UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant THOMAS J. FULLER
United States Air Force

ACM 37228

07 May 2009

Sentence adjudged 23 January 2008 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Jason M. Kellhofer.

Before

HEIMANN, HELGET, and PLACKE
Appellate Military Judges

OPINION OF THE COURT

PLACKE, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, in accordance with his pleas, of one specification of wrongful and knowing receipt of visual depictions of minors engaging in sexually explicit conduct, three specifications of wrongful and knowing possession of various media containing visual depictions of minors engaging in sexually explicit conduct, and one specification of wrongful and knowing possession of obscene material, all in violation of Article 134,

UCMJ, 10 U.S.C. § 934. Also in accordance with his pleas, the appellant was convicted of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The adjudged and approved sentence consists of a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1. On appeal, the appellant contends that his sentence is inappropriately severe.[1]

Background

This case arose after a complaint that the appellant inappropriately touched TA, a 10-year-old Air Force dependent whose father was deployed at the time. That incident occurred one evening at TA's home, while the appellant visited and watched a movie with TA, his two siblings, their mother, and another adult female. The appellant offered to rub TA's back after TA complained that his back hurt. Even though TA declined to remove his shirt, the appellant reached under TA's shirt without permission while rubbing TA's back. Air Force Office of Special Investigations agents investigated, ultimately interviewed the appellant, and obtained his consent to search his off-base residence. Agents discovered thousands of sexually explicit images of children on two computer hard drives and 37 compact disks, as well as printouts of a few such images. Investigators also discovered three digital publications, "Brotherly Love," "Against the Law," and "Lord of the Flies," which contain graphic descriptions of sexual acts between minor boys, including incest, and sexual acts between minor boys and adult men.

Sentence Appropriateness

The appellant argues that his sentence is inappropriately severe and that we should only approve a bad-conduct discharge and five years confinement. We do not agree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's own status as a victim of childhood sexual assault is a mitigating factor, as is his otherwise satisfactory military record. However, the appellant received and possessed thousands of very graphic images of minor children, some quite young,

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

engaged in all manner of sexually explicit conduct, including oral and anal intercourse. Although the appellant did not produce or distribute those images, many children were victimized to produce the images he received and possessed. The assault consummated by a battery on TA is also significant given that it involved actual contact with a 10-year-old victim. The maximum sentence the appellant faced included a dishonorable discharge, confinement in excess of 50 years,[2] forfeiture of all pay and allowances, and reduction to E-1. The adjudged and approved sentence of a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1, is not inappropriately severe.

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.

OFFICIAL

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

[2] Although the counsel and the military judge discussed it in a Rule for Courts-Martial 802 session, they did not explain on the record how they calculated the total maximum term of confinement as 52 years and six months. The maximum term of confinement for assault consummated by a battery is six months. *Manual for Courts-Martial, United States*, Part IV, ¶ 54.e.(2) (2005 ed.). In *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007), our superior court approved reference to 18 U.S.C. § 2252 to determine the maximum term of confinement for a charge under clause 1 or 2 of Article 134, UCMJ, 10 U.S.C. § 934, involving visual depictions of minors engaging in sexually explicit conduct. Here, that yields a 20-year maximum for the single specification of receiving such material, and a 10-year maximum for each of the three specifications of possession of such material. 18 U.S.C. § 2252(a)(2), (4), (b)(1)-(2) (2003). While it is not clear how the parties calculated the maximum term of confinement for the single specification of possession of obscene material, it is clear that the total maximum term of confinement in this case exceeded 50 years and six months, and that the appellant was not prejudiced by the failure to explain the calculations on the record. In future cases, all parties are encouraged to explain, on the record, how they calculated the maximum term of confinement for charges under clause 1 or 2 of Article 134, UCMJ.