UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MICHAEL R. MOULTRIE
United States Air Force

ACM 36372

31 May 2007

Sentence adjudged 3 February 2005 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: William A. Kurlander (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 48 months, forfeiture of all pay and allowances, and a reprimand.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Captain Jefferson E. McBride.

Before

BROWN, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification each of wrongful use of marijuana and methamphetamines, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, the appellant was also convicted of one specification of

wrongful receipt, possession, and distribution of child pornography, in violation of 18 U.S.C. § 2252A, assimilated through Article 134, UCMJ, 10 U.S.C. § 934, and one specification of wrongful receipt, possession, and distribution of visual depictions of minors engaged in sexually explicit conduct, also in violation of Article 134, UCMJ. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 48 months, forfeiture of all pay and allowances, and a reprimand.

The appellant raises four allegations of error: 1) the evidence is legally and factually insufficient to support his conviction of the offenses to which he pled not guilty; 2) the two specifications to which he pled not guilty are multiplicious, or, in the alternative, represent an unreasonable multiplication of charges; 3) the military judge improperly considered three stipulations of expected testimony during pre-sentencing;[1] and 4) the court-martial order does not accurately reflect the results of trial.[2] Finding no error as to the first three assignments of error, we affirm, but direct preparation of a new promulgating order.

Legal and Factual Sufficiency

The appellant entered active duty on 29 June 2000. A search of his personal computer system by law enforcement personnel in 2003 found over ten thousand visual depictions of children engaged in sexually explicit conduct or in sexually suggestive poses, of which over one thousand were identified as pictures of actual children. At trial and on appeal, the appellant readily admitted to possessing the illegal material, but asserted the government failed to prove he received and distributed it after he entered active duty. The appellant contends any receipt and distribution offenses occurred prior to his entry on active duty and that the court-martial therefore lacked jurisdiction to try him for those offenses.

We review the appellant's claim of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] The government concedes the court-martial order is incorrect and urges the Court to direct preparation of a new order to correct the deficiency.

ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Both standards are met here.

A Federal Bureau of Investigation (FBI) agent who was an expert in computer forensics testified he examined the appellant's computer after it was seized by law enforcement personnel in September 2003. His examination found that multiple images of children engaged in sexually explicit conduct had been transferred via the Internet to and from the appellant's computer on dates well after the appellant's entry on active duty. Through comparison with national law enforcement databases, the agent determined that many of the images were of actual children. In addition, an Air Force Office of Special Investigations (AFOSI) agent who interviewed the appellant after his apprehension in September 2003 testified the appellant admitted to receiving and distributing child pornography "from 1998 to the present". Alternative theories postulated by the appellant at trial to explain the Internet transfers of the illicit images to and from his personal computer after his entry on active duty were unconvincing, as was his attempt to discredit the AFOSI agent's testimony as to the nature of his confession.

The testimony of the FBI and AFOSI agents, taken together with the other evidence of record, and considered in the light most favorable to the prosecution, is sufficient for a reasonable trier of fact to find beyond a reasonable doubt all essential elements of the offenses to which the appellant pled not guilty. Further, we ourselves are convinced beyond a reasonable doubt the appellant is guilty of such offenses. Mindful that we did not personally observe the witnesses, we find the testimony of both agents credible and convincing.

Multiplicity / Unreasonable Multiplication of Charges

The appellant was charged with one specification of possessing, receiving and distributing pornographic pictures of *actual* minors, in violation of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A, made applicable under clause 3 of Article 134, UCMJ. A second specification charged him with possessing, receiving and distributing *visual depictions* of minors engaged in sexually explicit conduct, in violation of the proscriptions imposed by clauses 1 and 2 of Article 134, UCMJ, regarding conduct that is prejudicial to good order and discipline or service discrediting. The military judge, at the request of the trial defense counsel, considered the two offenses as one for sentencing purposes.[3] Although he did not raise the issue at trial, the appellant

[3] The appellee argues in part that because the military judge considered the two specifications multiplicious for sentencing purposes, the appellant cannot in any event have been prejudiced. We disagree. Being convicted of an additional offense that, if multiplicious, would otherwise have been dismissed, can itself constitute prejudice. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006).

now asserts the two specifications should also be deemed multiplicious for findings or an unreasonable multiplication of charges. Neither assertion has merit.

