UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PATRICK L. FLORES-MULLER
United States Air Force

ACM S31183

13 November 2007

Sentence adjudged 11 August 2006 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: James B. Roan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Jamie L. Mendelson.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of two specifications of attempting to commit carnal knowledge and two specifications of attempting to commit sodomy, in violation of Article 80, UCMJ, 10 U.S.C. § 880. A special court-martial comprised of a military judge sitting alone sentenced the appellant to a bad-conduct discharge, confinement for 9 months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence. On appeal, the appellant asserts (1) he was entitled to credit for pretrial confinement when he was held by local authorities and charged with a related offense similar to the offenses to which he pleaded guilty, and

(2) his sentence is inappropriately severe.[1] We find the assignments of error to be without merit and affirm.

Credit for Pretrial Confinement

At the time of the offenses the appellant was stationed at Elmendorf Air Force Base (AFB), Alaska. On 23 March 2006, he began a conversation on an internet messaging web site with "hot_allie14," a person he believed to be a fourteen-year-old girl. After an hour of conversation, the appellant began to ask "hot_allie14" questions of a sexual nature, including whether she had had oral and anal sex. During further conversations, "hot_allie14" introduced the appellant to "emma14_ak," another person the appellant believed to be a fourteen-year-old girl. The appellant suggested that the three of them have sex together.

The appellant arranged to meet "hot_allie14" and "emma14_ak" at a movie theater in Anchorage. As he told the military judge during the inquiry into his guilty plea, the appellant intended to take the girls onto Elmendorf AFB and have sexual intercourse with them, as well as oral sex and anal intercourse. He drove to the theater, equipped with baby oil, condoms, and lubricant. As it turned out, "hot_allie14" and "emma14_ak" were Anchorage Police Department detectives, conducting undercover operations as members of the Crimes Against Children Unit. They arrested the appellant and placed him in the local jail, where he faced charges of enticement of a minor and possession of child pornography. He remained in civilian custody up to the date of his court-martial.

At trial, the appellant moved for pretrial confinement credit for the time he spent in civilian confinement. The military judge declined to award credit, finding that although the enticement charge the appellant faced in state court was essentially the same as the court-martial charges, the appellant was being held on an additional charge, that is, the alleged possession of child pornography. The military judge also noted that the appellant was not being held under the direction of the military authorities, and thus he decided that pretrial confinement credit was not warranted.

In *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), our superior court held that, by operation of Department of Defense instructions, a person confined as a result of a sentence "shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." *Id.* at 128 (quoting 28 C.F.R. § 2.10(a) (1980)).

Since 1994, computation of federal sentences to confinement has been governed by 18 U.S.C. § 3585(b), which provides, in part, that a defendant "shall be given credit toward the service of a term of imprisonment for any time he has spent in official

[1] The second assignment of error is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed . . . that has not been credited against another sentence." *See also United States v. Murray*, 43 M.J. 507, 514 (A.F. Ct. Crim. App. 1995). This requirement has been extended to apply to pretrial confinement by state officials, *Murray*, 43 M.J. at 514-15, and by foreign governments, *United States v. Pinson*, 54 M.J. 692, 694-95 (A.F. Ct. Crim. App. 2001), *aff'd,* 56 M.J. 489 (C.A.A.F. 2002).

In this case, the appellant was arrested by Alaskan authorities for online enticement of a minor. At his court-martial, the appellant was convicted of attempted carnal knowledge and sodomy of minors, which he accomplished by using the internet. Accordingly, the matter falls squarely within the parameters of 18 U.S.C. § 3585(b). Under these circumstances, we find the military judge should have given the appellant credit for the time spent in civilian pretrial confinement. *See United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

The government has responded to this assignment of error by supplementing the record with the appellant's confinement timesheet from the Alaska Department of Corrections. This timesheet establishes that the appellant was convicted in state court and sentenced to serve time in Alaskan custody after his court-martial, and reflects an adjusted release date of 31 March, 2008. The timesheet also indicates the appellant was given credit against his sentence for the time he spent in pretrial confinement, including the time at issue in the present case. Thus, while the appellant should have been given credit at the time of his court-martial, as it now stands he has been given credit for that time against a sentence in compliance with 18 U.S.C. § 3585(b). We find, therefore, that the appellant has not been prejudiced by the error at trial and is entitled to no relief.

Sentence Appropriateness

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We have given individualized consideration to this particular appellant and carefully reviewed the facts and circumstances of this case.

The appellant's sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during the findings or sentencing proceedings. After carefully examining the submissions of counsel, taking into account all the facts

and circumstances surrounding the crime of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe. *Snelling*, 14 M.J. at 268.

Conclusion

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court