CORRECTED PAGE

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DAVID T. KEITH
United States Air Force

ACM 35204

17 August 2004

Sentence adjudged 23 May 2002 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Maria A. Fried, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Steven R. Kaufman.

Before

STONE, GENT, and MOODY
Appellate Military Judges

PER CURIAM:

We examined the record of trial, the assignment of errors, and the government's reply thereto. The appellant assigns two errors. We address the second error first. The appellant pled guilty to a violation of clause 2, Article 134, UCMJ, 10 U.S.C. § 934, by knowingly possessing visual depictions of what appeared to be a minor engaging in sexually explicit conduct. The appellant now asserts that his plea was improvident because the military judge did not explain that "possession of virtual child pornography could be legal." We find this issue is without merit. *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) (even assuming the images are "virtual" child pornography, those

images can constitutionally be subjected to criminal sanction under the uniquely military offenses in clauses 1 and 2 of Article 134, UCMJ.)

We note that in *Mason*, 60 M.J. at 20, our superior court amended the Article 134, UCMJ, specification to remove the language "that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, in violation of 18 U.S.C. 2252A." Out of an abundance of caution, we will also strike this language from Specification 5 of the Charge. Specification 5 of the Charge is amended to read as follows:

> In that STAFF SERGEANT DAVID T. KEITH, United States Air Force, 552d Computer Systems Squadron, did, at or near Midwest City, Oklahoma, on or about 28 November 2000, knowingly possess visual depictions of what appears to be a minor engaging in sexually explicit conduct ~~that had been mailed, shipped, or transported in interstate commerce by any means including by computer in violation of 18 U.S.C. §2252~~ which conduct was of a nature to bring discredit upon the Armed Forces.

The appellant next asserts that the finding of guilty to Specification 1 of the Charge must be set aside because it is vague and ambiguous. Specification 1 alleged that the appellant committed indecent acts upon DEK, a child under 16 years of age, on divers occasions. In this bench trial, the military judge found the appellant guilty, excepting the word divers. The military judge's finding did not reflect the specific instance of conduct upon which his finding was based. We hold that the finding is ambiguous and it prejudiced the appellant's right to a full and fair review of the finding under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003). The finding must be set aside.

Having set aside the guilty finding for Specification 1 of the Charge, we find that we can reassess the sentence. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). After considering the record before us, we are confident that the military judge would have imposed a sentence of at least a bad-conduct discharge, confinement for 8 months, and reduction to E-1. We have also given "individualized consideration" to the appellant on the basis of his character and the nature and seriousness of the remaining offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). As reassessed, this sentence

is one purged of prejudicial error and appropriate for the offense of which the appellant now stands convicted. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *Sales*, 22 M.J. at 307.

The finding of guilty for Specification 1 of the Charge is set aside and the specification is dismissed. The remaining finding, as modified, and the 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the remaining finding, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator