UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RAYMOND P. DUNHAM
United States Air Force

ACM 34834

24 January 2005

Sentence adjudged 24 October 2001 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: William E. Cassara (argued), Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, Major Karen L. Hecker, Major Jefferson B. Brown, Major Antony B. Kolenc, and Major James M. Winner.

Appellate Counsel for the United States: Major James K. Floyd (argued), Colonel Anthony P. Dattilo, Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Gary F. Spencer, and Captain C. Taylor Smith.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

STONE, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of four specifications of conduct prejudicial to good order and discipline, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority approved the

adjudged sentence of a bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

This case is before this Court for automatic review pursuant to Article 66, UCMJ, 10 U.S.C. § 866. We have considered the record of trial, the appellant's assignments of error, the matters personally raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the government's response thereto, and the arguments of appellate counsel. The appellant asserts six assignments of error. Because of the relief we order below, we find it necessary to address only three.

Discussion

Soon after filing his appellate brief with this Court, our superior court decided the cases of *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), and *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004). As a consequence, we reframed Issue V[1] as follows:

> WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO CONVICT THE APPELLANT OF SPECIFICATIONS 1, 2, AND 4 OF THE CHARGE, IN LIGHT OF *UNITED STATES V. WALTERS* AND *UNITED STATES V. SEIDER*. IF NOT, MAY THIS COURT ORDER A PROCEEDING IN REVISION PURSUANT TO RULE FOR COURTS-MARTIAL 1102(b)(1).

Specifications 1, 2, and 4 each alleged conduct occurring on "divers occasions." Specification 1 alleged a violation of 18 U.S.C. § 2252A, in that the appellant knowingly possessed child pornography. This possession was alleged to have occurred over a two-year period while the appellant was stationed at Tinker Air Force Base (AFB), Oklahoma. Specification 2 also alleged a violation of 18 U.S.C. § 2252A, in that he knowingly possessed child pornography during a two-month period while he was deployed to Incirlik Air Base, Turkey. Specification 4 also covered the same two-year period while the appellant was stationed at Tinker AFB. It alleged he knowingly used a common carrier or interactive computer service to carry obscene pictures, motion-picture files, or other matters of an indecent character in interstate commerce, in violation of 18 U.S.C. § 1462. The military judge found the appellant guilty of these three specifications as alleged, excepting the words "on divers occasions."

When a "divers occasion" specification is converted to a "one occasion" specification through a finding by exception, the verdict is uncertain and ambiguous "because the findings of guilty and not guilty do not disclose the conduct upon which each of them was based." *Walters*, 58 M.J. at 397. When the findings of guilty "do not disclose the conduct upon which each of them was based, the Court[s] of Criminal

[1] Submitted pursuant to *Grostefon*, 12 M.J. at 431.

Appeals cannot conduct a factual sufficiency review" pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), to determine the basis of the conviction. *Seider*, 60 M.J. at 38.

We asked counsel for both sides to address whether this Court had the authority to order a proceeding in revision pursuant to Rule for Courts-Martial (R.C.M.) 1102(b)(1) to correct the ambiguous findings. We conclude that we may not. Proceedings in revision are not authorized in any case in which "any part of the sentence has been ordered executed." R.C.M. 1102(d). Because the convening authority's action approved the execution of confinement, forfeiture of pay, and reduction in grade, we are precluded by operation of this rule from ordering a proceeding in revision. In *United States v. Timmerman*, 28 M.J. 531 (A.F.C.M.R. 1989), this Court was faced with an irregular finding and carefully considered the use of a proceeding in revision to correct the error. After providing an extensive historical review of R.C.M. 1102(b)(1), we concluded:

> Although our research has not disclosed any specific legal basis or rationale for this rule [limiting proceedings in revisions to the period prior to execution of the punishment], we suspect it is premised upon the belief that proceedings in revision would no longer be appropriate once a case has become final in law. . . . Absent additional guidance from the President, we will not presume that we have the authority to order a proceeding in revision at this stage in the appellate process [after the convening authority has taken action on portions of the sentence not extending to a punitive discharge]. This is most unfortunate, and a situation we are not sure was intended, or for that matter even considered when the present Manual [for Courts-Martial] was being drafted. Proceedings in this case are not final in law as appellate review has not been completed, and in our view there is no rational basis for an appellate court not to have the same power as a military judge or convening authority as far as proceedings in revision are concerned.

