UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL T. NERAD
United States Air Force

ACM 36994 (rem)

09 March 2011

Sentence adjudged 7 February 2007 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Darrin K. Johns, Major Lance J. Wood, Major Reggie D. Yager, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

OPINION OF THE COURT

UPON REMAND

ORR, Senior Judge:

Consistent with his pleas, the appellant was convicted by a military judge, sitting as a general court-martial, of one specification each of failure to obey a lawful order, wrongful disposition of military property, larceny of military property, sodomy,

possession of child pornography, and adultery, in violation of Articles 92, 108, 121, 125, and 134, UCMJ, 10 U.S.C. §§ 892, 908, 921, 925, 934. The adjudged and approved sentence consists of a dishonorable discharge, 12 months of confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

This case is before this Court on remand. In a published decision, issued 29 May 2009, this Court set aside and dismissed the finding of guilty as to Specification 1 of Charge VI, regarding wrongful possession of child pornography, and approved the remaining findings and sentence as adjudged. *United States v. Nerad*, 67 M.J. 748, 749 (A.F. Ct. Crim. App. 2009), *rev'd*, 69 M.J. 138 (C.A.A.F.), *cert. denied*, 131 S. Ct. 669 (2010). The Judge Advocate General of the Air Force certified the case to our superior court asserting that this Court erred by nullifying the appellant's conviction for possession of child pornography. By decision issued 27 July 2010, the Court of Appeals for the Armed Forces (CAAF) found that we failed to disclose the legal basis for our decision to set aside the finding of guilty as to the child pornography offense. *Nerad*, 69 M.J. at 138. As a result, our superior court set aside our decision and returned the case to The Judge Advocate General of the Air Force for remand to this Court "for a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c)." *Id.* at 148. The record was thereafter returned to this Court on 19 August 2010. Upon further review and finding no material prejudice to the appellant, we affirm the findings and the sentence.

Background

In his original assignment of errors, the appellant asserted that he was subjected to cruel and unusual post-trial punishment, in violation of the Eighth Amendment, U.S. CONST. amend. VIII, and Article 55, UCMJ, 10 U.S.C. § 855.[1] We disagreed. Although not raised by the appellant on appeal,[2] this Court also specified the issue of whether the Court, exercising its mandate under Article 66(c), UCMJ, in relation to the appellant's conviction for possession of child pornography, has the power to set aside a finding of guilty that is otherwise determined to be correct in law and fact, in the interest of justice. After reviewing the submission of briefs from both sides, we set aside and dismissed the appellant's conviction for possession of child pornography.

Rationale for the Original Decision

The child pornography offenses arose out of the appellant's love affair with a 17-year-old girl. During the course of that relationship, the appellant's paramour sent him, via the Internet, several nude or partially nude pictures of herself, including a video clip in which she is naked. The appellant, with his girlfriend's knowledge and consent, also

[1] The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Although the appellant did not raise this issue on appeal, his post-trial submissions to the convening authority asked that the convening authority not approve the finding of guilty to possession of child pornography, for reasons similar to those enunciated in this opinion.

took some nude pictures of her, including some depicting the couple engaged in a sex act. Because the appellant's girlfriend was 17 at the time the pictures were taken, the appellant's possession of the images was in violation of federal prohibitions on child pornography, as articulated in 18 U.S.C. § 2256(1), where a "minor" is defined as anyone under the age of 18. Thus, the appellant was in the unique position of having a relationship with someone he could legally see naked and, but for his existing marriage, legally have sexual intercourse with, but could not legally possess nude pictures of her, several of which she took and sent to him. After considering the entire record, we concluded that the appellant's possession of the photos under these circumstances is not the sort of conduct which warrants criminal prosecution for possessing child pornography and that this conviction, while technically accurate, unreasonably exaggerated the criminality of his conduct. Our major concern in this case was the fact that this appellant's conviction for possession of child pornography would require him to register as a sex offender and the significant consequences of such a registration. We believed that the plain language of Article 66(c), UCMJ, permitted this Court to overturn a finding or sentence, even if it is correct in law and fact, if we find that it should *not* be approved. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Additionally, the legislative history of Article 66, UCMJ, appeared to support this Court's broad authority to overturn a finding or sentence, even in the absence of legal or factual error. *Nerad*, 67 M.J. at 751-52. Based on the unique facts of this case, and relying on the broad mandate provided this Court by Congress under Article 66(c), UCMJ, we set aside and dismissed the finding of guilty to Specification 1 of Charge VI, regarding wrongful possession of child pornography.

Limits on Article 66(c), UCMJ, Authority

In its decision returning the case to this Court, our superior court confirmed our belief that this Court has the authority to set aside a legally and factually sufficient finding of guilty. *Nerad*, 69 M.J. at 142-146. "[A Court of Criminal Appeals] has discretion under Article 66(c), UCMJ, to fashion an appropriate remedy for excessive post-trial delay with respect to findings or sentences that are legally and factually correct." *Id.* at 142 (interpreting *Tardif*, 57 M.J. at 224). Moreover, this Court may "dismiss a finding because an accused's criminality was unreasonably exaggerated by the same acts being charged multiple ways." *Nerad*, 69 M.J. at 146 (citing *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001)).

