UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER M. DELANO
United States Air Force

ACM 37126

22 December 2008

Sentence adjudged 26 September 2007 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: W. Thomas Cumbie and Bryan D. Watson (sitting alone).

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

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Donna S. Rueppell.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of wrongfully possessing sexually explicit images of persons indistinguishable from minor children, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a bad-conduct discharge and confinement for nine months.[1]

[1] The appellant and the convening authority entered into a pretrial agreement which limited confinement to nine months. The adjudged sentence included confinement for 20 months.

The issues on appeal are whether the appellant was denied credit for restriction tantamount to confinement and whether a sentence which includes a bad-conduct discharge and nine months confinement is inappropriately severe.[2]

Background

The appellant, who had received administrative actions for inappropriately touching females[3] and was disrespectful and a disruption in the dormitory,[4] was sent to Transition Flight on 6 October 2006. He was awaiting administrative separation.

Shortly after his arrival at Transition Flight, he was witnessed viewing "gross" images on his laptop computer. The appellant explained to the disgusted airman that the pictures were not of real children[5] so they were not illegal. The disgusted airman reported the appellant's conduct and an investigation ensued. The appellant's administrative separation was suspended pending the outcome of the investigation.

During the appellant's court-martial, his trial defense counsel made a motion for credit for illegal pretrial punishment and credit for restriction tantamount to confinement for the time the appellant spent in Transition Flight, minus 41 days that the appellant was on leave. After hearing the testimony of a number of witnesses, the military judge denied the motion and made extensive findings of fact and conclusions of law.

Conditions Tantamount to Confinement/Illegal Pretrial Confinement

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ, 10 U.S.C. § 813, "presents a 'mixed question of law and fact.'" *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997) (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). "We will not overturn a military judge's findings of fact . . . unless they are clearly erroneous." *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We "review *de novo* the ultimate question whether an appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id.* The totality of the circumstances is used to determine if conditions of restriction are tantamount to confinement. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003). If the pretrial restraint falls so close to the confinement end of the spectrum ranging between restriction and confinement as to be tantamount to confinement, the appellant is entitled to administrative credit against his

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[2] The appellant raised both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The appellant received an Article 15, UCMJ, 10 U.S.C. § 815, on 25 September 2006, and a Vacation Action on 1 November 2006.

[4] The appellant received a Letter of Reprimand, dated 3 October 2006, and a Letter of Counseling, dated 1 May 2006.

[5] The images included in the specification of the charge at trial could not be identified as actual known child victims by the National Center for Missing and Exploited Children. Possession of pornography, including computer–generated pornography, is forbidden in Transition Flight.

sentence. *United States v. Smith,* 20 M.J. 528, 531 (A.C.M.R. 1985) (citing *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985)).

In conducting our review of the condition of restrictions, we look to the totality of the conditions imposed. *Id.* at 530. In *King*, our superior court outlined the factors to consider in determining whether restrictions are tantamount to confinement:

> the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

King, 58 M.J. at 113 (quoting *Smith*, 20 M.J. at 531-32).

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon him, we hold that the appellant's pretrial restriction was not tantamount to confinement. Further, we find the military judge's findings of fact are clearly supported by the record and adopt them as our own. The conditions imposed on the appellant and others in the Transition Flight were necessary to maintain good order and discipline among airmen awaiting separation from the Air Force, and while strict, the restrictions were not equivalent to confinement and were not punishment under Article 13, UCMJ.

Sentence Severity

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). 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).

After reviewing the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence to a bad-conduct discharge and confinement for nine months 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). Accordingly, the approved findings and sentence are

AFFIRMED.

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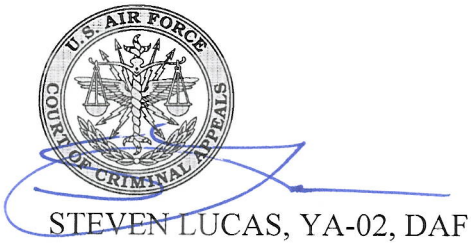

STEVEN LUCAS, YA-02, DAF
Clerk of the Court