UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER D. GULEFF
United States Air Force

ACM 37542

14 July 2011

Sentence adjudged 28 July 2009 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Le T. Zimmerman (sitting alone).

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

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Darrin K. Johns, Major Shannon A. Bennett, Major Reggie D. Yager, and Capt Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

The appellant pled guilty pursuant to a pretrial agreement to wrongfully and knowingly possessing "what appear to be" visual depictions of minors engaging in sexually explicit conduct, in violation of Clauses 1 or 2 of Article 134, UCMJ, 10 U.S.C.

§ 934.[1] A military judge sitting as a general court-martial sentenced him to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1. A pretrial agreement capped confinement at 15 months and limited approval of any adjudged punitive discharge to a bad-conduct discharge, with no other limitations. The convening authority did not approve any forfeitures, but approved the remaining sentence as adjudged.

As he did at trial, the appellant challenges the military judge's determination of the maximum punishment. He argues that the language of the specification alleging possession of "what appear to be" visual depictions of minors engaged in sexually explicit conduct precludes application of the Federal law maximum of ten years under the Child Pornography Prevention Act (CPPA), 18 U.S.C. § 2252A. Further, the maximum punishment should be for disorderly conduct – confinement for four months and forfeiture of two-thirds pay per month for four months. The appellant is correct. In *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 26 April 2011), our superior court held that the maximum authorized punishment for a charge of possessing "what appears to be" child pornography--as opposed to possessing actual child pornography--is punishable as a simple disorder which has a maximum authorized punishment of four months confinement and forfeiture of two-thirds pay per month for four months. The charge and specification upon which the appellant was convicted uses the same critical language as found in *Beaty*, so the maximum authorized punishment is the same: confinement for four months and forfeiture of two-thirds pay per month for four months. Being far in excess of the maximum authorized, the imposed sentence here materially prejudiced the appellant.

We next analyze the case to determine whether we can reassess the sentence. *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, 88 (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. *Id.* (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

Although the maximum punishment is substantially reduced, we are confident that the military judge would have adjudged the maximum authorized for disorderly conduct

[1] A second specification alleging distribution of "what appear to be" visual depictions of minors engaging in sexually explicit conduct was withdrawn with prejudice per the pretrial agreement.

based on the facts presented in this case. The appellant stipulated as fact that he possessed seven images of actual minors engaged in sexually explicit conduct. The child in five of the possessed images has been identified by the National Center for Missing and Exploited Children as being 13 years old at the time she was photographed. Describing these five images, the appellant told the military judge that in three of the images the young girl is nude, her breasts and genitals are exposed, and that some of the photographs are "bondage type" that show the girl "on the floor [with] her hands bound above her head." Considering the evidence in the record, a reassessed sentence of confinement for four months and reduction to the grade of E-1 purges the record of error.[2]

Appellate Delay

We note that the overall delay of 23 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The case decided by our superior court—which was anticipated by the appellant in his assignment of errors at footnote 4 and which now supports the appellant's position for relief—was decided just a few months ago. Having considered the totality of the circumstances and the entire record,[3] we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The findings of guilt are affirmed.[4] Only so much of the sentence as provides for confinement for four months and reduction to the grade of E-1 is approved. The findings and reassessed sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant exists. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] The convening authority disapproved the adjudged forfeitures based on the needs of the appellant's family.

[3] We note that the appellant's defense counsel requested and received eight delays, extending the time for filing an assignment of errors to 424 days from the date the record was received by the appellant's counsel. The appellant concurred in the requested delay.

[4] Because the approved finding of guilt is a simple disorderly conduct offense rather than the analogous offense of possession of child pornography under Federal law, the collateral consequence of sexual offender registration should be again reviewed by appellant and his counsel. *See United States v. Miller*, 63 M.J. 452, 458 (C.A.A.F. 2006).

Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court