UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman AARON J. HETMAN
United States Air Force

ACM 37853

18 March 2013

Sentence adjudged 10 December 2010 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, a military judge sitting as a general court-martial convicted the appellant of indecent acts[1] and wrongful possession of one or more visual depictions of "what appear to be" minors engaging in sexually explicit conduct, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The appellant was sentenced to a bad-conduct discharge, confinement for 6 months, and reduction to E–1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts his

[1] The appellant was originally charged with indecent liberties, but the military judge convicted him of the lesser included offense of indecent acts.

sentence must be set aside because the military judge determined the sentence based on the wrong maximum punishment.

Background

Following a litigated trial, the appellant was convicted of engaging in an indecent act by taking several photographs of the "genitalia and buttocks area" of DP, the 11-year-old daughter of his friend, by using his cellular phone to surreptitiously take photographs of DP's crotch area while she was sitting at a table and standing near him. He then e-mailed the photographs to himself and later accessed them from his home computer. After the appellant's wife discovered the photographs and notified the child's parents, military authorities were contacted.

During a statement made under rights advisement, the appellant admitted to taking the photographs of DP. He also admitted possessing what could be child pornography on his computer and that he was "sexually aroused" by 12- to 14-year-old girls. A forensic analysis of his computer revealed sexually explicit images in the "recycle bin," the temporary file folder, and in unallocated disk space. Because the children in these images were never identified as being "actual children," the appellant was charged with possessing visual depictions of what "appear to be minors engaging in sexually explicit conduct."

Following the appellant's conviction, the military judge did not specifically state what she considered to be the maximum possible punishment for the appellant's two crimes. In her sentencing argument, however, the trial counsel stated the appellant "could face 15 years imprisonment and a dishonorable discharge" for his crimes. The defense did not object or comment on that statement.

Maximum Authorized Punishment

The maximum punishment authorized for an offense is a question of law, which we review de novo. *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011). "While we review a military judge's sentencing determination under an abuse of discretion standard, . . . where a military judge's decision was influenced by an erroneous view of the law, that decision constitutes an abuse of discretion." *Id.* (citations omitted).

In *Beaty*, the Court of Appeals for the Armed Forces determined a charge of possessing "what appears to be" child pornography is punishable as a simple disorder with a maximum authorized punishment of four months confinement and forfeiture of two-thirds pay per month for four months.[2] Using the new maximum confinement

[2] We decline the Government's invitation to "urge our superior court" to reconsider its decision in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). The decision articulated in *Beaty* is controlling and applicable to the offense for which the appellant stands convicted.

following *Beaty*, the maximum confinement for all offenses upon which the appellant was convicted is 5 years and 4 months. At trial, however, the military judge and counsel apparently calculated the maximum punishment for this child pornography specification as 10 years, making the total authorized punishment for both offenses 15 years.[3] This constitutes error as a matter of law. *Id.* at 44.

Sentence Reassessment

Having found error, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. Our Court "must be able to discern the extent of the error's effect on the sentence . . . [and the] reassessment must be based on a conclusion that the sentence that would have been imposed at trial absent the error 'would have been at least of a certain magnitude.'" *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citing *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999), and quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). This conclusion about the sentence that would have been imposed must be made "with confidence." *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Therefore, we reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*. Even with the disparity between the maximum sentence of 15 years calculated by the military judge and the actual maximum sentence of 5 years and 4 months, we are confident that this error did not substantially influence the sentence and materially prejudice the appellant's substantial rights. The appellant knowingly and wrongfully possessed multiple images of what appear to be minors engaged in sexually explicit conduct and used his cellular phone camera to take photographs up the skirt of an 11-year-old child.

The prosecution argued for a sentence that included 18 months of confinement and a bad-conduct discharge while the appellant's trial defense counsel asked the military judge to impose 2 to 5 months of confinement. The military judge ultimately sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. We believe that the maximum allowable amount of confinement considered by the military judge had very little, if any, impact on her decision.

[3] The parties did not discuss the maximum sentence during the trial. However, at the time of trial, the standard practice in courts-martial was to use ten years as the maximum sentence for possessing "what appears to be" child pornography. The parties in this case appear to have used that maximum sentence plus five years for the indecent act, for a total of 15 years of confinement.

Accordingly, under the facts and circumstances of this case, and considering the relative severity of the charges, we are confident that the military judge would have imposed at least a bad-conduct discharge, confinement for 6 months, and reduction to E-1, even if she knew the maximum amount of authorized confinement was 5 years and 4 months. We also find, after considering the appellant's character, the nature and seriousness of the offenses and the entire record, that the reassessed sentence is appropriate.

Conclusion

The approved findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).