UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain CHARLES L. CHANDLER
United States Air Force

ACM 36967

17 December 2008

Sentence adjudged 18 October 2006 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Adam Oler (sitting alone).

Approved sentence: Dismissal and confinement for 8 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Steven R. Kaufman, and Captain Jefferson E. McBride.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

HELGET, Judge:

In accordance with his pleas, a military judge sitting as a general court-martial found the appellant guilty of two specifications of wrongfully and knowingly possessing visual depictions of minors engaging in sexually explicit behavior and one specification of violating a lawful order by knowingly possessing pornography, in violation of Articles 134 and 92, UCMJ, 10 U.S.C. §§ 934, 892. The military judge sentenced the appellant to a dismissal and 18 months confinement. The convening authority approved the dismissal but reduced the period of confinement to eight months.[1]

---

[1] Pursuant to a pretrial agreement, the convening authority agreed that he would not approve any adjudged confinement in excess of nine months.

The appellant raises two issues on appeal. The first issue is whether the appellant was subjected to unreasonable post-trial delay when 143 days elapsed between the conclusion of his court-martial and the date the convening authority signed the Action. The second issue is whether the appellant's sentence is inappropriately severe.

Background

The appellant received his commission on 24 June 2001. On 3 April 2004, the appellant was assigned to RAF Lakenheath, United Kingdom. While stationed there, he lived in Cambridge, United Kingdom. He was assigned as a Weapon System Officer on the F-15E Strike Eagle for the 494th Fighter Squadron.

On divers occasions from 3 April 2004 to sometime in January 2005, the appellant downloaded onto his personal computer thousands of pornographic images from the internet. A portion of those images were of children, including prepubescent females, engaged in sexually explicit behavior, and some of the images were of child victims known to the National Center for Missing and Exploited Children.[2] He downloaded the images through multiple means, including newsgroups, web pages, and peer-to-peer clients.

From January to June 2005, the appellant was deployed to Al-Udeid, Qatar. Sometime prior to his deployment in January 2005, the appellant transferred numerous pornographic images, including some of the images of children engaged in sexually explicit behavior, to his X-box game system. He had modified his X-box by installing a larger hard drive and a chip to make the X-box interactive so he could communicate with the X-box via the network.

On or about 26 April 2005, while in Qatar, the appellant possessed approximately 11,000 images of adult pornography, in violation of General Order Number 1A, *Prohibited Activities for U.S. Department of Defense Personnel Present Within the United States Central Command (USCENTCOM) AOR*, ¶ 2.e., (19 Dec 2000), which prohibits the "introduction, possession, transfer, sale, creation or display of any pornographic or sexually explicit photographs, video tapes, movie, drawing, book, magazine, or similar representations." The appellant was aware of the prohibition against possessing pornography in Qatar prior to his deployment.

Timely Post-Trial Processing

The appellant's court-martial concluded on 18 October 2006. During the trial, the military judge ordered the government to produce a copy of the appellant's hard drive containing the 11,000 images of adult pornography the appellant possessed at Al-Udeid,

[2] The military judge found there were approximately 1,000 images of child pornography.

Qatar, and include it in the record of trial (ROT). The military judge wanted the defense to have an opportunity to review the mirrored copy before he authenticated the ROT.

Included in the ROT is an affidavit from Lieutenant Colonel (Lt Col) JB, who at the time was the Staff Judge Advocate at RAF Lakenheath, United Kingdom. In his affidavit, Lt Col JB states that because the local Air Force Office of Special Investigations (AFOSI) detachment at RAF Lakenheath did not have the proper equipment to produce a copy of the hard drive, the government had to send the hard drive to the Department of Defense Computer Forensics Lab (DCFL) in Maryland. On 20 December 2006, DCFL finished copying the hard drive onto four DVDs and mailed them to the AFOSI detachment at RAF Lakenheath. On 8 January 2007, the DCFL made a second copy of the DVDs, which were forwarded to the trial defense counsel at Scott Air Force Base (AFB), Illinois, for his review on 18 January 2007.

On 19 January 2007, the trial defense counsel informed the military judge that the DVDs contained both pornographic and non-pornographic images and requested clarification on what should be included in the ROT. On 29 January 2007, the military judge ordered the government to only include the pornographic images and provide those to the trial defense counsel by 1 February 2007. The trial defense counsel requested a continuance until 3 February 2007, which was granted by the military judge. On 3 February 2007, the government and trial defense counsel went through all of the images on the four DVDs and agreed on which images to include in the ROT. On 6 February 2007, the military judge authenticated the ROT, and on 9 March 2007, the convening authority took action.

The appellant alleges that his due process right to timely post-trial processing was violated when 143 days elapsed between the conclusion of his court-martial and the date the convening authority signed the Action.

