UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant DANIEL S. MOORE
United States Air Force

ACM 36673

31 May 2007

Sentence adjudged 1 December 2005 by GCM convened at Altus Air Force Base, Oklahoma. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Dismissal, confinement for 3 years, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Vicki A. Belleau, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

This opinion is subject to editorial correction before final release.

JACOBSON, Senior Judge:

The appellant was convicted, in accordance with his pleas, of failing to obey a lawful general regulation by wrongfully displaying, storing and transmitting pornography and sexually explicit images on a government computer system, wrongfully and knowingly possessing and receiving visual depictions of actual minors engaging in sexually explicit conduct, and knowingly possessing and receiving visual depictions of actual minors engaging in sexually explicit conduct in interstate commerce, in violation of Articles 92, 133 and 134, UCMJ, 10 U.S.C. §§ 892, 933, 934. A military judge sitting alone as a general court-martial sentenced the appellant to dismissal from the service, confinement for 3 years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged, but waived $3,039.60 pay per month of the

mandatory forfeitures for 6 months and directed that amount be paid to the appellant's spouse for the benefit of the appellant's dependents.

On appeal, the appellant asserts: (1) the trial counsel's sentencing argument was improper and materially prejudiced his substantial rights; (2) his sentence is inappropriately severe;[1] and, (3) the convening authority's action should be remanded for a new action that is consistent with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). For the reasons set out below, we find no merit in the appellant's first and second assignments of error. We do, however, find merit in the appellant's third assignment of error but hold that the error can be cured by disapproving the adjudged forfeitures.

Background

The appellant was a Deputy Flight Commander assigned to the 97th Communications Squadron at Altus Air Force Base, Oklahoma, prior to coming under suspicion for the crimes that ultimately led to his court-martial. During the providence inquiry the appellant told the military judge he used his government computer to search the internet for pornography. When he found a website or pictures that he wanted to keep, he would save them to his personal USB flash drive and bring them home. He told the military judge that he carried out this activity despite knowing that Air Force Instruction 33-129, *Web Management and Internet Use,* ¶ 2.2.3 (12 August 2004), prohibited using a government computer in this manner. He also informed the military judge he carried out these activities while he was serving as the Acting Flight Commander, a position that provided him with a private office in which to use his government computer. In regard to the child pornography charges, the appellant admitted he received and possessed, on his personal computer, pornographic pictures of actual children whom he believed were minors. Evidence adduced during the pre-sentencing phase of the trial indicated that 74 of the children depicted in the photographs were victims known to law enforcement agencies. One particularly graphic photograph was of a girl known to be between six and seven years of age at the time the photograph was taken.

Further evidence introduced during the pre-sentencing phase of the court-martial showed the appellant's activities were discovered when a network administrator working for the 97th Communications Squadron was conducting a routine monthly check of the base computer network's logs. This check revealed, according to the former network administrator's testimony at trial, that one particular computer user had been visiting "an abundance" of pornography sites, including one with a subject line "of a 13-year-old girl being raped and screaming." Further investigation revealed that the person viewing the pornographic sites appeared to be doing so under the appellant's log-in identity. Although the information obtained through the routine check was not enough to

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

specifically pinpoint the appellant as the guilty party, the appellant later informed his commander that he was, in fact, the individual who had visited the unauthorized sites.

The appellant had been married for almost three years when his illegal activities were discovered. The couple had two daughters, DM, their 20-month-old biological daughter, and RM, the 8-year-old daughter of the appellant's wife by her previous marriage. The appellant adopted RM in May of 2003.

Improper Argument

In asserting that the trial counsel's sentencing argument was improper, the appellant points to only one sentence in an argument that spanned eight pages of the record of trial. That sentence, which was not objected to by defense counsel at trial, referred to a statement made by the appellant in a biography he personally prepared and provided to his wife prior to trial. In the biography, the appellant wrote "I most likely would have committed an offense to [RM] that I could never forgive myself for, and I would be very old before I saw the light of freedom again." During testimony during the pre-sentencing phase, the appellant's wife added that the appellant also told her verbally and via e-mail that he was glad she moved away from him with the children because "he said that he felt if I hadn't, then he might have done something to [RM]."

