UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SCOTT A. KLEIN
United States Air Force

ACM 37833

18 January 2013

Sentence adjudged 8 October 2010 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial composed of officer members, the appellant pled guilty to desertion and possession of child pornography, in violation of Articles 85 and 134, UCMJ, 10 U.S.C. §§ 885, 934. After the military judge accepted his pleas and entered findings of guilty, the court sentenced him to a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant asserts three errors: (1) trial counsel made an improper sentencing argument; (2) he was denied the effective assistance of counsel; and (3) his sentence is inappropriately severe.

We also considered whether the appellant has been denied the due process right to speedy post-trial review. Finding no error that materially prejudices the appellant, we affirm.

Background

The appellant pled guilty to possessing visual depictions of minors engaging in sexually explicit conduct, in both photographic and video-recording form, on divers occasions between 1 January 2007 and 10 February 2008.[1] While searching the Internet for child pornography in January 2007, he found an on-line child pornography website and purchased a one-month membership for $79.95, knowing the images on the site were of male and female children in their early to mid-teens posing in a sexually explicit manner. The appellant viewed images on the site and downloaded some photographs from this website onto his personal computer. He also viewed other images by accessing a non-subscription child pornography website, including images showing children engaging in masturbation. Through email addresses found on this second website, the appellant requested and received video-recordings of child pornography. He would view the video-recordings and save them to his computer, as well as keep the original emails containing the video-recordings.

While conducting an investigation into commercial child pornography websites in 2007, investigators with the United States Customs Service discovered some individuals, including the appellant, had used PayPal accounts to purchase memberships on the websites. After being informed of the appellant's involvement, agents from the Air Force Office of Special Investigations (AFOSI) interviewed the appellant under rights advisement on 8 February 2008.

The appellant admitted to buying the one-month membership and accessing the site until his subscription expired. He also admitted to downloading photographs, requesting video-recordings from others over email, and belonging to a chat room where child pornography was shared. Saying that viewing the photographs had become an "obsession," he told the AFOSI agents that he checked for new photographs every few days, that he did so for his own sexual gratification, and that he knew the images were illegal.

After his AFOSI interview, the appellant went to his dormitory room, packed a bag of clothes and left, after withdrawing $500 from an automated teller machine on base, intending to permanently remain away from his duty station. He drove to Canada, crossing the border on the morning of 10 February 2008. When interviewed by Canadian immigration officials at the border, he told them he was deploying soon and was en-route to see his father in British Columbia.

[1] This specification alleged both Clause 1 and 2 of Article 134, UCMJ, 10 U.S.C § 934, as the terminal element and thus stated an offense. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F.), *cert denied*, 133 S. Ct. 43 (2012) (mem.).

When the appellant did not report for work on 11 February 2008, his first sergeant checked his dormitory room. In addition to discovering that the appellant's clothing was gone, he found a note from the appellant that stated: "To all my friend(s) who cared about me in Las Vegas, I'll miss you . . . I made some mistakes and will always regret them and would sooner disappear then (sic) have to endure the shame and embarrassment. Please remember me as I was at the best of times. I appreciate the help my supervisors gave and please don't think less of me. . . . I never hurt anyone." The appellant's commander declared him a deserter that same day.

While in Canada, the appellant worked as a server in a hotel and at a computer lab. On 4 February 2010, almost two years after he left Nellis Air Force Base, the appellant was arrested at his apartment by Canadian authorities, based on his desertion and involvement with child pornography. Two months later, he consented to extradition and was returned to the United States on 9 July 2010, where he was placed in military pretrial confinement.

Trial Counsel Argument

Failure to object to improper argument before the start of sentencing instructions waives the objection. Rule for Courts-Martial 1001(g). Absent objection, argument is reviewed for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Error is not "plain and obvious" if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened sua sponte. *Burton*, 67 M.J. at 153 (citing *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)).

