UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class EMANUEL R. WALKER
United States Air Force

ACM 37865

04 January 2013

Sentence adjudged 21 October 2010 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court adjudged a bad-conduct discharge, confinement for 15 months, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence. The appellant assigns as error that the military judge erred by admitting, in sentencing, evidence on the impact of child pornography on its victims, as documented in a 1996 Senate Judiciary Committee Report. He also requests relief for excessive post-trial delay from trial to action and argues that his sentence is inappropriately severe.

Admission of Evidence in Aggravation

The appellant stipulated as fact that, over the course of several months, he used an Internet file sharing program to collect images and videos of child pornography. An analysis of files seized from the appellant's computer by the National Center for Missing and Exploited Children identified 88 image files and 130 video files of child pornography involving known victims. In sentencing, the Government offered a redacted 1996 Senate Judiciary Report that describes the impact of child pornography on its victims. The defense objected on the basis of relevance, arguing that the report "does not detail anything that directly relates to the [charged] offenses." The military judge disagreed, finding that the probative value of the extensively redacted report offered by the Government was not substantially outweighed by the danger of unfair prejudice. Noting that the report described the impact of child pornography in general, the military judge stated that he would limit his consideration of the exhibit to the potential impact on the victims portrayed in the case before him and give the report its "proper weight."

We review a military judge's decision to admit or exclude sentencing evidence for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009). When the military judge conducts a proper balancing test, the ruling will not be overturned absent a clear abuse of discretion. *Id*. at 235. Concerning the appellant's argument that the trial participants mischaracterized the exhibit as a Senate Report rather than a Senate Judiciary Committee Report, we note the source of the report was not the basis for objection.[1] We will review the military judge's decision based on the legal theory argued at trial: relevance to sentencing. *See United States v. Lloyd*, 69 M.J. 95, 101 (C.A.A.F. 2010) (A legal theory not presented at trial may not generally be raised for the first time on appeal.).

The prosecution may present evidence of aggravating circumstances "directly relating to or resulting from the offenses of which the accused has been found guilty" to include "social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused." Rule for Courts-Martial 1001(b)(4). The impact on children who are used in the child pornography business is sufficiently direct to the offense of possessing child pornography to assist the sentencing authority. *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). The exhibit offered by the prosecution addressed that impact, and the military judge properly limited his consideration of the exhibit to the potential impact on the children involved in the images and videos presented at trial. Under the circumstances of this case, we find no abuse of discretion in admitting the exhibit as relevant aggravating evidence of victim impact.

[1] Furthermore, a comparison between the two reports reveals no substantive difference in the findings at issue. Therefore, we discern no prejudice whatsoever from the mischaracterization. As stated, the substance rather than the form was the issue at trial.

Post-Trial Delay

The appellant argues that he is entitled to relief for post-trial delay of 125 days from trial to action of the convening authority. We review de novo whether an appellant's due process right to a speedy post-trial review has been violated. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). A presumption of unreasonable delay applies if the convening authority does not act on a case within 120 days of trial. *Id*. at 142. The processing time in this case exceeded that standard by five days. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

The appellant claims that the delay deprived him of appellate relief for the military judge's admission of "erroneous sentencing evidence." However, as we determined above, the military judge did not erroneously admit sentencing evidence and the post-trial record contains no other evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's rights to a speedy post-trial review and appeal was harmless beyond a reasonable doubt. Nor do we find sufficient cause in this case to grant relief absent prejudice. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002) (Service courts have the authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to "tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case.").

Sentence Appropriateness

The appellant argues that his sentence is inappropriately severe and invites us to consider the sentences in other cases with varying lengths of confinement but all including a bad-conduct discharge.[2] We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

[2] The issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Sentence comparison is required only in closely related cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008). Closely related cases include, for example, those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "At [this Court], an appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are '*highly disparate*.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id*. (emphasis added). The appellant has not shown sufficient similarity for sentence comparison.

We next consider whether the appellant's sentence was appropriately judged by "individualized consideration" of the appellant "on the basis of the nature and seriousness of the offense[s] and the character of the offender." *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offense of which he was found guilty, we do not find that the appellant's approved sentence is inappropriately severe.

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