court reviewed a charge under clause 3 of Article 134, UCMJ, and held, "By charging a violation of the federal statute, the Government was not required to prove either the prejudicial or discrediting nature of the conduct to make it a criminal offense." *See also United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995); *United States v. Ivey*, 53 M.J. 685, 695 n.14 (Army Ct. Crim. App. 2000), *aff'd*, 55 M.J. 251 (C.A.A.F. 2001).

Offenses enumerated under federal law are akin to crimes enumerated in the UCMJ. "The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces." *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994). In the same way, enumerated federal offenses chargeable under clause 3 of Article 134, UCMJ, necessarily include these elements. Of course, a prudent judge may elect to question the accused about these offenses, to eliminate any confusion or to lay a foundation for a lesser included offense upon further review. However, failure to address these elements is not fatal to an inquiry of a clause 3, Article 134, UCMJ, offense. We conclude that even if the military judge did not elicit from the appellant a factual basis for believing that his conduct was prejudicial to good order and discipline or was service discrediting, if would not affect the providence of his plea to an offense under clause 3, Article 134, UCMJ.

In any event, during the providence inquiry in this case the military judge advised the appellant that his conduct had to be to the prejudice of good order and discipline within the armed forces or of a nature to bring discredit to the armed forces. She asked the appellant which he thought it was, and he responded, "Good order and discipline, ma'am." When asked why, he said, "Being a military member, I should abide by the laws." The military judge went on to ask, "So, you believe that if they knew you had them on your computer, it might bring discredit to the service that you knew you had them and you kept -- for sure, you meant to keep the one with the young woman, right?" He replied that he did. The military judge discussed it further, and summed up by asking, "So you feel comfortable it is prejudicial to good order and discipline, at least, and it might also be of a nature of service [sic] discrediting, is that what I understand?" The appellant agreed.

We are satisfied the military judge made the proper inquiry to establish a factual basis for a provident plea. *United States v. Jordan*, 57 M.J. 236, 238-39 (C.A.A.F. 2002); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). We find no substantial basis in law or fact for questioning the guilty plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

V. Conclusion

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator