

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Matthew L. SMITH
Chief Cryptologic Technician (E-7), U. S. Navy**

NMCCA 200600327

Decided 12 January 2007

Sentence adjudged 14 January 2005. Military Judge: J.M. Warden. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Mid-Atlantic Regional Maintenance Center, Norfolk, VA.

LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
LCDR EVELIO RUBIELLA, JAGC, USNR, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel
LT ROSS W. WEILAND, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as special court-martial, of failure to obey a lawful regulation, receipt of child pornography, and possession of child pornography in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 30 days, and reduction to pay grade E-4. The convening authority (CA) approved the sentence as adjudged and ordered it executed. A pretrial agreement had no effect.

We have examined the record of trial, the appellant's four assignments of error and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sentence Appropriateness

In his first assignment of error, the appellant asserts that his sentence was inappropriately severe because it included a bad-conduct discharge. We disagree. The appellant committed severe misconduct when he wrongfully used his Government computer to receive and possess child pornography. After reviewing the entire record, we conclude that the sentence is appropriate for the offenses and the offender. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). Therefore, the appellant's first assignment of error is without merit.

Failure to List Awards in the SJAR

In his second assignment of error, the appellant claims that the staff judge advocate incorrectly listed the appellant's awards and decorations in his recommendation. Specifically, the staff judge advocate's recommendation (SJAR) did not mention the appellant's Good Conduct Medal, his Navy-Marine Corps Commendation Medal, and his Kuwait Liberation Medal.¹ The appellant also incorrectly states that the SJAR did not record that the appellant received the Meritorious Unit Commendation, Battle "E" Ribbon, Armed Forces Expeditionary Medal, Southwest Asia Service Medal, and Sea Service Deployment Ribbon. The SJAR does, in fact, record that the appellant received these awards. It does not, however, reflect the number of each of these awards that he received. We agree that the complete omission of any mention of the Good Conduct Medal, his Navy-Marine Corps Commendation Medal, and his Kuwait Liberation Medal was error. We also agree that the failure to record the number of awards received for the Meritorious Unit Commendation, Battle "E" Ribbon, Armed Forces Expeditionary Medal, Southwest Asia Service Medal, and Sea Service Deployment Ribbon was also error. However, trial defense counsel's failure to comment on errors or omissions in the SJAR forfeits the issue, absent plain error. *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); *United States v. Lugo*, 54 M.J. 558, 560 (N.M.Ct.Crim.App. 2000). "To succeed under a plain error analysis, appellant has the burden of establishing that there was plain or obvious error that 'materially prejudiced' his 'substantial rights.'" *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)(quoting Art. 59(a), UCMJ). Moreover, when raising error in the post-trial review process, in addition to alleging error, the appellant must allege prejudice as a result of the

¹ The appellant also alleges that the SJAR did not record the number of the appellant's Navy-Marine Corps Achievement Medals. This is incorrect. The SJAR properly recorded that the appellant received three Navy-Marine Corps Achievement Medals.

error, and must show what he would do to resolve the error if given such an opportunity. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

We do not find plain error in this case. The awards omitted were properly reflected in the record of trial, Defense Exhibit A - J; Defense Exhibit BB at 4-5, and in his action, the CA stated that he considered the record of trial. Indeed, Defense Exhibits A through J appear to be photographic copies of all the actual awards which the appellant received. Further, the awards omitted were not personal decorations for valor, heroism, or service in combat, and we find that their omission in the SJAR was "neither material nor likely to have misled the convening authority concerning the nature of the appellant's service." *United States v. Serrata*, 34 M.J. 693, 694 (N.M.C.M.R. 1991). This is especially true given that the appellant appears to have placed his entire service record into the record of trial, including, in addition to the above-mentioned listing of awards and actual copies of the awards, complete copies of all of his performance evaluations, his enlisted qualifications history, and his history of assignments. No relief is warranted in this case.

CA's Ordering the BCD Executed

In his third assignment of error, the appellant correctly states that the CA improperly purported to order the bad-conduct discharge executed. We agree. However, that portion of the CA's action executing the bad-conduct discharge is a nullity that does not require correction. *United States v. Caver*, 41 M.J. 556, 565 (N.M.C.M.R. 1994).

Waiver of Statute of Limitations

In summary fashion, the appellant claims that the evidence is legally insufficient to support the pleas and findings of guilty where a portion of the charged events falls outside the statute of limitations. We disagree.

The statute of limitations in effect at the time of the appellant's offenses was five years for all of the offenses alleged. The original charge sheet alleged dates for some of the offenses as occurring outside the statute of limitations. However, during pretrial conferences recounted on the record by the military judge and during a pre-arraignment colloquy in the courtroom, the parties demonstrated that they were well-aware of the statute of limitation issue and worked cooperatively to amend the

charges in an attempt to bring the dates within conformance of the statute of limitations. The effort was insufficient, however, as the amended dates were still almost a full week in excess of the five-year statute of limitations. As a result, the providence inquiry reveals that a portion of the offenses to which the appellant pled guilty occurred outside the statute of limitations.

Regarding Charge I, the providence inquiry and the stipulation of fact reveal that the appellant viewed pornography on a Government computer on more than 300 occasions over a 2 and 1/2 year period, all of that 2 and 1/2 years occurring within the statute of limitations, except one week. Regarding Charge II, and the two specifications thereunder, the providence inquiry and the stipulation of fact reveals that the appellant received and possessed child pornography in late summer 2001, a period squarely within the statute of limitations. We are therefore completely satisfied that the appellant committed all of the offenses described on the charge sheets within the statute of limitations for each charge. The fact that the appellant plead guilty to additional offenses beyond the statute of limitations for each charge has no effect on the providence of his pleas of guilty to the offenses that actually fell within the statute of limitations. As to each specification under Charges I and II, we affirm the findings except for the date "5 August 1999" in each specification and substitute therefore the date "12 August 1999". We affirm the findings as modified and after reassessing the sentence pursuant to *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), we affirm the sentence as approved by the convening authority.

Chief Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court