UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Master Sergeant MICHAEL L. ROOSA
United States Air Force

ACM 37151

17 March 2009

Sentence adjudged 30 August 2007 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-4.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Lance J. Wood.

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

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of engaging in conduct prejudicial to good order and discipline and service discrediting,[1] one specification of knowingly possessing child pornography on divers occasions in violation of 18 U.S.C. § 2252A(a)(5), and one specification of knowingly receiving child pornography on divers occasions transported in interstate or foreign commerce, by computer, in violation of 18 U.S.C. § 2252A(a)(2),

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[1]The military judge found the appellant guilty of this specification by exceptions and substitutions.

in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a bad-conduct discharge, twenty months confinement, and reduction to E-4.

On appeal the appellant asks the Court to set aside the findings and the sentence. The basis for his request is: (1) the evidence is legally and factually insufficient to support a finding of guilty on Specification 1 of the Charge and (2) his detainment at work led to an unlawful search of his computer. Finding no prejudicial error, we affirm.

Background

On 3 May 2006, DR, the appellant's wife, told a friend that she saw child pornography on the appellant's computer and was upset that the appellant was viewing child pornography. DR's friend told her husband who, in turn, reported the incident to his first sergeant who then reported the incident to agents with the Air Force Office of Special Investigations (AFOSI). On 5 May 2006, AFOSI agents interviewed DR at her home and asked her consent to search and seize the computers in her home. The appellant was not at home at the time the AFOSI agents interviewed DR and asked for her consent to search and seize the computers.

DR consented and the AFOSI agents seized two computers, some floppy disks, a camera, and some storage media devices. A later analysis of the computers revealed several thousand child pornography images, several child pornography videos, and a video of the appellant masturbating in his squadron's bathroom stall to a picture of then-First Lieutenant (1st Lt) CB, a female officer who worked in his squadron. At trial, the appellant unsuccessfully moved to suppress the evidence seized from his computers.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential

elements of Specification 1 of the Charge. We note the following evidence legally supports the appellant's conviction: (1) the appellant entered into a confessional stipulation of fact wherein he admitted that AFOSI agents seized, from one of his home computers, a video of him masturbating in his squadron's bathroom stall to a photograph of 1st Lt CB; (2) DR gave the AFOSI agents valid consent to search and seize the computers located in the residence she shared with the appellant; (3) in the video, the appellant can clearly be seen in his battle dress uniform in a bathroom stall masturbating to 1st Lt CB's photograph and ejaculating onto the photograph;[2] (4) 1st Lt CB worked daily with the appellant, was shocked and saddened by the appellant's actions, and, as a result thereof, has difficulty trusting people; and (5) the appellant's actions, as depicted on the video, are such that would tend to bring the United States military into disrepute or lower it in public esteem.

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] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this charge and specification.

Legality of Search and Seizure of the Appellant's Computers

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008) (quoting *United States v. McDonald,* 59 M.J. 426, 430 (C.A.A.F. 2004)). A military judge abuses her discretion if her findings of fact are clearly erroneous or her conclusions of law are incorrect. *Id.* (citing *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995)). The appellant asserts that: (1) the AFOSI agents constructively removed him from his home; (2) in light of *Georgia v. Randolph*, 547 U.S. 103 (2006), the search and seizure of his computers were unlawful; and (3) the military judge erred in failing to suppress the evidence seized and searched from the appellant's computers. The government counsel asserts that *Randolph* is inapplicable because: (1) at the time DR gave the AFOSI agents consent, the appellant was not physically present at his home and (2) the appellant never refused to give search and seizure consent.

The lawfulness of the search and seizure was litigated at trial and the military judge made extensive findings of fact and conclusions of law. Specifically, the military

[2]Though not raised as an issue on appeal, we take a moment to note that the appellant's actions of videotaping his sexual act turned what was ostensibly a private sexual act into a public sexual act and, in so doing, removed any constitutional protections the appellant had in performing the sexual act. *See United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001).

judge found and concluded: (1) the appellant and DR shared a residence; (2) either the appellant or DR had the authority to consent to the search and seizure of their residence; (3) DR voluntarily consented to the search and seizure of items from their residence; (4) the appellant was not physically present at his residence when the AFOSI agents sought and obtained DR's consent to search the residence; (5) the AFOSI agents and other law enforcement agents did not remove the appellant from his home; (6) the AFOSI agents and members from the appellant's unit did not restrain or detain the appellant at work for the purpose of avoiding his objection to DR's consent; (7) the AFOSI agents had a legitimate interest in keeping the appellant away from his residence, namely to prevent the possible intimidation of DR and to preserve the integrity and security of the scene; (8) any delay the appellant experienced in returning to his residence does not amount to a removal from his residence; and (9) the appellant's claims that he would have objected to the search if he had been present does not vitiate DR's otherwise valid consent.

The military judge's findings of fact are amply supported by the record and are not clearly erroneous. Moreover, her conclusions of law are correct. We also note that *Randolph* is inapplicable because the appellant's case does not involve a case of competing consents. In short, the military judge did not abuse her discretion in denying the appellant's motion to suppress and in considering the evidence seized from the appellant's computers.

Erroneous Promulgating Order

Finally, we note two problems with the promulgating order. First, there are two promulgating orders in the record of trial. One appears to be the expurgated version and the other the unexpurgated version; however, the finding language for Specification 1 of the Charge is different in each. The finding language for Specification 1 of the Charge should read "G, except the words 'to images,' substituting therefor the words 'an image.' Of the excepted words, NG. Of the substituted words, G."

Second, the promulgating order erroneously fails to list all of the specifications of which the appellant was arraigned. In addition to the specifications of which the appellant was convicted, the appellant was charged with two other specifications of engaging in conduct prejudicial to good order and discipline and service discrediting.[3] After arraignment, the military judge granted the government's motion to withdraw the two specifications. The government lined through the two specifications and erroneously renumbered the remaining specifications.[4]

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[3]These specifications alleged that the appellant wrongfully masturbated to and ejaculated onto images of Technical Sergeant NW and Senior Airman EM respectively.

[4]The government's actions of renumbering the specifications was erroneous because specifications should not be renumbered when they are withdrawn after arraignment and after they have come to the attention of the military judge sitting alone. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 8.1.2.3 (26 Nov 2003).

On 4 December 2007, the government promulgated the result of trial and the Action. The guidance in existence at the time required the initial promulgating order to include at least a summary of the charge and specifications on which the accused was arraigned.[5] Rule for Courts-Martial 1114(c); Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 10.4.4.1 (26 Nov 2003). Preparation of a corrected court-martial order, properly stating the finding for Specification 1 of the Charge and properly reflecting the specifications upon which the appellant was arraigned and the proper disposition of the charge and specifications, is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Conclusion

The approved findings and the 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

However, the error is harmless because the record clearly demonstrates the military judge found the appellant guilty of the remaining specifications.

[5]The current guidance requires the same.