UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANDREW J. FERGUSON
United States Air Force

ACM 37272

15 July 2009

Sentence adjudged 16 May 2008 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: John E. Hartsell.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, Major Imelda L. Paredes, and Captain Jennifer J. Raab.

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

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted of one specification of attempting, on divers occasions, to send obscene materials to a minor via the Internet; one specification of communicating indecent language, on divers occasions, to a person believed to be a minor; one specification of indecent exposure; and one specification of possession of child pornography, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. The approved sentence, adjudged by a panel of officers, consists of a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1.

The appellant initially raised no issues on appeal, submitting the case on its merits. However, in response to an order of the Court specifying an issue concerning the providence of the appellant's plea to indecent exposure, the appellant now asserts that his plea to that specification was not provident. Finding no error, we affirm.

Background

On 9 April 2007, the appellant used his computer to enter an Internet chat room, where he initiated contact with another chat room user whose online profile identified him to be, and who the appellant believed was, a 14-year-old boy. In reality, the "boy" was an undercover civilian police officer posing as a teenager under the screen name "bradnh14."

Within 11 minutes of initiating contact, the appellant told bradnh14 that bradnh14 was a "hottie" and soon thereafter told him how it felt to have a male ejaculate in the appellant's mouth. Between then and 3 May 2009, the appellant engaged in several additional sexually explicit conversations with bradnh14 in the online chat room.

In addition to engaging bradnh14 in sexually explicit conversations, the appellant sent him a number of sexually explicit images. They included still photographs of the appellant masturbating and ejaculating, two adult pornographic videos, and two video clips of the appellant masturbating, in one to the point of ejaculation. Additionally, during the course of an online chat on 3 May 2007, the appellant, via his computer webcam, displayed himself to bradnh14 masturbating and ejaculating.

Although not expressly stated on the record, it is apparent from the wording of the specification at issue and the relevant *Care*[1] inquiry colloquy that it was the 3 May 2007 incident which served as the basis for the indecent exposure charge.[2] The specification alleges the appellant exposed himself by masturbating "while transmitting images of himself to an audience on the internet through a computer." Thus, it is clear that the alleged conduct was ongoing at the same time the images were being transmitted. The appellant's exposure of himself through the webcam feed on 3 May 2007 is the only incident that fits that description. The appellant's responses to the military judge about this offense during the *Care* inquiry also indicated that he exposed himself "while transmitting [the] images." Again, the language chosen indicates the transmission and indecent act occurred simultaneously, something that only occurred during the webcam incident.[3]

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[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[2] The indecent exposure offense was set forth in Charge II, Specification 1.

[3] Although the time frame of the indecent exposure offense was broad enough to encompass all of the nude images of himself that the appellant sent to bradnh14, the other images were not charged under that specification. Rather, it is apparent from the language of Charge I, Specification 1 and the associated *Care* inquiry colloquy that the still

The civilian police officer posing as bradnh14 ultimately reported the appellant's conduct to the Air Force Office of Special Investigations. Subsequent forensic analysis of the appellant's computer disclosed several child pornography images which, though previously deleted, were recovered and entered into evidence at the appellant's trial.

Providency of Indecent Exposure Plea

We review a military judge's decision to accept a guilty plea for abuse of discretion and will not overturn such a decision unless the record establishes that there is a substantial basis in law or fact for questioning the legitimacy of the plea. *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008); *United States v. Inabinette*, 66 M.J. 320, 321-322 (C.A.A.F. 2008). If the "'factual circumstances as revealed by the accused himself objectively support that plea,'" the requisite factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). Applying these precepts, we find the appellant's plea to indecent exposure provident and decline to overturn the military judge's decision to accept that plea.

The elements of indecent exposure are: (1) that the accused exposed a certain part of his body to public view in an indecent manner; (2) that the exposure was willful and wrongful; and (3) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 88(b) (2005 ed.).[4] The evidence establishes, and the appellant does not dispute, that exposing himself to bradnh14 while masturbating and ejaculating was a willful act and that such act was service discrediting. However, relying on *United States v. Hockemeyer*, NMCCA 200800077 (N.M. Ct. Crim. App. 30 Sep 2008) (unpub. op.), the appellant asserts that because he only exposed himself in a "nonpublic" way, i.e., via an Internet chat room, to an undercover police officer who was neither "unsuspecting nor uninterested," his conduct was not in "public view" and therefore did not qualify as indecent exposure.

As in this case, *Hockemeyer* involved an accused who exposed his genitalia, via the Internet, to an undercover officer posing as a minor. A transcript of the online conversation between the officer and the accused immediately prior to and after that exposure indicated that the officer, playing his role as a purported minor female, expressed interest in seeing the images transmitted to him by the accused. *Hockemeyer*,

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images and video clips of the appellant that the appellant sent bradnh14 during their other chats, along with other adult pornography videos, served as the basis for the specification alleging attempted transfer of obscene material to a minor.

