UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM J. DIEHL
United States Air Force

ACM S30994

15 June 2006

Sentence adjudged 29 August 2005 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $300 pay per month for 4 months, and reduction E-1.

Appellate Counsel for Appellant: Declined representation by counsel.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

Pursuant to his pleas, the appellant was convicted of attempting to commit indecent acts and attempting to violate 47 U.S.C. § 223(d)(1)(A), both offenses in violation of Article 80, UCMJ, 10 U.S.C. § 880. He was also convicted of two specifications of communicating indecent language, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sitting as a special court-martial sentenced the appellant to a bad-conduct discharge, confinement for 4 months, forfeiture of $300 pay per month for 4 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant elected, in writing, not to be represented by appellate defense counsel.[1] Although we did not have the benefit of review by appellate counsel, we have identified an obvious error that renders the appellant's guilty plea improvident to Specification 1 of Charge I.

Background

The appellant engaged in an internet chat discussion on "Yahoo!" with a person he believed was a 14-year-old girl. That person, referred to as "angelsnalaska," actually was a civilian law enforcement official. The appellant sent "angelsnalaska" a number of sexually explicit messages and sought to arrange a meeting between the two of them. He transmitted a picture of himself wearing an Air Force desert camouflage uniform, and he transmitted live web-camera footage of himself exposing his penis.

The detailed stipulation of fact signed by the trial counsel, the appellant, and the trial defense counsel, noted that "Yahoo!" is "an instant messaging service that utilizes servers in many states, thus creating an interactive, interstate computer service within the meaning of 47 U.S.C. § 230(f)(2)." That fact was relevant to the government's decision to charge the appellant with a violation of Article 80, UCMJ:

> In that SENIOR AIRMAN WILLIAM J. DIEHL, United States Air Force, 3rd Communications Squadron, Elmendorf Air Force Base, Alaska, in or near the State of Alaska, on or about 17 February 2005, knowingly use [sic] a means of interstate commerce by using an interactive computer service to send to a specific person he believed to be under 18 years of age, an image that, in context, depicts sexual activities or organs for which an [sic] person can be charged with a criminal offense in violation of 47 United States Code § 223(d)(1)(A).

Although the word "attempt" is missing from the specification (Specification 1 of Charge I), the military judge and the parties construed the appellant's web-camera transmission as the overt act done with the specific intent to violate 47 U.S.C. § 223(d)(1). The offense was charged as an attempt because, unbeknownst to the appellant at the time, "angelsnalaska" was not a person under 18 years of age.

Discussion

The specification had a fundamental defect that the plea inquiry[2] could not cure. Title 47 United States Code § 223 addresses obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications. When the alleged

[1] *See* Article 70(c), UCMJ, 10 U.S.C. § 870(c).
[2] *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

misconduct occurred, and when charges were preferred and referred to trial, 47 U.S.C. § 223(d) provided that:

> (d) Sending or displaying offensive material to persons under 18. Whoever--
>
> (1) in interstate or foreign communications knowingly--
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
>
> any comment, request, suggestion, proposal, image, or other communication that is ***obscene or child pornography***, regardless of whether the user of such service placed the call or initiated the communication; or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

(Emphasis added.)

Congress inserted the highlighted language as part of Public Law 108-21, on 30 April 2003. Section 223(d)(1) was amended by striking the words ‘‘in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs’’ and inserting ‘‘is obscene or child pornography.’’ Specification 1 of Charge I was drafted in 2005 using language deleted from Section 223(d)(1) in 2003. Apart from explaining his conduct during the providency inquiry in the context of an irrelevant standard, the appellant was not asked to explain how his communication was "obscene or child pornography." Accordingly, his plea to Charge I, Specification 1 was improvident and his conviction for that offense is set aside and dismissed.

Staff Judge Advocate's Recommendation (SJAR)

In his post-trial recommendation to the convening authority, the staff judge advocate stated the maximum imposable sentence included "forfeiture of 2/3 pay and

allowances." His advice was inaccurate in two respects: first, it did not define the maximum duration of the forfeiture period; and second, allowances are not subject to forfeiture by a special court-martial. *See* Article 19, UCMJ, 10 U.S.C. § 819; Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(i).

The appellant and his trial defense counsel were served with the SJAR, but the appellant waived his right to submit clemency matters. There was no comment on the error by trial defense counsel. We consider the issue waived, unless we find plain error. R.C.M. 1106(f)(6). To find plain error, we must be convinced (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).

In post-trial matters, "there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997). We conclude the error in the SJAR was obvious, but we do not find a colorable showing of possible prejudice. Considering the nature of the offenses, the sentence adjudged, and the action of the convening authority, we find no material prejudice to the substantial rights of the appellant. *See* Article 59(a), UCMJ. *See also United States v. Parsons*, 61 M.J. 550, 551-52 (A.F. Ct. Crim. App. 2005).

Reassessment

Having modified the findings, we next consider whether we can reassess the sentence. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We are confident we can reassess the sentence in accordance with the established criteria.

The web-camera video transmission, admitted in evidence during the presentencing phase of the trial, was the evidence supporting Specification I of Charge I. It also was relevant and admissible to Specification 2 of Charge I,[3] which alleged that the

[3] This offense originally was Specification 3 of Charge II, listed as a violation of Article 134, UCMJ. When the military judge noticed the specification alleged an attempt to commit an indecent act, he asked government counsel why the offense was not listed under Charge I as a violation of Article 80, UCMJ. The record reflects some confusion about the government's charging theory and, after an R.C.M. 802 session, the trial counsel came back on the record to explain: "Your Honor, I believe the government may have made an oversight. I believe that we originally had intended a solicitation charge, or perhaps the attempt through a different criminal context. The government is willing to pen and ink Specification 3 as a Charge of Article 80." After further discussion, counsel for both parties concurred with moving the specification from Charge II to Charge I and characterized the change as minor because, as the trial counsel explained, "it is simply the government's failure to allege the proper article when this was charged." Fortunately, the military judge appreciated the nature of the change and, even with defense

appellant attempted to commit an indecent act "by attempting to persuade, induce, entice, or coerce an individual to engage in indecent sexual acts." Although not charged as an attempt to engage in indecent acts or liberties with a child, "angelsnalaska" was the "individual" contemplated by the specification. The web-camera transmission supported the appellant's attempts to entice "angelsnalaska" to meet with him and engage in indecent sexual acts with him.

Dismissal of Specification 1 of Charge I lessens the appellant's overall culpability. Nevertheless, considering the admissibility of the web-camera transmission apart from the defective specification, and the fact this was a bench trial, the deletion of the defective specification had a negligible effect. We are certain that, absent the error, the sentence would not have been less than a bad-conduct discharge, confinement for 3 months, forfeiture of $300 pay per month for 3 months, and reduction to E-1. We conclude the sentence, as reassessed, is appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

The approved findings, as modified, and sentence, as reassessed, 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, as modified, and sentence, as reassessed, are

AFFIRMED.

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LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

concurrence, had the government obtain the convening authority's approval. Even if the change was major, it was accomplished in accordance with R.C.M. 603.