UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DANIEL J. BROWN
United States Air Force

ACM 36695

16 November 2007

Sentence adjudged 20 January 2006 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Major Anniece Barber, Captain Christopher L. Ferretti, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, Major Amy E. Hutchens, Captain Jefferson E. McBride, and Captain Donna Rueppell.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his plea, of one specification of possessing visual depictions of minors engaging in sexually explicit conduct, which was of a nature to bring discredit upon the armed forces, in violation of Article 134, UCMJ, 10 U.S.C. § 934. On appeal, the appellant asserts the evidence was legally and factually insufficient where the Government failed to prove his possession of child pornography was of a nature to bring discredit upon the armed forces. For the reasons set out below, we find no merit in the assigned error and affirm.

Background

The appellant came to the attention of law enforcement authorities as a result of an international child pornography sting operation. Various child pornography images were made available on the Internet. Information was then obtained regarding the identity, or Internet Protocol (IP) address, of those computers on which the images were downloaded. This information was provided to the United States Customs and Immigration Service which served a subpoena on the Internet service provider who had provided service to the appellant's computer at his previous address in Bellevue, NE. The Customs and Immigration Service then contacted local civilian police authorities who tracked the appellant to his then-current address in Council Bluffs, IA. The police, after obtaining the cooperation of the Air Force Office of Special Investigations (AFOSI), interviewed the appellant at Offutt Air Force Base (AFB) on 28 Oct 04.

During the interview, the appellant stated that he had lived in the identified residence located in Bellevue, NE, with roommates who had access to his computer.[1] He then moved to his own residence in Council Bluffs, at which time he continued to possess the same computer. The appellant stated he used a peer-to-peer program named Kazaa to trade files on the Internet. The appellant subsequently consented to a search of his computer and they proceeded to his residence. The computer was on and the police investigator observed a Kazaa shared file folder on the screen. The appellant consented to the officer opening the folder. Once the folder was opened, the police investigator could view thumbnail images of the files, some of which depicted images of a specific child pornography series known to the police investigator. A search warrant was obtained and the computer seized. The appellant explained to the investigator that he used Kazaa to search for pictures of young boys and teen girls engaged in sex.

At trial, the appellant testified in his own defense essentially as follows: he denied that he had any interest in child pornography and its downloading was inadvertent. Rather, he used his computer to search for pornography featuring people in his own age group, 18 to 20 years old. He would use the search terms "teen," "teen girl," and "teen boy." When he did a search, items relevant to the search term would appear along with the attributes of each file. About 20 file listings would appear on the screen at one time. He would highlight and download the top 20 files, because these were the ones having the most viewers and were the most reliable. He rarely took the time to read the file names or types. The download would take from hours to days depending on the bandwidth. After they were downloaded into his Kazaa "My Shared Folder" he would look at the contents. In March 2004 he first noticed he had downloaded child pornography. He deleted the file to the recycling bin and then deleted it from there. It

[1] The one roommate who testified at trial stated that he had not observed any child pornography on the appellant's computer.

was the first time that child pornography showed up in two years of his use of the Kazaa system. He continued to use the Kazaa system to search for pornography, deleting any child pornography he might capture. Child pornography showed up about eight or nine times afterwards, and he deleted the files. After moving to Council Bluffs in July 2004, he continued to use Kazaa to search for pornography, but less frequently. He had switched to a dial-up modem with a much slower download speed. He therefore focused on photographs. He had downloaded "questionable material" about seven or eight times. He didn't always delete them because the process was more time-consuming with photos than it had been with videos.

Discussion

The test for determining the legal sufficiency of evidence in support of a finding of guilty is whether, when the evidence is viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review is limited to only the evidence in the record actually admitted at trial and exposed to cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The issue in the instant case revolves around the question of whether sufficient evidence was adduced at trial to establish that the appellant's possession of child pornography was service discrediting in violation of what is often referred to as Clause 2 of Article 134, UCMJ. That clause makes punishable "conduct of a nature to bring discredit upon the armed forces" *Manual for Courts-Martial* (*MCM*), Part IV, ¶ 60c(3) (2002 ed.).[2] Such conduct is further defined as that which has a "tendency to bring the service into disrepute or which tends to lower it in public esteem." *MCM*, Part IV, ¶ 60c(1). In *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000) our superior court in discussing the parameters of Article 134, UCMJ, stated "[w]e have no doubt that the knowing possession of images depicting sexually explicit conduct by minors, *when determined to be service-discrediting conduct*, is a violation of Article 134." *Id.* at 92 (emphasis added). In *Sapp*, the appellant pleaded guilty to the Article 134, UCMJ, offense based upon his possession of images of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(A), and admitted during the providence inquiry that the conduct was service discrediting. While our superior court found the plea to the federal statute improvident, it upheld this Court's determination that the evidence

[2] The 2002 edition of *The Manual*, in effect at the time of this offense, is substantially the same in this area as the 2005 edition.

was sufficient for a finding of guilty to the lesser included offense of service discrediting conduct based upon his in-court admission alone. *Sapp*, 53 M.J. at 93.