However, the CAAF stated that, while this authority is broad, it is not unfettered and provided guidance as to when a Court of Criminal Appeals (CCA) may do so:

> We hold that while CCAs have broad authority under Article 66(c), UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review. *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F.

> 2001). Relatedly, while Article 66(c), UCMJ, affords a CCA broad powers, when faced with a constitutional statute a CCA "cannot, for example, override Congress' policy decision, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497[ ] (2001).

Nerad, 69 M.J. at 140.

> Having set aside the finding of guilty to the possession of child pornography offense, our superior court asked us to explain whether we exercised our authority within the context of legal standards. As previously noted, we found that under the unique circumstances of this case, the charge of possession of child pornography to which the appellant pled and was found guilty, though technically accurate, unreasonably exaggerated the criminality of the appellant's actions because a conviction for child pornography would require that the appellant register as a sex offender. *Nerad*, 67 M.J. at 752.
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> Even though we have the authority to disapprove part of the findings, we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *see also United States v. Prince*, 36 C.M.R. 470, 471-72 (C.M.A. 1966). Congress left the power to exercise equity and clemency with convening authorities as a matter of command prerogative. *See* Article 60(c), UCMJ, 10 U.S.C. § 860(c). Convening authorities have a great deal of discretion when acting on an adjudged sentence and "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." Rule for Courts-Martial 1107(d)(1). In disapproving the findings as to Specification 1 of Charge VI, we concluded that this was not the sort of criminal conduct which warranted criminal prosecution, even though the conduct fell squarely within the definition of child pornography found in 18 U.S.C. § 2256(1). When viewed in the context of our superior court's remand, our rationale for setting aside the child pornography specification was a de facto exercise of clemency and more closely aligned with equitable standards than any legal basis. *Nerad*, 69 M.J. at 140. Therefore, based upon the CAAF's guidance, we exceeded our authority when we set aside the child pornography specification because we were, in essence, overriding Congress' policy decision as articulated in 18 U.S.C. § 2256(1).

Other Issues

Upon receipt of the CAAF order to this Court for further review under Article 66(c), UCMJ, the appellant raised two additional issues for our consideration. First, that this Court should set aside the finding of guilty to Specification 1 of Charge VI because it unreasonably exaggerates the appellant's criminality. Second, the appellant asks whether

the Court of Appeals for the Armed Forces has jurisdiction to act with respect to Specification 1 of Charge VI, which this Court neither affirmed nor set aside as incorrect in law. We will address these issues in turn.

The appellant contends that we may and should disapprove these findings even if they are correct because his criminality was unreasonably exaggerated. Normally, the term of the appellant's pretrial agreement waiving all waivable motions would constitute waiver of an unreasonable multiplication challenge on appeal. *United States v Gladue*, 65 M.J. 903, 905 (A.F. Ct Crim. App. 2008), *aff'd*, 67 M.J. 311 (C.A.A.F. 2009). However, we now consider this challenge because we raised the issue sua sponte in our original opinion by determining that the child pornography offense unreasonably exaggerated the criminality of his conduct. *Nerad*, 67 M.J. at 749. As noted earlier, this Court has the authority to set aside a legally and factually sufficient finding of guilty. We may do so on multiplicity grounds if we find that the appellant was charged with the same acts multiple ways. The appellant cites the following passage from *Quiroz* as precedent for his position:

> [E]ven if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences on an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.

55 M.J. at 338.

In our original decision, we determined that the appellant's conviction for child pornography unreasonably exaggerated the criminality of his conduct. However, this determination was based upon the collateral consequences of his conviction and not the actual conviction or the appellant's adjudged sentence. Our major concern was that the appellant would have to register as a sex offender and the significant consequences of such a registration. Therefore, our determination was primarily based upon equitable standards rather than the traditional legal standard of reasonableness. *See Nerad*, 69 M.J. at 138. After reviewing the facts and circumstances of this case in the proper context, we find no unreasonable multiplication of charges. Accordingly, we find no basis for relief under this asserted error.

Secondly, the appellant asks this Court to determine whether the Court of Appeals for the Armed Forces has statutory jurisdiction to set aside our original decision, dismissing Specification 1 of Charge VI, because this Court neither affirmed that finding of guilty nor set it aside as incorrect in law. *See* Article 67(c), UCMJ, 10 U.S.C. § 867(c). Although we are convinced that it does, we need not decide this issue because our superior court has already exercised jurisdiction in this case and the United States

Supreme Court has denied the appellant's writ of certiorari contesting the CAAF's jurisdiction to dismiss Specification 1 of Charge VI. *Nerad*, 131 S. Ct. at 669.

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

STEVEN LUCAS
Clerk of the Court