

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
E.E. GEISER, R.G. KELLY, V.S. COUCH  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ANDREW J. DUNN  
MACHINIST'S MATE FIREMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 200602264  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 28 April 2006.

**Military Judge:** CAPT Bruce MacKenzie, JAGC, USN.

**Convening Authority:** Commander, Navy Region Hawaii, Pearl Harbor, HI.

**Staff Judge Advocate's Recommendation:** LCDR E.G. Korman, JAGC, USN.

**For Appellant:** CDR B.G. Filbert, JAGC, USN.

**For Appellee:** Maj Brian Keller, USMC.

**30 October 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

COUCH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of possessing visual depictions of minors engaging in sexually explicit conduct in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 48 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

After considering the record of trial, the appellant's five assignments of error,<sup>1</sup> and the Government's response, we conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Art. 59(a) and 66(c), UCMJ.

**Maximum Punishment for Possession of Child Pornography Under Art. 134, UCMJ**

In his first assignment of error, the appellant claims the military judge erred in his ruling that the maximum authorized punishment for possession of child pornography under Article 134, UCMJ, is confinement for 10 years, forfeiture of all pay and allowances, a fine, reduction to pay grade E-1, and a dishonorable discharge.<sup>2</sup> At trial and again on appeal, the defense argues that the maximum sentence should be tied to the most analogous offense. Contending the most analogous offense is disorderly conduct, under Article 134, the defense argues for a maximum authorized punishment of four months confinement and forfeiture of two-thirds pay per month for four months. Appellant's Brief and Assignments of Error of 29 Dec 2006, at 9-11 (citing RULE FOR COURTS-MARTIAL 1003(c)(1)(B)(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), and MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 73c(2)). We disagree.

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<sup>1</sup> I. THE MILITARY JUDGE ERRED IN HOLDING THAT THE MAXIMUM SENTENCE FOR THE CHARGE TO WHICH APPELLANT WAS FOUND GUILTY WAS DETERMINED BY REFERENCE TO 10 U.S.C. § 2252A(b)(5) AND NOT THE OFFENSE OF DISORDERLY CONDUCT UNDER ARTICLE 134, UCMJ.

II. IT WAS PLAIN ERROR PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF APPELLANT FOR THE TRIAL COUNSEL TO INTRODUCE, AND FOR THE MILITARY JUDGE TO ADMIT AND CONSIDER, TESTIMONY [OF DR. DALE ARNOLD] REGARDING THE TREATMENT AND SENTENCING OF SEXUAL OFFENDERS IN MILITARY CORRECTIONAL FACILITIES.

III. THE MILITARY JUDGE [COMMITTED PLAIN ERROR PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF APPELLANT] IN ADMITTING THE TESTIMONY OF DR. DALE ARNOLD UNDER MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ED.). . . .

IV. THE SENTENCING ARGUMENTS MADE BY TRIAL COUNSEL CONCERNING THE PERIOD OF CONFINEMENT NECESSARY TO COMPLETE SEXUAL OFFENDER TREATMENT [PROGRAMS] IN MILITARY CORRECTIONAL FACILITIES, THE LIKELIHOOD THAT APPELLANT WOULD SEEK TREATMENT FOR SEXUAL DEVIANCY, AND APPELLANT'S "SICKNESS" FOR WHICH HE REQUIRED TREATMENT CONSTITUTED PLAIN ERROR PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF APPELLANT.

V. TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO APPELLANT IN NOT OBJECTING TO THE TESTIMONY OF DR. DALE ARNOLD REGARDING TREATMENT AND SENTENCING OF MILITARY SEXUAL OFFENDERS AND IN NOT OBJECTING TO THE TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT.

<sup>2</sup> Record at 18. This issue was thoroughly litigated at the trial level. Appellate Exhibits III, IV; Record at 12-21. We commend the military judge and both parties for establishing a clear record for us to review.