Id. at 534-35. The *Timmerman* court reluctantly concluded it was without authority to order a proceeding in revision.

We are aware government counsel believes we can work around this limitation by setting aside the convening authority's action, thus "revoking," if you will, the execution of the punishment. In *Timmerman*, we held that the appellant was not prejudiced by irregular findings entered at trial, and thus never reached the issue of whether we could set aside the action of the convening authority and return the record for further consideration such that "it might be possible for a proceeding in revision to be held." *Id*. at 535. This option is enticing, but as noted by this Court in *United States v. King*, 50 M.J. 686, 687-88 (A.F. Ct. Crim. App. 1999) (en banc),[2] we may correct informalities or

[2] The *King* decision was overruled by this Court in *United States v. Walters*, 57 M.J. 554 (A.F. Ct. Crim. App. 2002) (en banc), *rev'd*, 58 M.J. 391 (C.A.A.F. 2003). Because *King* comports with our superior court's recent decisions on ambiguous findings, it is once again valid guidance.

inaccuracies in a verdict only if the military judge's or court members' intent is clear. To establish intent, we are limited to the pleadings and the record. *Id*. at 688. Moreover, we conclude setting aside the action with the expectation the convening authority would order a proceeding in revision would violate the apparent belief of our superior court, as set forth in its *Walters* and *Seider* decisions, that it is impossible as a matter of law under these circumstances to identify the "one occasion" a factfinder found the appellant guilty beyond a reasonable doubt. *See also United States v. Peck*, ACM S30553 (A.F. Ct. Crim. App. 9 Dec 2004) (unpub. op.). Based upon the clear language of R.C.M. 1102(b)(1) and (d), our decision in *Timmerman*, and the guidance of our superior court in *Walters* and *Seider*, we conclude that setting aside the action and sending it back to the convening authority is not an authorized means of remedying the military judge's ambiguous verdict. The only remedy available to this Court is to set aside and dismiss the affected specifications.

Dismissal of these three specifications moots Issue I (ineffective assistance of counsel for failing to procure an expert to support the appellant's theory of the case), Issue II (improper use of the definition of child pornography in violation of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)), and Issue VI (suppression of evidence pertaining to child pornography found in the appellant's locker and computer).

We have also carefully considered the appellant's two remaining assignments of error concerning the legal and factual sufficiency of Specification 3 and whether he is entitled to pretrial confinement credit. We find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Remedy

The issue now before this Court is to determine whether we can reassess the sentence based upon the remaining specification. We have the "jurisdiction, authority, and expertise to reassess court-martial sentences . . . after dismissing charges," when we believe we can determine what sentence would have been imposed at the original trial absent the error. *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000).

Specification 3 alleges the appellant wrongfully impeded an investigation into his case by asking a noncommissioned officer to erase the contents of the appellant's computer hard drive. In the context of the entire trial, this offense was not as significant as the dismissed specifications, which involved possession of massive quantities of child pornography and obscene materials. Consequently, given the significant change in the complexion of the case, it is impossible for us to determine how the dismissal of these more serious offenses would have affected the sentence the military judge imposed. Thus, we conclude we are unable to reassess the sentence using our authority under Article 66(c), UCMJ.

Conclusion

Specifications 1, 2, and 4 of the Charge are set aside and dismissed. The sentence is also set aside. As to the Charge and Specification 3, we conclude the findings 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 Charge and Specification 3 are affirmed. The record of trial is returned to the convening authority for a rehearing on the sentence. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved.

OFFICIAL

ANGELA M. BRICE
Clerk of Court