[4]This provision was subsequently replaced by the *Manual for Courts Martial, United States (MCM)*, Part IV, ¶ 45.a.(n) (2008 ed.), in the National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, 119, Stat. 3257 (codified as amended in Article 120, UCMJ, 10 U.S.C. § 920). *MCM*, A23-15. (2008 ed.).

unpub. op. at 3. Based on that transcript, the *Hockemeyer* court, citing our superior court's decision in *United States v. Graham*, 56 M.J. 266 (C.A.A.F. 2002), ruled that for an exposure to be in the "public view," the member of the public to whom an accused exposes himself must be "'unsuspecting and uninterested.'" *Id.* at 5. Since the undercover police officer did not qualify as either, but was seeking out Internet sex offenders and had tacitly assented to seeing the offending images, *Hockemeyer* found the exposure was not in "public view" and therefore not indecent. *Id.* at 8.

We find the *Hockemeyer* rationale unpersuasive, in that it would effectively preclude a finding of "public view," and thus indecent exposure, simply because the person to whom an Internet sex offender exposes himself is an undercover police officer charged with ferreting out the very type of criminal conduct which the appellant now seeks to escape. Certainly our superior court's holding in *Graham* does not dictate such a result. *Graham* did not involve Internet exposure to an undercover officer, but to a babysitter inside the offender's own home. The *Graham* Court made clear that "public view," within the meaning of the indecent exposure offense, encompasses more than just exposure in a public place. It also includes exposure to "any member of the public," under circumstances that would make it indecent, even if done within the confines of a private setting. *Graham*, 56 M.J. at 269. An undercover police officer does not cease to be a "member of the public" just because he is "interested" in identifying sex offenders and "suspects" that a particular person may be such an offender. Although *Graham* used the words "unsuspecting and uninterested" to describe the unfortunate babysitter to whom the accused in that case exposed himself, the Court there did not dictate a complete lack of interest and suspicion as a precondition to a finding of "public view," and no such requirement is included within the elements of indecent exposure set forth in the *Manual*. Nor should it be. Logically, even "invited" exposure might, under certain circumstances, still be considered indecent, and to a "member of the public." For example, consider the hypothetical case of a child to whom an accused is a relative stranger and who, in response to a question by the accused, agrees that he wants to "see it." If an accused, in response to such interest, proceeds to expose himself to the child, we have no doubt that both societal norms and the law would consider such a deviant act indecent exposure, even if it occurred within the confines of the accused's home or the relative privacy of the Internet.[5]

That is not to say that consent, or lack thereof, and the relationship of the accused to the purported victim are not important. Such factors are certainly part of the totality of the circumstances that must be taken into consideration in determining whether the exposure at issue was "indecent" or in "public view." For example, if the exposure is

[5] The dissent, while finding no "indecent exposure" under such circumstances, would take comfort from the possibility that the offender in such case might instead be charged with committing an indecent act with a child. While that may be true, our superior court has explicitly determined that whether or not an accused could have been charged with alternative offenses is "irrelevant" for purposes of determining whether or not the deviant behavior at issue also constituted indecent exposure. *United States v. Graham*, 56 M.J. 266, 270 (C.A.A.F. 2002).

between consenting adults, depending on the other attendant circumstances, it might not be considered indecent. The same holds true if the exposure is to a member of the accused's immediate family, such as a spouse.[6] The need to consider such factors was implicitly recognized by the *Graham* Court, which, in delineating the issue there involved, observed that the victim in that case was "a fifteen-year-old girl who was completely unrelated to and uninvolved with [the accused], and who neither invited nor consented to his conduct." *Id.* at 267.[7] Thus, whether the conduct is "invited" and the relationship to the victim are important considerations. However, what we decline to do, and what *Graham* does not do, is establish a bright line rule that if the conduct at issue is "invited," it automatically cannot qualify as "indecent exposure." Considering all of the surrounding circumstances in determining whether any given conduct is "indecent" or in "public view" is not, as the dissent suggests, "judicial activism." It is simply recognition that such determinations are very fact specific and that as a result, courts must consider all of the surrounding circumstances in determining whether the elements of the offense are met. Although not using that express terminology, that is effectively what our superior court did in *Graham* and, indeed, does in any case addressing conduct characterized as indecent exposure. *See, e.g., United States v. Shaffer*, 46 M.J. 94 (C.A.A.F. 1997) (effectively considering all of the surrounding circumstances in determining whether the accused's exposure from the privacy of his home was "willful").

