UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PATRICK M. LEONARD JR.
United States Air Force

ACM 35740

21 March 2006

Sentence adjudged 30 July 2003 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: R. Scott Howard (sitting alone).

Approved sentence: Dishonorable Discharge, confinement for 45 months, and reduction to E-1.

Appellate Counsel for Appellant: Frank J. Spinner, Esq. (argued), Colonel Carlos L. McDade, Colonel Nikki A. Hall, Major Terry L. McElyea, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Major Michelle M. McCluer (argued), Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

FINCHER, Judge:

We examined the record of trial, the assignments of error, and the government's answer. The appellant argues his plea was improvident, his sentencing flawed, and the staff judge advocate's post-trial recommendation erroneous, all because the military judge miscalculated the maximum authorized punishment for his offense. We disagree and affirm.

Background

At trial, the appellant pled guilty to wrongfully and knowingly receiving visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. In determining the maximum punishment for the offense, the military judge looked to 18 U.S.C. § 2252(a)(2), which prohibits receiving any visual depiction, transported in interstate or foreign commerce, including via computer, of a minor engaging in sexually explicit conduct. During the charged timeframe of the offense, 18 U.S.C. § 2252(a)(2) established a maximum punishment of 15 years imprisonment. The military judge, trial counsel, and trial defense counsel all agreed the appellant could receive up to 15 years of confinement as a result of his guilty plea. The appellant now contends the military judge's reliance on 18 U.S.C. § 2252(a)(2) constitutes error in that he should instead have applied the five year maximum associated with *possession* of such visual depictions under 18 U.S.C. § 2252(a)(4). We heard oral argument on this matter on 26 January 2006.

Analysis

When an offense is not listed in Part IV of the Manual for Courts-Martial, or is not "included in or closely related" to a listed offense, the maximum punishment is determined by referring to the United States Code. *United States v. Kyle*, 32 M.J. 724, 727 (A.F.C.M.R. 1991); Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii). In the appellant's case, he was charged with wrongfully and knowingly receiving visual depictions of minors engaging in sexually explicit conduct under clauses 1 and 2 of Article 134, UCMJ. Because that offense is not, itself, listed in or closely related to an offense listed in the *Manual*, the military judge properly looked to the United States Code to determine a maximum sentence. *Kyle*, 32 M.J. at 727; R.C.M. 1003(c)(1)(B)(ii). Title 18 U.S.C. § 2252(a)(2), specifically prohibits the knowing receipt of any visual depiction of a minor engaging in sexually explicit conduct.[1] During the time frame of the charged offense, 18 U.S.C. § 2252(a)(2) established a maximum punishment of 15-years imprisonment. The military judge applied this maximum sentence to the charge in the case *sua sponte*, and all parties agreed.

The appellant now argues the military judge erred when he relied on 18 U.S.C. § 2252(a)(2) to determine the maximum punishment. Since the specification, as alleged, did not contain language regarding "interstate or foreign commerce," the appellant insists he should not face the 15-year maximum punishment associated therewith. Instead, the appellant argues the military judge should have recognized the inherent similarities between *receiving* and *possessing* the visual depictions at issue and should have looked to

[1] Title 18 U.S.C. § 2252(a)(2) applies specifically to visual depictions which were shipped or transported in interstate or foreign commerce, or which contain materials which were so shipped.

the lesser *possession* offense under 18 U.S.C. § 2252(a)(4), which carried a five year maximum at that time.[2]

We are not persuaded. The act of receiving visual depictions of minors engaging in sexually explicit conduct and the act of possessing such visual depictions are not coterminous. *See United States v. Malik*, 385 F.3d 758, 759 (7th Cir. 2004). Nor is alleging "interstate or foreign commerce" under clauses 1 and 2 of Article 134, UCMJ, a prerequisite to applying the maximum punishment for receiving such visual depictions as provided under 18 U.S.C. § 2252(a)(2). We hold the military judge computed the maximum punishment correctly.

Conclusion

The approved findings and sentence 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[2] We note 18 U.S.C. § 2252(a)(4) also includes the elements of "interstate or foreign commerce."