UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MATTHEW R. STONE
United States Air Force

ACM 35183

21 December 2004

Sentence adjudged 30 October 2001 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Bryan T. Wheeler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 19 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Antony B. Kolenc, and David P. Sheldon.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major Kevin P. Stiens, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of violating a lawful general regulation, three specifications of sodomy of a child, four specifications of indecent acts upon a child, four specifications of indecent liberties with a child, and one specification of possessing child pornography, in violation of Articles 92, 125, and 134, UCMJ, 10 U.S.C. §§ 892, 925, 934. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 19 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged.

The appellant has submitted four assignments of error: (1) The appellant's plea to possession of child pornography is improvident; (2) The appellant was prejudiced by the parties' incorrect determination of the maximum punishment; (3) The punishment is inappropriately severe; and (4) The appellant has been subjected to cruel and unusual punishment while in post-trial confinement. This last assignment of error was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding error as to the first assignment, we order corrective action.

Background

The facts adduced at trial established that the appellant became affiliated with the Big Brother/Big Sister Mentorship Program. He became the Big Brother to a young boy, through whom he met other male children. He also became friendly with the young sons of fellow military members. The appellant would engage in various sexual activities with these boys, to include sodomy, showing them pornographic pictures and videos, playing sexual games with them, such as Truth or Dare, engaging in sexual activity while showering with them, etc. One of the victims was under the age of 12 at the time of the offenses. Furthermore, the appellant maintained images of child pornography on his personal computer. He also used his government computer to download pornographic images, which formed the basis of the Article 92, UCMJ, violation.

Improvidence 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) (citing *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, 367 (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 (C.A.A.F. 1996).

In the case sub judice, Specification 9 of Charge II alleged that the appellant possessed child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), the Child Pornography Prevention Act (CPPA). However, during the providence inquiry, the military judge never defined the term "child pornography" at all. He merely asked the appellant whether he had any questions about the statute, to which the appellant replied, "I haven't seen it, but I don't question it, sir." We hold that the colloquy between the military judge and the appellant was insufficient as a matter of law to establish that the appellant really understood precisely what he was pleading to on the charged offense. Therefore, we hold that the military judge abused his discretion in accepting the appellant's plea to possession of child pornography.

However, our analysis does not stop there. In addition to discussing the CPPA with the appellant, the military judge advised the appellant that an element of the offense was that his conduct in possessing the images was prejudicial to good order and discipline or service discrediting. He also elicited admissions from the appellant as to the sexually explicit content of the images in question:

> MJ: And is one of these video clips entitled, "Daddy and his six-year-old daughter?["]
>
> ACC: I don't remember the exact title, but to that effect, yes, sir.
>
> MJ: Apparently depicted an adult and a young girl?
>
> ACC: Yes, sir.
>
> MJ: And, do I understand another one of these video clips depicted a girl going to the bathroom and a boy coming up, apparently, having sexual intercourse with her from behind?
>
> ACC: Yes, sir.
>
> MJ: Were both of the people in that clip, were they children?
>
> ACC: Yes, sir.
>
> MJ: Under the age of sixteen?
>
> ACC: Yes, sir.
>
> MJ: Do you recall whether they were under the age of twelve or under the age of sixteen?
>
> ACC: I do not know.
>
> MJ: Do you have any doubt that they were children?
>
> ACC: No, sir.
>
> MJ: All right. I understand that one of the pornographic photos showed a female, a minor, with her legs spread apart, with a vibrator?
>
> ACC: Yes, sir.

MJ: Do you know about how old that child would have been?

ACC: No, sir.

MJ: Was she under the age of sixteen?

ACC: Yes, sir.

MJ: Do you have any doubt about that?

ACC: No, sir.

. . . .

MJ: [O]ne more thing, do you agree that your actions were then to the prejudice of good order and discipline or of a nature to bring discredit upon the Armed Forces?

ACC: Yes, sir.

MJ: Okay. Why don't you tell me in your own words why that would be?

ACC: Again, the Armed Forces is supposed to uphold a higher code of conduct than the civilian populace and they don't expect their military to go out and download several megs of child pornography?

Additionally, the appellant entered into a stipulation of fact which characterized the material referenced above as "pornographic" and "visual images of minors engaging in sexually explicit conduct."