Turning to the facts of this case, it is evident that in some sense the undercover officer invited, or at least acquiesced in, the online exposure that serves as the basis for the indecent exposure offense. In this regard, the following excerpt from the 3 May 2007 chat room dialogue between the appellant and bradnh14, immediately before the appellant began transmitting pictures of himself masturbating and ejaculating, is instructive.

> Appellant[8] (5:53:35 PM): im hard now lol
> Bradnh14 (5:53:41 PM): wow love to see that
> Appellant (5:53:49 PM): lol ya i bet
> Appellant (5:53:55 PM): u want ot
> Bradnh14 (5:54:00 PM): yea
> Appellant (5:54:03 PM): ok
> Appellant (5:54:06 PM): u alone?
> Bradnh14 (5:54:11 PM): yea

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[6] Indeed, we note that the indecent exposure provision contained in the new Article 120, UCMJ, provision explicitly includes only those exposures that "may reasonably be expected to be viewed by people *other than members of the actor's family or household.*" *MCM*, Part IV, ¶ 45.a.(n) (2008 ed.) (emphasis added).

[7] Interestingly, that observation was made not in connection with the Court's discussion of whether or not the exposure was in public view, which is where the *Hockemeyer* court erroneously placed it, but in connection with the determination as to whether or not the conduct was considered "indecent."

[8] During his dialogue with bradnh14, the appellant used the designation "andrew98277," a combination of his first name and the zip code of his home of record. For ease of reference, we have substituted "appellant" throughout the quoted excerpt. The abbreviations and spelling errors are original to the transmission.

Appellant (5:54:15 PM): k

At this point the appellant began the live transmission that served as the basis for the indecent exposure offense. The appellant's discussion with bradnh14 continued:

Bradnh14 (5:54:47 PM): wow
Appellant (5:55:02 PM): lol like
Bradnh14 (5:55:19 PM): love

Although it is evident from the above exchange that the officer, in response to the appellant's query, expressed interest in seeing the transmission that the appellant then sent to him, that does not end our inquiry. Rather, we must consider the totality of the circumstances to determine if the transmission was indecent and in "public view." Addressing the latter question first, we find that the officer, despite his law enforcement interest in the appellant's activities, remained a "member of the public" within the meaning of *Graham*. There is nothing in the record to suggest that he had the type of pre-existing relationship with the appellant, such as that of a family member or paramour, which would dictate otherwise. Thus, the appellant's exposure to the officer was in the "public view."

Finally, we turn to the question of whether the appellant's exposure via the webcam of himself masturbating was "indecent." The *Manual* designates as "indecent" acts which "[signify] that form of immorality relating to sexual impurity which is . . . grossly vulgar, obscene, and repugnant to common propriety." *MCM*, Part IV, ¶¶ 88(c), 90(c) (2005 ed.). Three factors cause us to conclude that the appellant's conduct was in fact "indecent" under this definition. The first is the very nature of the conduct. Second, the transmission at issue was not isolated, but was the culmination of a continuing course of conduct in which the appellant had already sent bradnh14 photographs and video of the appellant masturbating and ejaculating. Third, and most significant, when the appellant broadcast the images, he was sending them to someone he believed was a 14-year-old boy. Under these circumstances, the appellant's exposure was, by any standard, "grossly vulgar, obscene, and repugnant to common propriety." Indeed, the appellant himself explicitly recognized such during the course of the *Care* inquiry. In response to questions by the military judge as to why his acts were indecent, the appellant stated that it was indecent because he was sending it to someone he "thought was a minor." We agree.

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.

HEIMANN, Senior Judge (concurring in part, dissenting in part)

I join the majority's opinion except as to the providency of the appellant's plea to indecent exposure. I agree that the appellant exposed himself in an indecent manner to an undercover officer. I dispute however, the conclusion that the exposure was in "public view," a required element of the offense indecent exposure.

To find someone guilty of indecent exposure, Congress requires that "the accused exposed a certain part of [his] body to *public view* in an indecent manner." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 88(b)(1) (2005 ed.) (emphasis added). While the appellant's conduct in this case was certainly reprehensible, given the circumstances, it was not in "public view," and while it may constitute other offenses, it does not constitute the crime of indecent exposure.

The majority agrees that the statute and *Graham* denote two different types of indecent exposure qualify as exposure in the "public view": 1) exposure in a public place, and 2) "nonpublic" exposure which may occur in a "'privately-owned home.'" *United States v. Graham*, 56 M.J. 266, 268 (C.A.A.F. 2002). Yet despite this clear statutory language and precedent, the majority concludes that "we must consider the totality of the circumstances to determine if the transmission was indecent and in 'public view.'" Further, in considering the totality of the circumstances, the majority concludes that the police officer remained a "member of the public" and thus the exposure was in the public view. This type of analysis is what my Army brethren would refer to as "big hand little map" analysis. It sounds good, but it ignores the law for the sake of getting to a desired conclusion.

