UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JULIAN LATORRE
United States Air Force

ACM 34670 (f rev)

18 October 2005

Sentence adjudged 16 May 2001 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Timothy W. Murphy, Major Terry L. McElyea, Major Jeffrey A. Vires, Major Mark A. Jones, Major Patricia A. McHugh, Major Sandra K. Whittington, Major James M. Winner, Major Karen L. Hecker, Major Jennifer K. Martwick, Captain David P. Bennett, Captain Kristin M. Castiglia, and David P. Sheldon.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Anthony P. Dattilo, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Kevin P. Stiens, Major Michelle M. McCluer, Captain C. Taylor Smith, Captain Stacey J. Vetter, and Spencer R. Fisher (legal intern).

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

MOODY, Senior Judge:

The appellant was convicted, in accordance with his pleas, of rape of a child under 12 on divers occasions; wrongful appropriation of a digital camera; forcible sodomy of a

child under 12 on divers occasions; traveling in interstate commerce for the purpose of engaging in a sexual act with a person under 18; transporting child pornography in interstate commerce by means of a computer on divers occasions; using an interactive computer service to send obscene pictures in interstate commerce on divers occasions; indecent acts with a child under 16 on divers occasions; and creating and possessing child pornography, in violation of Articles 120, 121, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 921, 925, 934. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged.[1]

The appellant has submitted eleven assignments of error: (1) Whether the appellant was materially prejudiced by the military judge's incorrect determination of the maximum punishment; (2) Whether the appellant's plea of guilty to sending obscene pictures by e-mail is improvident; (3) Whether the appellant's plea to rape is improvident; (4) Whether the appellant's plea to traveling in interstate commerce to engage in sexual conduct with a minor is improvident; (5) Whether there was an unreasonable multiplication of charges; (6) Whether the appellant was subjected to illegal pretrial punishment; (7) Whether the appellant received ineffective assistance of counsel; (8) Whether the appellant's plea to transporting child pornography in interstate commerce is improvident; (9) Whether the appellant is entitled to confinement credit; (10) Whether the appellant's plea to wrongful appropriation is provident; and (11) Whether the appellant's sentence is inappropriately severe. Assignments of error (3) through (11) were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding error as to assignments (2) and (8), we order corrective action.

Providency of Plea of Guilty to Transportation of Obscene Matters

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996). We review the military judge's conclusions of law de novo. *United States v. White*, 48 M.J. 251, 257 (C.A.A.F. 1998).

The appellant pled guilty to Specification 3 of Charge II. This specification alleged a violation of Article 134, UCMJ, by knowingly using "an interactive computer

[1] For the appellate history of this case, see our prior opinions, *United States v. Latorre*, ACM 34670 (A.F. Ct. Crim. App. 21 Dec 2004) (unpub. op.) and *United States v. Latorre*, ACM 34670 (A.F. Ct. Crim. App. 1 Oct 2003) (unpub. op.).

service to send via e-mail one or more lewd or lascivious pictures in interstate commerce, in violation of 18 USC section 1462." This statute makes it illegal to, among other things, transport "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character" in interstate commerce. 18 U.S.C. § 1462(a). The Supreme Court has limited the application of this statute to transmissions that meet the Constitutional definition of obscenity. *United States v. Orito*, 413 U.S. 139 (1973). *See also United States v. B & H Dist. Corp.*, 375 F. Supp. 136 (W.D. Wis. 1974).

The Supreme Court supplied the current definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973), issued the same day as *Orito*. *See also United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 129-30 (1973). Under *Miller*, for a work to be obscene it must satisfy three criteria:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (internal citations omitted). The Court went on to provide examples for the conduct referenced in (b) above as follows:

> (a) [P]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. [and]
>
> (b) [P]atently offensive representation or description of masturbation, excretory functions, and lewd exhibition of the genitals. *Id*. at 25.