The appellant later called Dr. William Flynn as an expert witness in the field of "risk assessment and future offending." During cross-examination of Dr. Flynn, the trial counsel asked him about the appellant's statement in the biography, and the following colloquy ensued:

> Q: Now, you said something Doctor that made me scratch my head a little bit; you said that [the appellant] explained to you that in his comment to his wife, that he was afraid that he would do something to [RM] that he would regret for the rest of his life; you're saying it's not necessarily something sexual, or it's not something sexual?
>
> A: I'm saying it's not necessarily something sexual.
>
> Q: So, what are we talking about; are we talking about physically harming her in some way?
>
> A: Yes, Sir.
>
> Q: Killing her?
>
> A: Yes, Sir.

Trial defense counsel did not object to this line of questioning. Later, in his sentencing argument, the trial counsel commented on the matter by saying "[T]he court is left to believe that possibly he [appellant] meant assaulting her, or even perhaps, murder her." Defense counsel did not object to the statement at trial, but the appellant now asserts the statement was improper in that it exceeded permissible comment on the evidence and appealed to the emotions of the military judge by invoking "pure speculation and conjecture."

As appellate defense counsel points out, the standard of review for determining the propriety of counsel's argument is whether the statement is erroneous and materially prejudices the substantial rights of the accused. Article 59(a), UCMJ, 10 U.S.C. § 859(a), *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Absent defense objection at trial, we review for plain error. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). The burden is on the defense to establish plain error. *United States v. Olano*, 507 U.S. 725, 734 (1993).

We find no error here, plain or otherwise. The appellant's own witness, presented to the court as an expert in the field of "risk assessment and future offending," opined that the appellant's words could have been interpreted to mean that he most likely would have physically harmed or even murdered his adopted daughter had the appellant's wife not moved away with the children. The trial counsel's subsequent comment on this testimony, especially viewed in context with the rest of his sentencing argument, was an appropriate and reasonable characterization of the evidence adduced at trial. *See Berger v. United States*, 295 U.S. 78 (1935); *Baer,* 53 M.J. at 238; *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1979). In addition, we note that this was a judge-alone trial presided over by one of the most senior military judges in the Air Force. Military judges are presumed to know the law and to follow it. Absent some indication to the contrary, we presume they consider only matters properly before them. *United States v. Montgomery*, 42 C.M.R. 227 (C.M.A. 1970); *United States v. Branoff*, 34 M.J. 612, 627 (A.F.C.M.R. 1992), *rev'd on other grounds*, 38 M.J. 98 (C.M.A. 1993)). We see no reason to abdicate that presumption in the present case.

Sentence Appropriateness

In his second assignment of error, the appellant asserts that his sentence is inappropriately severe. We reviewed the record of trial, the appellant's argument on this issue, and the government's reply. In determining the appropriateness of a sentence, this Court exercises its "highly discretionary" powers to assure that justice is done and the appellant receives the punishment he deserves. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). Performing this function does not, however, authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give "individualized consideration" to an appellant "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A.

1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After a careful review of the appellant's case, we hold that the appellant's sentence is not inappropriately severe.

Compliance with United States v. Emminizer

In his final assignment of error, the appellant asserts the convening authority's action is erroneous because it does not reflect the convening authority's intent. The appellant believes the convening authority intended to waive the mandatory forfeitures for a six-month period. However, the convening authority did not adhere to the dictates set forth in *Emminizer* and failed to disapprove, modify, or suspend the adjudged forfeitures. *Emminizer,* 56 M.J. at 445. As a result, the appellant argues the action fails to accomplish the convening authority's intentions. He therefore asks this Court to set aside the action and return the case to the convening authority for new post-trial processing.

In response, the government concedes error and agrees that the convening authority should have disapproved, modified, or suspended the adjudged forfeitures before waiving the mandatory forfeitures. Thus, government counsel urges this Court to disapprove the adjudged forfeitures. We agree with the government that this approach will cure the error. In *United States v. Johnson,* 62 M.J. 31 (C.A.A.F. 2005), our superior court corrected a similar error by disapproving the adjudged forfeitures. *Id*. at 38. Like the Court in *Johnson*, we are convinced the convening authority intended to waive the mandatory forfeitures to ensure that money was available to support the appellant's dependents. As a result, we see no need to return the case to the convening authority for corrective action. Therefore, we hereby disapprove the adjudged forfeitures and approve only so much of the sentence as provides for a dismissal and confinement for 3 years.

Conclusion

The approved findings and sentence, as modified by this Court, are correct in law and fact, and no additional 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 (2000). Accordingly, the approved findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator