UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CASEY D. RODERICK
United States Air Force

ACM 34977

29 October 2004

Sentence adjudged 26 September 2001 by GCM convened at Andersen Air Force Base, Guam. Military Judge: David F. Brash (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 7 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Kyle R. Jacobson, and David P. Sheldon.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major James K. Floyd.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of photographing a minor engaging in sexually explicit conduct, receiving child pornography that had traveled in interstate commerce, possessing child pornography, and committing indecent acts upon a minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was convicted, contrary to his pleas, of two specifications of photographing minors engaging in sexually explicit conduct and three specifications of indecent liberties with minors by photographing their genitals and pubic area, in violation of Article 134, UCMJ. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant

to a dishonorable discharge, confinement for 7 years, and reduction to E-1. The convening authority approved the sentence adjudged.

The appellant has submitted four assignments of error: (1) The guilty plea to receiving child pornography is improvident; (2) The evidence is legally and factually insufficient to sustain the conviction for indecent liberties; (3) The indecent liberties specifications are multiplicious with those that allege photographing the minors; and (4) The sentence is inappropriately severe. Finding error, we order corrective action.

Background

The facts underlying this case came to light following a counseling session between SKA, a minor female, and a clinical psychologist. The psychologist reported that SKA had been a victim of child sexual abuse. Subsequent investigation by the Air Force Office of Special Investigations (AFOSI) revealed that the appellant had photographed SKA in the nude and had touched her genitals with his hand. The investigation uncovered numerous items of child pornography on the appellant's home computer. These items included photographs, as well as three stories which described in graphic detail sexual relations between fathers and their daughters. In addition, investigators discovered photographic negatives and an undeveloped roll of film, which contained, among other things, photographs of the appellant's two prepubescent daughters, CMR and LNR, in the nude.

Providence of the Guilty Plea

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 369 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

In charging the appellant with receiving and possessing child pornography, the government alleged a violation of 18 U.S.C. § 2252A, popularly known as the Child Pornography Prevention Act (CPPA). During the *Care*[1] inquiry, the military judge advised the appellant as to the definition of child pornography as contained in 18 U.S.C. § 2256(8). At that time, the statute provided that child pornography included any "visual depiction . . . [that] is or appears to be of a minor engaging in sexually explicit conduct."

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

However, after trial, the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down part of the CPPA. Specifically, the Court held, among other things, that the phrase "appears to be" is unconstitutionally vague and overbroad, in that it would extend to depictions which did not involve actual children in its production.

Subsequently, our superior court issued its opinion in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In that case, the court found a plea of guilty to possessing child pornography to be improvident due to its reliance upon the stricken portions of the CPPA. However, even when a finding of guilty is contrary to *Ashcroft*, it may still be legally permissible to affirm a lesser included offense. In *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004), the Court held that, because the military judge affirmatively discussed the service discrediting aspect of the accused's conduct in the providence inquiry, it was legally permissible to affirm a conviction under clauses 1 and 2 of Article 134, UCMJ.

In the case sub judice, we conclude that the military judge provided an unconstitutionally overbroad definition of child pornography, both as to the specification alleging receipt of such material as well as the one concerning possession. However, he also advised the appellant that, under Article 134, UCMJ, the offense must be prejudicial to good order and discipline or service discrediting. During the providence inquiry as to both specifications, the appellant affirmed that the receipt and possession of child pornography would lessen public esteem for the Air Force. In addition, as regards to both specifications, he stated to the military judge that "as a military member I am held to a higher standard, and I failed to live up to that standard, sir." This statement buttresses the service discrediting aspect of the appellant's conduct and contributes to the factual basis for that element of both offenses. Therefore, consistent with *Mason*, we conclude that we can correct the error by finding the appellant guilty as to the lesser included offense of conduct which is of a nature to bring discredit upon the armed forces. We will make the appropriate exceptions and substitutions in our decretal paragraph.

Having found error, we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior 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.

In this case, we are satisfied that we can reassess sentence. In finding the appellant guilty of the lesser included offense we are not required to discount any of the photographs that the military judge considered in evaluating these specifications in his sentencing deliberations. Furthermore, while child pornography is a serious matter, we find that the gravaman of this case was the abusive conduct of the appellant toward SKA, CMR, and LNR. We conclude, therefore, that even if the military judge had found the appellant guilty of the lesser included offense of a violation of clause 2 of Article 134, UCMJ, he would have imposed a sentence no less than the one actually adjudged.

Factual and Legal Sufficiency

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The appellant was charged with violating 18 U.S.C. § 2251(a) and with engaging in indecent acts by photographing his daughters. The photographs in question were taken from an undeveloped roll of film and from photographic negatives. Although the military judge admitted numerous such photographs, after announcing findings, he identified 15 which formed the basis of the conviction. These special findings were in response to a request by the defense. In evaluating this assignment of error, we will consider only these 15 photographs.

The photographs depict CMR and LNR in varying states of undress, and engaging in mundane activities around the home such as using the toilet, sitting on furniture, sleeping, etc. These pictures were interspersed on the negatives and film with images of other family activity, none of which involved nudity. The appellant alleges that the photographs of CMR and LNR do not depict sexually explicit conduct and, therefore, are outside the ambit of 18 U.S.C. § 2251(a). He also alleges that the taking of the photographs does not constitute an indecent liberty.

On a preliminary matter, the appellant asserts that the government failed to prove he took the pictures in question. After considering the record as a whole, we note that the pictures extend over a period of time which encompassed more than one duty assignment. They show intimate domestic activity most likely to have been photographed by a member of the household. The appellant's wife testified under oath that she did not take the pictures. SKA testified on findings that, as the appellant was photographing her, he

told her that he took similar pictures of CMR. All in all, we are satisfied that the evidence rules out any reasonable hypothesis but that the appellant took the photographs.

18 U.S.C. § 2251(a)

18 U.S.C. § 2251(a) provides that "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" shall be punished. 18 U.S.C. § 2256(2) defines "sexually explicit conduct" as:

> actual or simulated--
>
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) bestiality;
> (iii) masturbation;
> (iv) sadistic or masochistic abuse; or
> (v) lascivious exhibition of the genitals or pubic area of any person.

The statute itself does not define the word lascivious. The accepted standard for determining whether a visual depiction of a minor constitutes a "lascivious exhibition" of the genitals or pubic area is set forth in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The *Dost* factors are as follows:

> 1. whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2. whether the setting of the visual depiction is sexually suggestive, i. e., in a place or pose generally associated with sexual activity;
>
> 3. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4. whether the child is fully or partially clothed or nude;
>
> 5. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
>
> 6. whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832; *see also United States v. Pullen*, 41 M.J. 886, 889 (A.F. Ct. Crim. App. 1995). "The picture of a child 'engaged in sexually explicit conduct' within the meaning of 18 U.S.C. §§ 2251 and 2251 . . . is a picture of a child's sex organs displayed lasciviously – that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." *Wiegand*, 812 F.2d at 1244. *See also United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994); *United States v. Mr. A*, 756 F. Supp. 326, 329 (E.D. Mich. 1991). "Where children are photographed, the sexuality of the depictions often is imposed upon them by the attitude of the viewer or photographer. The motive of the photographer in taking the pictures therefore may be a factor which informs the meaning of 'lascivious.'" *United States v. Arvin*, 900 F.2d 1385, 1390 (9th Cir. 1990), o*verruled, in part, on other grounds, United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

In the case sub judice, we find that the pictures involve total or partial nudity; that the genitals or pubic areas of the children are visible; and that more than one involve an unnatural pose for a child—for example, lying supine and totally naked. In addition, we note that the military judge admitted the three incest stories referenced above, which describe sexual encounters between fathers and daughters. We have considered these stories as evidence of the appellant's motive and intent in accordance with Mil. R. Evid. 404(b). Therefore, we find that the appellant intended the photographs to elicit a sexual response in the viewer. Considering the record as a whole, we conclude that the photographs are lascivious within the meaning of 18 U.S.C. §§ 2251, 2256.

Indecent Acts with a Child

The offense of indecent acts with a child, in violation of Article 134, UCMJ, is defined as follows:

> a. That the accused committed a certain act;
> b. That the act amounted to the taking of indecent liberties with a certain person;
> c. That the accused committed the act in the presence of this person;
> d. That this person was under 16 years of age and not the spouse of the accused;
> e. That the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
> f. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 87 (b)(2) (2000 ed.).

For reasons set forth above, we conclude that the sexually explicit photographs in question are indecent within the meaning of Article 134, UCMJ. *See MCM*, Part IV, ¶ 89(c); *United States v. Whitcomb*, 34 M.J. 984 (A.C.M.R. 1992). Considering the record as a whole, and taking into account the nature of the pictures and the Mil. R. Evid. 404(b) evidence, we find that the appellant photographed his daughters in order to arouse, appeal to, or gratify his lust, passion, or sexual desires. Therefore, we conclude that in doing so he committed indecent acts within the meaning of Article 134, UCMJ.

We hold that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the appellant is guilty of the offenses and that the specifications are, therefore, legally sufficient. Furthermore, weighing all the evidence admitted at trial and mindful of the fact that we have not heard the witnesses, this Court is convinced beyond a reasonable doubt that the appellant is guilty of the offenses.

Other Issues

We resolve the remaining issues adversely to the appellant. We find no reason to disturb the military judge's conclusion that the specifications alleging violations of 18 U.S.C. 2251(a) were not multiplicious with those alleging indecent liberties for the same course of action. These specifications require the proof of different elements; therefore, they did not violate the Double Jeopardy Clause of the United States Constitution. *See United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). The military judge did consider these specifications to constitute one offense each per victim for purposes of sentencing. In doing so, he did not abuse his discretion. *See United States v. Aaron*, 54 M.J. 538 (A.F. Ct. Crim. App. 2000). He concluded that he did not have the authority to dismiss one or more of the specifications under a theory of unreasonable multiplication of charges. Even if erroneous, in light of the above, we hold that there was no material prejudice to the substantial rights of the appellant. As to the remaining assignment of error, the sentence adjudged and approved is not inappropriately severe. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

Conclusion

The finding of guilty as to Specification 4 of the Charge is modified by excepting the words "in violation of Title 18, United States Code, Section 2252A(a)(2)(A)," substituting therefore the words "which conduct was of a nature to bring discredit upon the armed forces." The finding of guilty as to Specification 5 of the Charge is modified by excepting the words "in violation of Title 18, United States Code, Section 2252A(a)(5)(A)," substituting therefore the words "which conduct was of a nature to bring discredit upon the armed forces."

The findings, as modified, and the sentence, as reassessed, 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); *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

PRATT, Chief Judge (concurring in part and dissenting in part):

Although I concur with the majority as to the Charge and the remaining specifications, I must respectfully dissent from the majority's affirmation of the appellant's conviction of Specifications 1, 2, 8 and 9. The conviction for these latter offenses is grounded on a determination that certain photographs taken by the appellant of his minor children depicted "sexually explicit conduct." In the context of these offenses, that is defined as "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E). Applying the factors delineated in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), the 15 pictures identified by the trial judge as supporting these offenses do not, in my opinion, constitute "lascivious exhibition of the genitals or pubic area." Accordingly, I would set aside the appellant's conviction for Specifications 1, 2, 8 and 9, affirm the remaining specifications, and reassess the sentence.

OFFICIAL

ANGELA M. BRICE
Clerk of Court