In prosecutions under federal obscenity statutes,[2] juries have been instructed to apply *Miller* in evaluating whether the material in question was obscene. *See, e.g.*, *Pinkus v. United States*, 436 U.S. 293 (1978)*; Smith v. United States*, 431 U.S. 291 (1977); *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Ratner*, 502 F.2d 1300 (5th Cir. 1974); *United States v. Easley*, 942 F.2d 405 (6th Cir. 1991); *Modern*

[2] *See, for example*, 18 U.S.C. §§ 1461 and 1462, which forbid mailing obscene matters and transporting obscene matters in interstate commerce respectively. Section 1461 refers to matters which are "obscene, lewd, lascivious, indecent, filthy or vile." Section 1462 refers to matters which are "obscene, lewd, lascivious, or filthy." Although the latter statute differs from the former by excluding the word "vile," both phrases are interpreted to mean obscenity in the sense of *Miller v. California*.

Federal Jury Instruction-Criminal § 2.63 (2001). In the case sub judice, the appellant contends that the military judge did not properly advise him of the meaning of obscenity, rendering his plea of guilty improvident.

During the providence inquiry, after listing the elements of the offense under consideration in this assignment of error, the military judge attempted to define the relevant terms as follows:

> MJ: [Lascivious means] exciting sexual desires or marked by a lust; something that pertains to the prurient interests.
>
> Lewd is characterized by, again, exciting to the lust and then it talks about lascivious. So, that definition of what I gave you about what was lascivious and since this is lewd and lascivious pictures, they must have a sexual nature and sexually explicit conduct.
>
> Again, some of those would be, if it had to do with children, then it would be the focal point of it, whether it had to do with them. And I know we've talked about some of the child stuff, but sexually explicit, that gets into any of those sorts of things that would tend to be towards the lust and the prurient interests and deprave morals. Sort of like the indecent definition too.
>
> But that definition—we kind of went over before with lascivious, even though it particularly talked about children—pertains in terms of what that means.
>
> Again, lewd being sort of obscene or indecent as well—that sort of thing. What would be vulgar to the community moral standards. I know the Supreme Court has said before, I'll know obscene when I see it, but as the judge, I have to define it for you. It is what pertains to the prurient interests and it is depraved in the terms of morals, or tends to excite the lust or signify that form of immorality—that sort of goes with indecent as well—relating to sexual impurity.
>
> So, it's vulgar, obscene, and repugnant to common propriety, tends to excite lust and depraves the morals with respect to the materials and the sexual relations.
>
> Again, lascivious, I went over before. Do you feel comfortable with that definition?
>
> ACC: Yes, your honor.

Further on, the appellant explained the factual basis for his plea of guilty to this specification.

> ACC: Your Honor, between 2 December 1996 and 2 December 2000 at McGuire Air Force Base in my home residence, I sent some adult pictures over the Internet that were lewd to a person I believed to be Lauren. . . .
>
> MJ: When you say lewd, what was in the content of these pictures?
>
> ACC: From what I remember, your Honor, those pictures of adult females in different poses and I believe there was at least one that was in a sexual nature. What I mean by that is that they were having intercourse.
>
> MJ: And that's with a male person who was also unclothed?
>
> ACC: Yes, your Honor.
>
> MJ: Okay. And about how many times, it says on divers occasions, did you do this? . . .
>
> ACC: Your Honor, it was at least five pictures or more. . .
>
> MJ: Okay. You said they were lewd and lascivious. And again, we talked about the sexually explicit conduct and content, but you feel that the definition that I gave you and what we have gone over with before—you feel like these were obscene or lewd and lascivious type pictures that would pander to the prurient interests or the base interests of the people as I talked about—with a sort of indecent, vulgar, obscene, repugnant to common propriety. Now, I know some things that some people might think are fine, but you feel comfortable having gone through all of this that these were lewd and lascivious pictures?
>
> ACC: Yes, your Honor.

It is obvious that the military judge, in advising the appellant of the meaning of the various terms pertinent to this specification, was relying upon memory rather than reading verbatim from a pattern instruction. Indeed, the only written instruction in Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 3-94-1 (15 Sep 2002), concerning obscenity addresses the Article 134, UCMJ, offense of depositing obscene matter in the mail. Subparagraph (d) reads as follows:

> "Obscene" refers to that form of immorality relating to sexual impurity which is not only grossly vulgar and repugnant to common propriety, but

> which tends to excite lust and deprave the morals with respect to sexual relations. The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. The community standards of decency or obscenity are to be judged according to the average person in the military community as a whole, rather than the most prudish or tolerant. In determining whether community standards have been violated you must avoid applying your own personal view of decency or obscenity.