We find that the appellant provided facts that objectively supported a plea of guilty as to clause 2 of Article 134, UCMJ. *See United States v. Mason*, 60 M.J. 15, 19-20 (C.A.A.F. 2004); *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), *pet. denied*, No. 04-0670/AF (22 Nov 2004). As a consequence, we find no substantial basis in law or fact to question the providence of the plea as to the lesser included offense of possessing child pornography in violation of clause 2 of Article 134, UCMJ. *See United States v. Irvin*, 60 M.J. 23, 25-26 (C.A.A.F. 2004). We hold that we can affirm a finding of guilty as to Specification 9, Charge II, except to the words "that had been transported in interstate or foreign commerce by means of a computer in violation of Title 18 U.S.C. 2252(A)(a)(5)(B)," substituting, therefore, the words "which conduct was of a nature to bring discredit upon the armed forces."

Maximum Punishment

This Court reviews questions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). During the providence inquiry, the trial counsel stated the maximum punishment as:

> TC: Dishonorable discharge, confinement for life plus one hundred and three years, forfeiture of all pay and allowances, reduction to E-1, and a fine at the court's discretion.
>
> MJ: Defense?
>
> DC: In addition, your Honor, the maximum period of confinement is life without the possibility of parole.
>
> MJ: Yeah, that is the way I read it.

The appellant contends that this was error. Specifically, he points out that, while the Uniform Code of Military Justice (UCMJ) had been amended to provide for life without the possibility of parole as a possible punishment in cases in which life imprisonment was authorized, the President had not yet amended the 2000 *Manual for Courts-Martial* to reflect that change at the time of the appellant's trial. According to the appellant, it is the President who determines the upper limits on legally permissible punishments. Because the President had not updated the *Manual*, the appellant contends that life without the possibility of parole was not a legally permissible punishment for him. He contends that he was prejudiced in that he entered into a pretrial agreement without a correct understanding of the maximum sentence he could receive. He further contends that this allegedly erroneous understanding of the maximum punishment would have been "a factor that the convening authority would consider in deciding what pretrial agreement to authorize and whether to grant clemency" in his case.

We do not agree with the appellant. In the first place, we conclude that the trial defense counsel's statement that life without the possibility of parole was a permissible punishment affirmatively waived any objection. Rule for Courts-Martial 905(e); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is . . . an intentional relinquishment or abandonment of a known right or privilege.").

In the second place, we conclude that the military judge's advice to the appellant as to the maximum punishment was not error. As this court stated in *United States v. Tilton*, ACM 33816 (A.F. Ct. Crim. App. 13 Dec 2001) (unpub. op.), *aff'd*, 58 M.J. 22 (C.A.A.F. 2002), the change to the UCMJ was effective as of the date the President signed it into law, rather than the date he amended the *Manual*. Because trial in the

appellant's case occurred after the enactment of the change to the UCMJ, the maximum punishment in his case did extend to life without the possibility of parole.

Finally, even if this were error, we find no material prejudice to the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The appellant has not asserted that, had he believed that he was entitled to parole, he would have changed his plea. Examining the record as a whole, we find no basis to conclude that his plea was "predicated" upon his belief that he could receive life without parole. *See United States v. Mincey*, 42 M.J. 376, 378 (C.A.A.F. 1995). Furthermore, we find no basis to conclude that parole exerted any real influence on the convening authority's deliberations on clemency, with the initial staff judge advocate's recommendation saying nothing about it. Therefore, we conclude that there was no plain error in this case. *See United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

Other Issues

We resolve the remaining issues adversely to the appellant. The sentence adjudged and approved is not inappropriately severe. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). Finally, the appellant has not been subjected to cruel and unusual punishment and, in any event, has failed to exhaust his administrative remedies on this matter. *See United States v. White*, 54 M.J. 469, 472-73 (C.A.A.F. 2001).

Sentence Reassessment

Because we have modified a finding of guilty, we must perform sentence reassessment. 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 conclude that we can reassess the sentence. By finding the appellant guilty of the lesser included offense of a violation of clause 2 of Article 134, UCMJ, we are not required to discount the stipulation of fact or any of the factual assertions made by the appellant during the providence inquiry. Furthermore, the specification in question is only a small part of the case, the gravaman being the appellant's repeated abusive conduct toward the victims. We are satisfied that, had the

military judge found the appellant guilty of the lesser included offense, he would have imposed a sentence of no less than a dishonorable discharge, confinement for 19 years, forfeiture of all pay and allowances, and reduction to E-1.

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court