The appellant's exposure was not done in the "public view" as defined by the statute or our superior court. First, the exposure was not in a "public place." Rather, it occurred as part of a private Internet text-message exchange between the appellant and the undercover police officer. As our superior court has previously recognized, "[m]embers of the public are not generally able to view e-mails and instant messenger conversations between individuals." *United States v. Wilcox*, 66 M.J. 442, 450 n.6 (C.A.A.F. 2008). There is nothing in the record here to indicate to the contrary. Indeed, although the appellant, during the *Care* inquiry, told the judge the exchange was "public" because it was possible for a third person to have been present with bradnh14 when he transmitted the images, there is no evidence to suggest that it was anything more than a possibility. That is not enough. More importantly, it is clear from the transcripts themselves that the appellant had no interest in anyone other than bradnh14 seeing the transmissions. Throughout their exchanges, the appellant expressed caution with

bradnh14 about disclosure of their shared information and the importance of deleting files after they were received. In addition, immediately before starting the live video feed, the appellant expressly asked bradnh14 if he was alone and received an affirmative reply.

The appellant's conduct also does not fit the category of exposures which, though done in a private setting, still qualify as "public exposure." When assessing private setting exposures, it is clear from *Graham* that the focus is on the status of the victim. *Graham*, 56 M.J. at 268. With that focus, the *Graham* Court found that exposure to a victim who was "an unsuspecting and uninterested member of the general population [who] had no choice but to see [the accused] naked" constituted exposure in the "public view." *Id.* Subsequent to *Graham*, our sister court had the opportunity to apply the same standard in the criminal investigation setting. *United States v. Hockemeyer*, NMCCA 200800077 (N.M. Ct. Crim. App. 30 Sep 2008) (unpub. op.). *Hockemeyer*, considering circumstances virtually on point with this case, found that a plea to indecent exposure lacked a factual basis because the evidence indicated that the live webcam video in which the appellant exposed himself was viewed only by an undercover detective who was posing as a teenager and who was thus neither "unsuspecting" nor "uninterested" in that exposure. *Hockemeyer*'s interpretation of *Graham* is both accurate and persuasive. As in *Hockemeyer*, the police officer here was interested in, and even invited, the exposure. Under these circumstances, the appellant's exposure to the officer over the Internet does not qualify as the type of "nonpublic" act that qualifies as indecent exposure occurring in public view.

Finally, I consider the majority's hypothetical, in which a young child accepts a deviant's invitation to see his private parts. The majority uses this example to justify why we must find the appellant's conduct indecent exposure: otherwise, apparently, this conduct is legal. Once again the majority uses the big hand little map strategy. Under their hypothetical the deviant is guilty of the offense of an indecent act with the child, a far more serious crime than indecent exposure, thus we need not engage in judicial activism simply to protect a child. Congress has already done so.

I would find that the military judge abused his discretion when he found the appellant's plea to Charge II, Specification 1, indecent exposure, provident, and would therefore set aside the appellant's conviction of that offense.

Attempt

The above does not end the inquiry, for the appellee asks this Court to find the appellant guilty of attempted indecent exposure if the plea to the completed act is deemed improvident. I would decline to do so. While the Court has the authority to approve such a finding under Article 59(b), UCMJ, 10 U.S.C. § 859(b), the appellant's conduct does not satisfy the elements of attempted indecent exposure. The appellant did not have the intent to commit the offense of indecent exposure, in that he did not intend his exposure

to be in the "public view." Thus, even if the facts were as the appellant believed them to be, he still would not have not committed the offense of indecent exposure. *MCM*, Part IV, ¶¶ 4.c.(1), (3) (2005 ed.).

Sentence Reassessment

Having determined it appropriate to set aside the appellant's conviction for indecent exposure, it would also be necessary to determine whether we can reassess the sentence or must order a new sentencing hearing. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that if the appellate court cannot determine that the sentence would have been at least of a certain magnitude, it must order a rehearing. *Harris*, 53 M.J. at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

Considering the maximum punishment for each of the specifications of which the appellant was found guilty, I am satisfied that the indecent exposure specification was the least severe of the offenses for which he was convicted. It only increased the maximum confinement the appellant faced by six months. The remaining maximum punishment was 22 years. More importantly, considering the appellant's remaining convictions, particularly the one for sending obscene materials to bradnh14, I am satisfied that all of the conduct in question would in any event have been admitted as facts and circumstances surrounding Specification 1 of Charge I. As such, I am confident that the members would have still have imposed the same sentence, and would reassess the sentence accordingly.

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

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