Counsel should limit their arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). "[T]rial counsel is at liberty to strike hard, but not foul, blows." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (citation and quotation marks omitted). As a result, "it is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *Id*. The trial counsel also must not inject matters that are not relevant into argument. *Id*. Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F 2001). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Id.* at 123. Improper argument does not require reversal unless the "'trial counsel's comments, taken as a whole, were so damaging that we cannot be confident' that [the appellant] was sentenced 'on the basis of the evidence alone." *Erickson*, 65 M.J. at 224 (quoting *Fletcher*, 62 M.J. at 184).

During sentencing argument, the trial counsel argued "the accused paid for someone else's pain. He paid to see someone raped because a child that young can never

consent." The appellant contends this is improper argument because the website he paid to access only contained still images of children and no evidence was presented that any depictions of child rape were found on that website. When considered in the context of the entire court-martial, we do not find this argument to be error. In any event, even if erroneous, the argument did not materially prejudice the substantial rights of the appellant.

Assistance of Counsel

The appellant entered into a pretrial agreement that capped his confinement exposure at three years. Through an affidavit submitted to this Court, he contends he received ineffective assistance from his trial defense counsel because he was not advised that, if released prior to the expiration of that sentence due to credit for good behavior, he would be subjected to supervised release which would require him to remain in the United States. He thus argues he entered into a pretrial agreement without fully knowing the ramifications of his decision, and, if he had known this information, he would have asked the convening authority to approve a pretrial agreement with different terms. In an affidavit provided in response to a Government-requested Order from this Court, the appellant's trial defense counsel, Captain TKA, stated he told the appellant he would be on supervised release until the expiration of his completed sentence and that these conditions would most likely affect the appellant's ability to move and travel.

Harrington v. Richter, 131 S. Ct. 770, 788, (2011), reaffirmed that the de novo standard of review for ineffective assistance of counsel claims is "most deferential." Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that "the deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive the defendant of a fair trial . . . whose result is reliable." *Strickland*, 466 U.S. at 687. In the context of a guilty plea, the prejudice question is whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citations omitted).

"[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citation omitted). We need not resort to a fact-finding hearing to resolve factual disputes in conflicting affidavits if the facts alleged in the appellant's affidavit, even if true, would not result in relief. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *see also United States v. Fagan*, 59 M.J. 238, 241-43 (C.A.A.F. 2004) (recognizing the first *Ginn*

factor as a proper basis for not requiring a fact-finding hearing, but ordering such a hearing after finding none of the five *Ginn* factors applicable).

That is the case here. Although the affidavits of the appellant and his defense counsel are in conflict regarding some of the facts underlying this allegation, the facts described in the appellant's declaration would not result in relief, even if any factual disputes are resolved in his favor. First, the panel sentenced the appellant to three years confinement, thus the pretrial agreement had no effect on his situation after his trial. Any requirement that he remain in the United States while on supervised release stems from that adjudged sentence. Further, even if the appellant had asked the convening authority to approve a lower sentence cap or change the terms of the pretrial agreement, the trial defense counsel's declaration makes clear these efforts would have been unsuccessful. Lastly, the appellant does not contend he would have insisted on litigating these charges but for his counsel's alleged errors. After examining the appellate filings and the record as a whole, we find that the appellant was not denied effective assistance of counsel.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). In doing so, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (citation omitted); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007) (citations omitted). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant asserts that his sentence to a bad-conduct discharge is inappropriately severe considering he was sexually abused as a child and because the Stipulation of Fact wrongfully implied he possessed more child pornography than he actually did. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Post-Trial Delay

Although not raised by the appellant, we note the appellant's record of trial was forwarded to this Court for appellate review more than 30 days after the convening

authority took action and more than 18 months have elapsed between the time the case was docketed and reviewed by this Court. Because such delays are 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." *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 it 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. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *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).

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[2] The Court notes an administrative error in the record of trial. The court-martial order (CMO) indicates the appellant was sentenced by a military judge; in fact, he was sentenced by officer members. A corrected CMO is ordered.