Depositing obscene matters in the mail is charged under clauses 1 and 2 of Article 134, UCMJ. We conclude that the instruction above is insufficient to pass constitutional muster when a federal obscenity statute is incorporated under clause 3 of that Article. Nevertheless, even assuming arguendo that this *Benchbook* definition of obscenity is minimally adequate to instruct an accused as to the meaning of 18 U.S.C. § 1462, we conclude that the instruction actually supplied by the military judge in this case falls short. In addition to its confusing, ad hoc quality, which renders the instruction extremely difficult to comprehend even upon repeated readings, we note that it fails to identify the pertinent community and fails to advise the appellant that the standards of that community are to be evaluated according to its average member.

We acknowledge that in *United States v. Maxwell*, 45 M.J. 406, 426 (C.A.A.F. 1996) our superior court held that a misidentification of the correct community standard[3] was harmless error. "[W]e are satisfied that using an amorphous nationwide standard is more favorable to appellant than a homogeneous Air Force standard would be. A more specific instruction would not have changed the result." *Id.* However, in the case sub judice, the military judge did not identify the community at all, with the real possibility that the appellant would understand it in a narrower sense than the law requires. Concern that the appellant did not really understand the legal meaning of obscenity is reinforced by his perfunctory description of the pictures in question merely as depicting "adult females in different poses." As such, this Court cannot be satisfied that his plea of guilt was based upon a correct understanding of the law. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); *Henderson v. Morgan*, 426 U.S. 637, 641 n.6 (1976) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)) (A guilty plea cannot be truly voluntary unless the appellant possessed an understanding of the law in relation to the facts). We hold that the military judge abused her discretion in accepting the appellant's plea of guilty to this specification. Accordingly, Specification 3 of Charge II is dismissed.

[3] The community standard identified was the nation as a whole rather than the Air Force community.

Providency of the Plea as to Transporting Child Pornography in Interstate Commerce

In Specification 2 of Charge II, the appellant pled guilty to transporting child pornography in interstate commerce by means of e-mail. In charging the appellant, the government alleged a violation of 18 U.S.C. § 2252A, popularly known as the Child Pornography Prevention Act (CPPA). During the *Care*[4] inquiry, the military judge advised the appellant as to the definition of child pornography as contained in 18 U.S.C. § 2256(8). At that time, the statute provided that child pornography included any "visual depiction . . . [that] is or appears to be of a minor engaging in sexually explicit conduct."

However, after trial the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down part of the CPPA. Specifically, the Court held, among other things, that the phrase "appears to be" is unconstitutionally vague and overbroad, in that it would extend to depictions which did not involve actual children in its production.

Subsequently, our superior court issued its opinion in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In that case, the court found a plea of guilty to possessing child pornography to be improvident due to its reliance upon the stricken portions of the CPPA.

In the case sub judice, the military judge, in advising the appellant of the elements of the offense, provided an unconstitutionally overbroad definition of child pornography. We cannot be certain that the appellant's plea of guilty was not based, at least in part, upon the language which *Ashcroft* held to be unconstitutional. We therefore hold that the appellant's plea as to this specification was improvident, for the same reason as in *O'Connor.* Accordingly, Specification 2 of Charge II is dismissed.

Remaining Issues

Concerning the alleged ineffectiveness of trial defense counsel, we have applied the criteria in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) and conclude that we can resolve this issue without additional fact finding. Examining the appellate filings and the record as a whole we hold that the appellant was not denied effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We have examined the remaining assignments of error and resolve them adversely to the appellant. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

[4] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Sentence Reassessment

Having found error, we must now consider whether we can reassess the sentence or whether we must return the case to the convening authority for a sentence rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

In this case we conclude that we can perform sentence reassessment. We conclude that the gravaman of the case, far and away, was the multiple rapes, forcible sodomies, and indecent acts with a child. Although transporting child pornography is a serious matter, we conclude that it is less so than these other offenses, because the harm it inflicts is more remote. We conclude as well that, although we have dismissed the specification regarding transporting obscenity in interstate commerce, the facts underlying that specification are part of the facts and circumstances surrounding the appellant's interstate travel for the purpose of having sexual relations with a minor. Accordingly, we reassess the sentence as follows: a dishonorable discharge, confinement for 39 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Conclusion

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court