UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KYLE R. DIETZ
United States Air Force

ACM 38117

12 July 2013

Sentence adjudged 02 February 2012 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph Kiefer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL[1]
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant, in accordance with his pleas, of seven specifications of knowingly and wrongfully possessing visual depictions of minors engaged in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[2] The military judge determined the maximum punishment by reference to 18 U.S.C. § 2252A(b)(2), which sets maximum confinement

[1] Upon our own motion, this Court vacated the previous decision in this case for reconsideration before a properly constituted panel. Our decision today reaffirms our earlier decision.
[2] The specification alleged, in the disjunctive, both Clauses 1 and 2 of the terminal element of Article 134, UCMJ, 10 U.S.C. § 934.

at 10 years for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5). The judge merged two groups of three specifications each for sentencing, making the maximum confinement 30 years.[3] The court adjudged a bad-conduct discharge, confinement for 15 months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence adjudged except for the forfeitures.

The appellant relies on *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), to argue that the punishment under 18 U.S.C. § 2252A does not apply because the specifications fail to allege the aggravating circumstance that the children in the images were "actual" minors. We disagree. Unlike the specification in *Beaty*, the specifications here did not allege that the images were of only "what appears to be" minors. Moreover, *Beaty* expressly found no abuse of discretion in using the analogous United States Code maximum for a specification alleging possession of "visual depictions of minors engaging in sexually explicit activity." *Id*. at 42.

Consistent with *Beaty*, the crime charged here is punishable as authorized by the United States Code section referenced by the military judge which criminalizes possession of "child pornography." The term "child pornography" includes any visual depiction of sexually explicit conduct where (1) the visual depiction involves "the use of *a minor* engaging in sexually explicit conduct" or (2) the visual depiction is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of *a minor* engaging in sexually explicit conduct." 18 U.S.C. § 2256(8) (A) and (B) (emphasis added). Consistent with this definition of child pornography, the specifications here allege the wrongful and knowing possession of visual depictions of minors engaged in sexually explicit conduct. Therefore, the military judge correctly used the punishment authorized for possession of child pornography under 18 U.S.C. § 2252A(a)(5) for purposes of determining the maximum punishment. *See* Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii) (providing that an offense not listed in or closely related to one listed in the *Manual for Courts-Martial* is punishable as authorized by the United States Code).

The appellant does not dispute the sufficiency of the plea inquiry wherein the military judge defined minor as "a *person* under the age of 16 years." After acknowledging his understanding of the elements and definitions, the appellant told the judge that his counsel had explained the definitions in the analogous United States Code provisions and that, consistent with those definitions, he possessed images of "minors engaged in sexually explicit conduct." Later in the plea inquiry, the military judge confirmed with the appellant that he possessed images of "actual people" who were "minors . . . engaged in sexually explicit conduct." Specifically as to age, the appellant told the judge that "some of them in [his] opinion, would probably be younger than 12

[3] The military judge merged for sentencing: Specifications 1, 2, and 3 as one offense; Specifications 4, 5, and 7 as one offense; and left Specification 8 separately punishable. This resulted in a total maximum confinement of 30 years.

years old." The inquiry conclusively shows a plea to possessing images of minors engaged in sexually explicit conduct as defined by the analogous United States Code provision used to determine the maximum.

In a second assignment of error, the appellant argues that the convening authority's action on the case should be set aside because the staff judge advocate misstated the maximum authorized punishment in his recommendations to the convening authority. As the appellant did not identify any legal error in his response to the recommendation, we will review for plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005). The staff judge advocate stated that the "maximum available sentence for the offenses for which the [appellant] was convicted" included confinement for 70 years. The statement is technically correct because the military judge did, in fact, convict the appellant of seven separate specifications of possessing child pornography which carried a maximum of 10 years each. The staff judge advocate did not mention that the judge's merger of some specifications for sentencing reduced the maximum to 30 years. At trial, the Government argued for 10 years.

Assuming arguendo that the statement is error, we find no colorable showing of possible prejudice under the facts of this case: the adjudged and approved term of confinement is a small fraction of that authorized for serious child pornography offenses, the appellant requested in clemency a further reduction in confinement of only two months, and the convening authority disapproved adjudged forfeitures to permit waiver of automatic forfeitures for the benefit of the appellant's spouse and dependent children. We are convinced that the single reference by the staff judge advocate to a 70-year maximum term of confinement had no impact on the convening authority's decision in this case. *See United States v. Flores*, 69 M.J. 651 (A.F. Ct. Crim. App. 2010), *affirmed*, 69 M.J. 366 (C.A.A.F. 2011) (staff judge advocate's misstatement of maximum confinement as 15 years in a special court-martial was not prejudicial where misconduct was egregious and the approved confinement was well below the authorized maximum).

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, 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 are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist