UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant CHARLES W. CALEY, JR.
United States Air Force

ACM 37573

01 August 2011

Sentence adjudged 06 October 2009 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Phillip T. Korman; and Major Bryan A. Bonner.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Scott C. Jansen; Major Naomi N. Porterfield; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

The appellant pled guilty, pursuant to a pretrial agreement, to one specification of wrongfully and knowingly possessing one or more visual depictions of "what appear to be" minors engaging in sexually explicit conduct, in violation of Clauses 1 or 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 16 months, and reduction to E-1. The convening authority approved a bad-conduct discharge,

confinement for 13 months, and reduction to E-1.[1] On appeal, the appellant alleges that his sentence is excessively severe and that the military judge determined the sentence based on the incorrect maximum punishment. Finding error, we reassess the sentence.

Maximum Punishment

The appellant asserts that, in light of our superior court's decision in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), the military judge erred in determining the maximum punishment for the charged offense as a dishonorable discharge, confinement for 10 years, total forfeiture of all pay and allowances, and reduction to E-1.[2] Citing *Beaty*, the appellant argues that the correct maximum punishment is confinement for 4 months and forfeiture of two-thirds pay per month for 4 months. *Id*. at 45. We agree. *Beaty* holds that the maximum authorized punishment for a charge of possessing "what appears to be" child pornography, as opposed to possessing actual child pornography, is that for a simple disorder which has a maximum authorized punishment of 4 months confinement and forfeiture of two-thirds pay per month for 4 months. *Id.* The charge and specification upon which the appellant was convicted uses the same critical language as in *Beaty*, therefore, the maximum authorized punishment is the same. We find that the approved sentence materially prejudiced the substantial rights of the appellant because it far exceeds that of the maximum authorized. *Id*.

We now analyze the case to determine whether we can reassess the sentence. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the penalty landscape" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that, if the appellate court "cannot determine that the sentence would have been at least of a certain magnitude," it must order a rehearing. *Id.* at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

Although the maximum punishment is substantially reduced as a consequence of the judge's error, we are confident the military judge would have adjudged the maximum punishment authorized for disorderly conduct based on the facts presented in this case. The appellant is a non-commissioned officer with over 25 years of service. He stipulated as fact that he possessed 264 images which included 221 images of what appear to be

[1] The pretrial agreement capped confinement at 13 months.

[2] We note that, unlike *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), here all the parties agreed with the military judge's determination of the maximum punishment. That is, the defense did not object at trial to the judge's erroneous statement of the maximum punishment; however, we do not find this material to our decision.

children engaging in sexually-explicit conduct and 43 other images of confirmed known and identified children who are engaged in sexually explicit conduct. The appellant admitted to intentionally searching for and downloading the images to his personal computer and that he would frequently view the images to gratify his lust and sexual desires. Considering the evidence in the record, we find that a reassessed sentence of confinement for 4 months and reduction to the grade of E-1 cures the error. We also find, after considering the appellant's character, the nature and seriousness of the offense, and the entire record, that the reassessed sentence is appropriate.

Appellate Delay

We note that the overall delay of more than 540 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

We affirm the findings and only so much of the sentence as provides for confinement for 4 months and reduction to E-1. The approved findings and the sentence, as modified, 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, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court