UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEVIN M. HADLEY
United States Air Force

ACM 35930

16 February 2006

Sentence adjudged 9 March 2004 at Kirtland Air Force Base, New Mexico. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Robin S. Wink, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Major Jin-Hwa L. Frazier.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, in accordance with his pleas, of one specification each of receiving and possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting alone sentenced him to a dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority reduced the confinement to 9 months pursuant to a pre-trial plea agreement, but otherwise approved the sentence as adjudged.

Before us, the appellant claims the parties at trial erroneously calculated the maximum punishment in his case; the prosecution sentencing argument was improperly inflammatory; his sentence is inappropriately severe; and he is entitled to a new staff judge advocate's recommendation and action by the convening authority because the convening authority was incorrectly apprised of the maximum punishment in his case. We resolve these issues adversely to the appellant and affirm.

Error Calculating the Maximum Punishment

The appellant contends the maximum penalty for his misconduct was improperly calculated at trial. The government concurs, as do we.

During the appellant's court-martial, the parties determined the maximum potential sentence to confinement by referring to penalties under 18 U.S.C. § 2252A for the same offenses. Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii). As it so happened, however, these penalties were increased by a change in the law enacted between the date of the appellant's last act of misconduct and the date of his trial. Pub. L. No. 108-21 § 103, 117 Stat. 650, 652 (2003). Apparently unaware of the change, counsel for the prosecution and for the defense advised the military judge that the maximum confinement that could be imposed was 30 years. Under the new law, their calculations were correct; however, the Ex Post Facto clause of the Constitution does not permit subjecting an accused to increased punishment based on a change in the law enacted after his criminal misconduct was committed. U.S. CONST. art. I, § 9, cl. 3; *Calder v. Bull*, 3 U.S. 386, 390 (1798). The maximum period of confinement to which the accused should have been subject was 20 years. Accordingly, we reassess the sentence below.

Improper Argument

The appellant also complains the assistant trial counsel's sentencing argument was inflammatory and improper. He asks us to set aside his sentence and order a rehearing. Because there was no objection to the argument at trial, we examine it for plain error. R.C.M. 919(c); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). The appellant has the burden of establishing error; that the error was plain and obvious; and that the error materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998). Applying this standard, we find the appellant has not met his burden. The assistant trial counsel clearly struck hard, but we are not convinced his blows were unfair. *See United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000).

The appellant specifically challenges the assistant trial counsel's reference to one of the children depicted in the appellant's pornography collection. That particular child,

as the assistant trial counsel noted, was subjected to a variety of sex acts during the course of her victimization by the pornographers. The appellant stipulated that this was true, and specifically stipulated that some of those sex acts went beyond what is shown in the appellant's collection. The assistant trial counsel did not contend the appellant caused these additional acts, but did argue that such victimization is part of the "black market industry" the appellant, through his conduct, was "[p]erpetuating and feeding." The appellant similarly admitted in his unsworn statement that his conduct "played a part in supporting [the children] being victims." In this context, we do not believe the assistant trial counsel's arguments amount to error, let alone plain error.

Nor are we persuaded the assistant trial counsel went too far in subsequent references to the appellant's "appetite" and "interest." The assistant trial counsel specified that the appetite in question was the appellant's appetite for child pornography, and the appellant's interests were in images depicting various "perverse" sexual acts. The appellant admitted he knew the images he received likely depicted child pornography because he could view the file names before downloading them. Given the explicit nature of those file names and the images themselves, we again cannot say that the assistant trial counsel's characterizations were plain error. *See Gilley*, 56 M.J. at 123.

Finally, the appellant contends the assistant trial counsel's argument was the product of sinister premeditation "undoubtedly calculated to improperly influence the military judge's deliberation." He claims the argument influenced the military judge on "some emotional or subconscious level." We think this gives counsel too much credit. We regard the lack of any defense objection as evidence of the minimal impact of the argument in comparison to the evidence itself. *See United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999). The images are sufficiently graphic that there is little the prosecutor's arguments could add.

Sentence Reassessment

Because there was an error in calculating the maximum sentence at trial, we next consider whether we can reassess the sentence. The purpose of reassessment is to purge the error that occurred at trial. We reassess the sentence awarded by the military judge, and not the sentence approved by the convening authority. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990). If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)).

Our recalculation of the maximum sentence does not affect the factual basis on which this military judge, sitting alone, sentenced the appellant. The adjudged

confinement was only a fraction of the maximum under either calculation. Taking into account the entire record, we are confident the military judge would have adjudged the same sentence absent the error.

Having reassessed, we turn to the question of whether the appellant's sentence, as approved by the convening authority, was appropriate. The appellant argues that, before this analysis can be undertaken, he is entitled to a new staff judge advocate's recommendation which correctly reflects the maximum sentence that could have been adjudged at trial, as well as a new action by the convening authority. Under other circumstances, we might agree. The convening authority has unfettered power to grant clemency for any reason, or no reason at all, and ordinarily we decline to speculate as to how the convening authority would have evaluated the appellant's request for clemency had he been apprised of the correct maximum punishment. Article 60, UCMJ, 10 U.S.C. § 860; *United States v. Catalani,* 46 M.J. 325, 328-29 (C.A.A.F. 1997); *United States v. Jones*, 36 M.J. 438, 439 (C.M.A. 1993). Here, however, the appellant waived his right to submit matters in clemency, and has not suggested to us anything he would have done differently but for the error in calculating his maximum sentence. *United States v. Gilbreath*, 57 M.J. 57, 61 (C.A.A.F. 2002). We conclude that the appellant has not made a colorable showing of prejudice. *See United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997).

Conclusion

The findings and sentence, as reassessed, 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 findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court