UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant WILLIAM T. HALEY
United States Air Force

ACM 37565 (rem)

13 December 2011

Sentence adjudged 6 August 2009 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 15 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Maria A. Fried; Major Shannon A. Bennett; Major Marla J. Gillman; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Jamie L. Mendelson; and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

UPON REMAND

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant in accordance with his pleas of one specification of violating a lawful general order, in violation of Article 92, UCMJ, 10 U.S.C. § 892; one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907; and six specifications of violating Article 134, UCMJ, 10 U.S.C. § 934, by (1) producing child pornography, (2) possessing in Iraq visual depictions of "what appears to be" a minor engaged in sexually explicit conduct, (3) possessing within the continental United States

visual depictions of "what appears to be" a minor engaged in sexually explicit conduct, (4) surreptitiously filming women and children to gratify his sexual desires, (5) committing indecent acts with a child under 16 years of age, and (6) possessing child pornography in violation of 18 U.S.C. § 2252(a). A pretrial confinement agreement limited confinement to 20 years in exchange for the pleas of guilty. The court-martial sentenced the appellant to a dishonorable discharge, confinement for 15 years, and reduction to E-1. The convening authority approved the sentence adjudged.

We previously affirmed the findings and sentence. *United States v. Haley*, ACM 37565 (rem) (A.F. Ct. Crim. App. 24 August 2010) (unpub. op.), *rev'd in part*, 70 M.J. 133 (C.A.A.F. 2011) (mem.). The Court of Appeals for the Armed Forces affirmed the findings of guilt but reversed as to sentence in light of *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011), which impacts the maximum authorized punishment for two of the eight specifications. It remanded the case for either sentence reassessment or rehearing as appropriate. *Haley*, 70 M.J. at 133.

In *Beaty*, the 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 with a maximum authorized punishment of 4 months confinement and forfeiture of two-thirds pay per month for 4 months. *Beaty*, 70 M.J. at 45. Therefore, each of the two specifications alleging possession of what appears to be child pornography has a maximum authorized confinement of 4 months. At trial, however, the military judge and counsel calculated the maximum confinement for each of these specifications as 10 years instead of 4 months, making the total authorized confinement 64 years and 4 months. Using the new maximum confinement for the affected specifications required by *Beaty*, the maximum authorized confinement for all offenses upon which the appellant was convicted is 45 years (64 years, 4 months minus 19 years, 4 months).

We must determine first whether sentence reassessment can purge the error in calculating the maximum authorized confinement. *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)).

Under the facts of this case, we are confident that we can discern the extent of the error's effect on the sentencing decision. Contrary to his initial denials to law enforcement agents, the appellant sexually abused his two-year-old daughter on multiple occasions and recorded the abuse on video tape. When the appellant deployed to Iraq in September 2007, he took child pornography with him in violation of General Order #1B. While in Iraq, the appellant used both secure and insecure computer networks to search for images of children in popular media such as Stars and Stripes, AFN, and CNN, and also searched for images of dependent children sent to other deployed military members. He would routinely use the images to sexually fantasize during masturbation.

When he departed Iraq, inspectors found more than 50 printed images of pre-teen girls and adult women in tight or revealing outfits packed in his luggage. The inspectors also found a number of electronic media containing child pornography. The appellant admitted viewing child pornography over the years and stated that "he would look at children of a certain age and then, when he got bored or needed additional stimulation, he would go younger by looking at sexually explicit pictures of even younger children." A consensual search of the appellant's other computers uncovered images of known child pornography victims and numerous other images that appeared to be children. Finally, the appellant secretly filmed young children and women for use during masturbation. He filmed in his neighborhood, the PX parking lot, a Wal-Mart parking lot, the beach, and the aquarium. At least one time, he was in uniform while filming. The trial counsel argued for a sentence which included confinement for 25 years, 5 years more than the confinement cap in the pretrial agreement but still 20 years less than the revised maximum under *Beaty*. Under the circumstances of this case and considering the relative severity of the unaffected charges and specifications, we are confident that the military judge would have imposed at least a dishonorable discharge, confinement for 15 years, and reduction to E-1. A reassessed sentence of a dishonorable discharge, confinement for 15 years, and reduction to E-1 purges the record of any error.

Conclusion

With the findings having been previously affirmed, the sentence, as reassessed, is 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 sentence, as reassessed, is

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court