Due process entitles convicted service members to a timely review and appeal of court-martial convictions. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). In conducting this review, 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.

For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay where the convening authority fails to take action within 120 days of the completion of trial. *Moreno*, 63 M.J. at 142. Once this due process analysis is triggered by a facially unreasonable delay, we analyze each factor and make a

determination as to whether that factor favors the government or the appellant. *Id.* at 136 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)).

The presumption of an unreasonable delay will be viewed as satisfying the first *Barker* factor, *length of the delay*. Considering the Action was signed 143 days after the completion of the court-martial, 23 days in excess of the *Moreno* presumption of 120 days, the first *Barker* factor weighs in favor of the appellant.

In analyzing the second *Barker* factor, *reasons for the delay*, "we look at each stage of the post-trial period, at the [g]overnment's responsibility for any delay and at any explanations for delay including those attributable to [the appellant]." *United States v. Toohey*, 63 M.J. 353, 359 (C.A.A.F. 2006). In this case, the delay was primarily due to the government's difficulty in complying with the military judge's order to produce a copy of the hard drive containing the purported 11,000 pornographic images. The government was unable to make a copy locally and instead had to send the hard drive to the DCFL in Maryland. Additionally, a second copy had to be made for the trial defense counsel who had moved to Scott AFB. Further, once a copy of the hard drive was finally made, the parties still needed to resolve which of the 11,000 images actually constituted adult pornography.

We find that the government acted with due diligence in trying to comply with the military judge's order to produce a copy of the hard drive containing the purported 11,000 images of adult pornography. Considering the unreasonable delay was only an additional 23 days and was the result of an order issued by the military judge at trial, we find that the second *Barker* factor weighs in favor of the government.

The third *Barker* factor is *the appellant's assertion of a right to a timely review and appeal.* In this case, the appellant never specifically asserted his right to a timely review. However, in *Moreno,* our superior court gave little weight to an appellant's failure to make such a request because it is the government's obligation to ensure a timely review of his case and it is not the appellant's responsibility to complain in order to receive timely convening authority action. *Moreno*, 63 M.J. at 138. The third *Barker* factor weighs slightly in favor of the government.

The fourth and remaining *Barker* factor is *prejudice*. The framework for analyzing prejudice under this fourth factor considers three interests: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id.* at 138-39. The appellant has failed to present any evidence showing how he was prejudiced by the delay of not having the convening authority sign the Action within 120 days of the completion of his trial. Accordingly, this fourth *Barker* factor weighs in favor of the government.

In *United States v. Toohey,* 63 M.J. 353, 362 (C.A.A. F. 2006), our superior court held that "where there is no finding of *Barke*r prejudice, we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey,* 63 M.J. at 362. We find that the delay of 23 days in this case was not egregious. Accordingly, the appellant was not denied his due process right to a speedy post-trial review and appeal.

Although not raised by the appellant, considering that our appellate review in this case was not completed within eighteen months of docketing before our Court on 2 April 2007, a presumption of unreasonable delay has occurred requiring us to examine the four *Barker* factors. However, 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. *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 and that no relief is warranted.

Sentence is Inappropriately Severe

The second issue is whether the appellant's sentence is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866 (c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd* 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988).

"Although we generally consider sentence appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases, and permitted—but 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)), *pet. granted on other grounds*, 65 M.J. 320 (C.A.A.F. 2007). "Merely because a case involves similar charges brought under the same section of the UCMJ does not mean it is 'closely related' within the meaning of this Court's mandate to

determine sentence appropriateness." *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). Rather, 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." *Id.* (quoting *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 [g]overnment must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

The maximum possible punishment in this case was a dismissal, confinement for 12 years, and forfeiture of all pay and allowances. The appellant's approved sentence was a dismissal and confinement for eight months. The appellant claims that his sentence is disproportionate to others similarly situated, and he provided newspaper articles reporting the sentences of six other individuals he claims were similarly situated. Of these six individuals, none were the appellant's coactors and the appellant has not shown a direct nexus between those cases and the appellant's case. Accordingly, the appellant has not met his burden of demonstrating that the other cases are closely related to his case.[3]

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, to include his combat service,[4] and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not 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).

---

[3] Of the six individuals cited, there is only one Air Force officer, a captain. The Air Force captain received a dismissal and six months confinement, two months less than the appellant. However, this other captain was not deployed when he possessed the child pornography, and he did not commit the additional offense of violating a General Order for possessing adult pornography in the CENTCOM area of responsibility.

[4] In Qatar, the appellant flew 165.5 combat hours in 25 combat missions as a Weapon System Officer on the F-15E.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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