UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BARRY V. O'CONNOR
United States Air Force

ACM 33671 (f rev)

29 October 2003

Sentence adjudged 5 March 1999 by GCM convened at Hurlburt Field, Florida. Military Judge: Bruce T. Brown (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, Major Kyle R. Jacobson, and Captain Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

BRESLIN, Senior Judge:

The appellant was charged with a variety of serious sexual crimes, including numerous offenses against a minor child extending over several years. He was found guilty, in accordance with his pleas, of two specifications of forcible sodomy upon a child on divers occasions, in violation of Article 125, UCMJ, 10 U.S.C. § 925. He was also found guilty, in accordance with his pleas, of two specifications of indecent acts upon a child through several deviant forms of physical contact, one specification of indecent liberties with a child by showing her adult pornography on divers occasions, one

specification of indecent liberties with a child by showing her child pornography on divers occasions, one specification of obstructing justice by asking his step-son to hide, remove, or dispose of child pornography sought by investigators, one specification of receiving or distributing child pornography that had been transported in interstate commerce, contrary to 18 U.S.C. § 2252A(a)(2)(A), and one specification of possessing three or more images of child pornography that had been transported in interstate commerce, contrary to 18 U.S.C. 2252A(a)(5)(B), in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting alone as a general court-martial sentenced the appellant to a dishonorable discharge, confinement for 16 years, and reduction to E-1. Pursuant to the terms of a pretrial agreement, the convening authority approved only so much of the sentence as included a dishonorable discharge, confinement for 12 years, and reduction to E-1.

This Court reviewed the appellant's case under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The appellant raised three allegations of error, but this Court found each to be without merit and affirmed the findings and sentence. *United States v. O'Connor*, ACM 33671 (A.F. Ct. Crim. App. 25 Jan 2001) (unpub. op.). The appellant petitioned the Court of Appeals for the Armed Forces for grant of review under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). The appellant asserted the same three issues previously considered and three new issues, including whether the federal statute criminalizing the receipt, distribution, and possession of child pornography was unconstitutional. Our superior court granted review on the sole issue of the constitutionality of the child pornography statute, and summarily affirmed the findings and sentence. *United States v. O'Connor*, 56 M.J. 141 (C.A.A.F. 2001) (mem.). The appellant then petitioned the Supreme Court for a writ of certiorari on that issue. In April 2002, the Supreme Court decided *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), holding that portions of the federal statute prohibiting child pornography were unconstitutionally overbroad. Thereafter, the Supreme Court remanded the appellant's case to the Court of Appeals for the Armed Forces for further review consistent with the decision in *Free Speech Coalition*. *O'Connor v. United States*, 535 U.S. 1014 (2002). The Court of Appeals for the Armed Forces determined that the appellant's pleas of guilty to receiving and possessing child pornography under 18 U.S.C. 2252A(a) were improvident. *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). The Court remanded the case, directing that this Court either dismiss the affected specifications and reassess the sentence, or order a rehearing. *Id.* at 455.

Our superior court has determined that this Court may reassess sentences to correct error in certain circumstances. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), the Court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 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. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id*. at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id*.

Under the unique circumstances of this case, we find that we can reassess the sentence in accordance with the established criteria.

We note the maximum possible punishment for the offenses now before this Court is exactly the same as it was before the military judge who sentenced the appellant: a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, a fine, and reduction to E-1. More significantly, the evidence that the appellant possessed the child pornography in question was admissible during the sentencing proceedings, even if the appellant had not been charged with the challenged specifications. Rule for Courts-Martial (R.C.M.) 1001(b)(4); *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990). We note that the appellant pled guilty to taking indecent liberties with the victim by showing her child pornography on divers occasions between May 1996 and December 1997. Moreover, the basis of the charge of obstruction of justice, to which the appellant also pled guilty, was that the appellant asked his step-son to hide, remove, or dispose of the images of child pornography on his computer equipment. Thus, even if the challenged specifications had not been included at trial, the evidence that the appellant possessed the child pornography in question would have been considered by the military judge as part of all the facts and circumstances relevant in sentencing. While the challenged specifications do require the additional evidence that the images traveled in interstate commerce, we are certain that additional information would not have had a substantial influence on the appellant's sentence.

Finally, we note the remaining offenses were especially egregious. We consider the extensive nature of the indecent acts and liberties committed upon the victim, the duration of the offenses, the tender age of the victim, the appellant's breach of a position of special trust, and the adverse effect upon the child and the appellant's family. The challenged specifications pale in comparison to the heinous crimes revealed at trial. Indeed, the appellant did far worse than simply receive or possess the child pornography in question–he repeatedly used it as a part of his depraved course of conduct.

The military judge originally sentenced the appellant to a dishonorable discharge, confinement for 16 years, and reduction to E-1. Even without the error as found by our superior court, the military judge would have sentenced the appellant based upon the

same maximum punishment and almost identical facts. We find the military judge would have imposed the same sentence even absent the error. Of course, pursuant to the terms of the pretrial agreement, the sentence finally approved was a dishonorable discharge, confinement for 12 years, and reduction to E-1. We are convinced beyond a reasonable doubt that, absent the error, the appellant's sentence would not have been less than the sentence originally approved.

In accordance with the decision of our superior court, Specifications 2 and 3 of Additional Charge II are dismissed. The findings, as amended, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the appellant's substantial rights 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, as amended, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court