Absent plain error, an appellant's failure to raise multiplicity of two specifications for findings at trial constitutes waiver and precludes consideration on appeal. *United States v. Spears*, 39 M.J. 823, 823-24 (A.F.C.M.R. 1994). We find no error here at all, let alone plain error. Indeed, the military judge's decision to treat the two offenses as even multiplicious for sentencing was generous.

We determine whether offenses are multiplicious by comparing their essential elements, looking to both the underlying statutes and the specifications of each offense. *United States v. Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006); *United States v. Weymouth*, 43 M.J. 329, 333 (C.A.A.F. 1995); *United States v. Teters*, 37 M.J. 370, 376-77 (C.M.A. 1993). Here, the elements are different. The specification alleging a violation of the CPPA required proof that the images in question were of actual children and were transported in interstate or foreign commerce, but did not require proof that their possession was prejudicial to good order and discipline or was service discrediting. *United States v. O'Connor*, 58 M.J. 450, 452-53 (C.A.A.F. 2003). The other specification required proof that the appellant's actions were prejudicial or service discrediting, but not that they were pictures of actual children or the nature of their transportation. *See United States v. Cendejas*, 62 M.J. 334, 338 (C.A.A.F. 2006).

The two specifications also do not cover the same underlying factual misconduct. Interchanges between the parties throughout the trial make it clear that everyone, including the appellant, understood the CPPA specification only covered images of actual children, based on matches to known images maintained in national law enforcement databases. The other specification covered visual depictions of minors who could not be identified as real children. The witnesses were examined and cross-examined accordingly and provided evidence that both categories of images were found on the appellant's computer system and had been transferred to and from that system over the Internet. Based on all of the above, we conclude the two specifications were not multiplicious.

The challenged specifications also did not constitute an unreasonable multiplication of charges. Although the government could have separately charged each individual image, it did not. Rather, the thousands of illicit images found on the appellant's computer system were simply lumped together under two broad specifications, thereby greatly reducing the appellant's potential criminal liability. That charging decision does not reflect government overreaching, but was a fair and reasonable exercise of prosecutorial discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). *See also United States v. Quiroz*, 55 M.J. 334, 337-38 (C.A.A.F. 2001).

Sentencing Evidence

As part of its case-in-chief, the government introduced three stipulations of expected testimony with respect to criminal investigators who matched some of the images found on the appellant's computer with images of known children. The stipulations identified the specific images concerned, provided information on how the pictures had been made, and provided information on how the images affected the children depicted. During pre-sentencing, the trial defense counsel objected to the military judge considering certain portions of those stipulations. The military judge completely sustained the defense objection with respect to one of the stipulations and largely sustained the defense objections with respect to the others. The appellant now contends the judge erred and should not have considered the information in the stipulations of expected testimony.

We review the military judge's ruling on the admissibility of evidence for abuse of discretion. Where, as here, the judge did not articulate his Mil. R. Evid. 403 balancing analysis on the record, we accord his decision less deference. *United States v. Anderson*, 60 M.J. 548, 555 (A.F. Ct. Crim. App. 2004)

Having applied this standard to the record at hand, we find no error. Rule for Courts-Martial (R.C.M.) 1001(b)(4) allows for the admission of evidence "as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty", including victim impact. *Anderson*, 60 M.J. at 556. Children depicted in child pornography qualify as victims within the meaning of this rule. *Id.* at 557.

The military judge, in ruling on the defense objections to portions of the stipulations of expected testimony, properly limited himself to consideration of only that relevant information admissible under R.C.M. 1001(b)(4). Considering the very limited nature of the information admitted by the military judge and the limited purposes, articulated on the record, for which he considered it, we find no abuse of discretion.

Erroneous Court-Martial Order

By exceptions and substitutions, the military judge found the appellant guilty of the offenses charged under Charge I, Specification 1, but over a significantly shorter period than that alleged. The court-martial promulgating order does not accurately reflect that finding. We direct a new court-martial promulgating order be prepared correctly reflecting both the appellant's pleas and the findings.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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