During the providence inquiry, the appellant admitted downloading photos and video images of child pornography. Record at 27-38. The description of the images reflected in prosecution exhibit 1 (stipulation of fact), met the definition of "sexually explicit conduct" as defined in 18 U.S.C. § 2252A(b)(5). Record at 26. The appellant acknowledged that his possession of the images was both service-discrediting and prejudicial to good order and discipline under Article 134, UCMJ, clauses 1 and 2. Record at 38-39.

The military judge and counsel discussed the maximum authorized punishment on the record. Record at 16.<sup>3</sup> After hearing argument and considering applicable case law, the military judge found that the charged misconduct was closely related to activities proscribed by 18 U.S.C. § 2252A(b)(5), which carries, inter alia, a maximum confinement of 10 years. The military judge expressly advised the appellant that the maximum sentence that could be adjudged for his offense was confinement for 10 years, total forfeiture of pay, a fine, reduction to pay grade E-1, and a dishonorable discharge.<sup>4</sup> *Id.* at 20. The appellant expressly elected to proceed with his guilty plea.

In a case decided shortly after the appellant's submission of assignments of error in this case, our superior court held that under Article 134, a military judge may reference a directly analogous federal statute to identify the maximum punishment "when every element of the federal crime, except the jurisdictional element, was included in the specification." *United States v. Leonard*, 64 M.J. 381, 384 (C.A.A.F. 2007). Noting that no maximum punishment has been set by the President for an Article 134 offense of receiving child pornography under 18 U.S.C. 2252(a)(2), the court reasoned that so long as "[t]he criminal conduct and mens rea set forth in the specification satisfy the requirements of *clauses 1 and 2 of Article 134, UCMJ*, and describe the gravamen of the offense" proscribed by the analogous federal statute, the military judge may reference the federal statutory maximums to determine the maximum authorized

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<sup>3</sup> R.C.M. 1003(c)(1)(B)(ii) states: "An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for . . . not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances[.]"

<sup>4</sup> The military judge also discussed with counsel the applicability of a fine, and invited appellate review of the issue. Record at 18-20. In that the military judge did not award a fine in this case, we decline to do so. However, we note that "[a] fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted." R.C.M. 1003(b)(3), Discussion.

sentence that could be adjudged by a court-martial. *Id.* (emphasis in original).

This is precisely what the military judge did in the instant case. We conclude that military judge correctly advised the appellant of the maximum sentence for his offense and that the appellant elected to continue with his guilty plea notwithstanding the military judge's determination. This assignment of error is without merit.

### **Testimony of Dr. Arnold**

The appellant's second assignment of error claims that the military judge committed plain error by admitting and considering a stipulation of expected testimony of Dr. Dale Arnold, a psychologist, regarding the treatment of convicted sexual offenders. We disagree.

In his pretrial agreement, the appellant agreed to stipulate to the testimony of Dr. Arnold as a specially negotiated provision of his contract with the convening authority. Appellate Exhibit I at 4, ¶ i. The appellant understood that his stipulation did not admit the truth of Dr. Arnold's testimony, and that he was free to attack, contradict, or explain the testimony. *Id.* The appellant stated on the record that he understood this provision of his pretrial agreement. Record at 50. During the Government's case in aggravation, the military judge discussed the stipulation again with the appellant, who agreed with the stipulation and its use as evidence against him. *Id.* at 57-59. The stipulation was admitted into evidence without objection.

In the absence of an objection, any error as to the stipulation of Dr. Arnold was forfeited by the appellant unless this court finds plain error. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)(citing MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)). We are unable to find any error, plain or obvious, in the military judge's admission of the stipulation of Dr. Arnold's expected testimony, or that the appellant's substantial rights were materially prejudiced by the evidence. *Id.* (citations omitted). We conclude that this assignment of error is without merit.

### **Conclusion**

We have considered the appellant's remaining assignments of error and in light of our holding related to the stipulation of expected testimony of Dr. Arnold, we find they have no merit. *United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987)). As for the appellant's claim of ineffective assistance of counsel, we specifically find that the appellant has failed to meet his burden to show that his defense counsel's performance "fell below an objective standard of reasonableness." *United States v.*

*States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(citing *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)).

Accordingly, we affirm the findings and the approved sentence.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court