In *United States v. Cendejas*, 62 MJ 334 (C.A.A.F. 2006), the accused was convicted contrary to his plea of possessing child pornography in violation of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A(a)(5)(B). Similar to the instant case, the evidence produced at Cendejas' trial consisted of photographs of naked females of varying ages and varying degrees of sexual maturity which had been discovered when the AFOSI and local police searched his home and seized his personal computer in which the photograph's had been discovered. Our superior court concluded this Court erred in using its fact-finding authority to determine that the children depicted were "actual" rather than "virtual" children, where the issue of "virtual" vis "actual" was not litigated at the trial level because of the military judge's ruling upholding the statute's definition of child pornography, possibly erroneous in light of the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), relieved the Government of its obligation to prove the images were of actual children. *Cendejas*, 62 M.J. at 340.

Nonetheless, the court then considered, in light of *Sapp*, whether a conviction under Clauses 1 or 2 of Article 134, UCMJ, could be supported. *Id.* Assuming for the sake of analysis and the lack of litigation at trial that the images were virtual, the court observed that, "the question is whether there was sufficient evidence introduced at trial to establish that Cendejas' conduct in possessing virtual child pornography was either prejudicial to good order and discipline or service-discrediting." *Id.* The court concluded that, "[T]here was no such evidence introduced at Cendejas' trial nor, since this was a contested charge, was there any discussion by the military judge as to what constitutes conduct that is prejudicial to good order and discipline or what constitutes service-discrediting conduct." *Id.* Accordingly, the court reversed our findings as to the charge under Article 134, UCMJ.

More recently, however, this Court addressed the issue of the extent to which the government must present evidence of a direct injury to the reputation of the armed forces which presumably would require proof of public awareness of the conduct and the appellant's military status to establish that the appellant's conduct was service discrediting. *United States v. Mead*, 63 M.J. 724, 727 (A.F. Ct. Crim. App. 2006). In that case, also contested, the appellant had lent his computer to another airman, who subsequently observed child pornography stored on the computer. The AFOSI was notified and seized the appellant's computer and a number of compact disks. The appellant was charged with a violation of Article 134, UCMJ, in that his possession of the child pornography was of a nature to bring discredit to the Armed Forces. The government did not present specific evidence to show how the appellant's possession of the images was service-discrediting. In *Mead*, this Court rejected the Army Court of Military Review's holding in *United States v. Green*, 39 M.J. 606 (1994), that, "to prove service discrediting conduct, the public must be aware of the behavior and the military

status of the offender." *See Mead*, 63 M.J. at 729. Rather, this Court relied upon the clear language of the *Manual* which states, "'Discredit' means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a *tendency* to bring the service into disrepute or which *tends* to lower it in public esteem." *MCM*, Part IV, ¶ 60c(3) (emphasis added). We affirmed the findings of guilty as to the Article 134, UCMJ, offense. Our superior court denied review of our decision in *United States v. Mead*, 64 M.J. 435 (C.A.A.F. 2007).

In the instant case there was more evidence available than merely the inference that the appellant's possession of child pornography had a *tendency* to bring the service into disrepute. The civilian police inspector testified at trial that, while at the appellant's home, he observed child pornography on the appellant's computer. There is no reason to believe that at the time of his observation the inspector was a member of the armed forces. Furthermore, the inspector was well aware of the appellant's being a member of the Air Force. Therefore, sufficient evidence was introduced to indicate that at least one member of the public who knew the military status of the appellant was aware of the nature of the appellant's misconduct.

After a careful examination of the record, we conclude that the military judge could have found all the essential elements of the specifications beyond a reasonable doubt, and are thus convinced that the evidence is legally sufficient to support the convictions. Further, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt, and thus find the evidence factually sufficient. Accordingly, we find the appellant's assignment of error to be without merit.

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; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court