

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

**BEFORE**

**J.D. HARTY**

**R.G. KELLY**

**W.M. FREDERICK**

**UNITED STATES**

**v.**

**Michael S. SNOOK  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200201598

Decided 8 August 2007

Sentence adjudged 27 June 2006. Military Judge: C.C. Hale. Staff Judge Advocate's Recommendation: Col R.W. Koeneke, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

CDR B.A. ERMENTROUT, JAGC, USN, Appellate Defense Counsel  
LT DEREK BUTLER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

The appellant's case comes before us a second time. In his original general court-martial, tried on 21 May 2001 and 10 July 2001, the appellant pled guilty to the possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), the Child Pornography Protection Act (CPPA) charged under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced him to 30 months confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority (CA), in accordance with a pretrial agreement (PTA), suspended all confinement in excess of six months.

On 31 March 2005, we affirmed the findings and sentence in a *per curiam* decision. On 22 December 2005, our superior court reversed that decision, set aside the findings and sentence, and authorized a rehearing, based upon its decision in *United States*

*v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005).<sup>1</sup> *United States v. Snook*, 62 M.J. 398 (C.A.A.F. 2005)(summary disposition).

Upon remand, the Government amended the charge by striking the provisions relating to the CPPA from the specification. At the rehearing, a military judge sitting alone as a general court-martial convicted the appellant, pursuant to his pleas, of wrongful possession of child pornography, which conduct was prejudicial to good order and discipline and was of a nature to bring discredit upon the armed forces in violation of clauses 1 and 2 of Article 134, UCMJ. The appellant was sentenced to reduction to pay grade E-1, confinement for 20 months, a \$5,000.000 fine, and a bad-conduct discharge. Pursuant to a PTA, the CA approved the sentence as adjudged but suspended confinement in excess of 6 months for the period of confinement served plus 12 months thereafter. The CA disapproved the fine.

We have reviewed the record of trial, the appellant's six assignments of error,<sup>2</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. Arts. 59(a) and 66(c), UCMJ.

### Background

At the appellant's second court-martial, the military judge, appellant, trial counsel, and trial defense counsel all agreed that the maximum punishment for the offense to which the appellant pled guilty was a dishonorable discharge, total

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<sup>1</sup> In *Martinelli*, our superior court held that the CPPA has no extraterritorial application and found that Martinelli's guilty pleas to the CPPA-based offenses for conduct occurring in Germany were improvident. In the instant case, the appellant's conduct underlying the charged offense occurred in Okinawa, Japan.

<sup>2</sup> I. THE MILITARY JUDGE ERRED IN SENTENCING [THE] APPELLANT TO A BAD-CONDUCT DISCHARGE.

II. THE GOVERNMENT HAS NOT ESTABLISHED THAT [THE] APPELLANT'S CONDUCT WAS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE OR OF A NATURE TO BRING DISCREDIT TO THE ARMED FORCES.

III. [THE] APPELLANT WAS PREJUDICED BY [THE] TRIAL COUNSEL'S INFLAMMATORY SENTENCING ARGUMENT.

IV. THE STAFF JUDGE ADVOCATE'S RECOMMENDATION WAS MISLEADING IN THAT IT INDICATED [THE] APPELLANT HAD A PRIOR COURT-MARTIAL WITHOUT INDICATING THAT THE COURT OF APPEALS FOR THE ARMED FORCES HAD SET ASIDE THE CONVICTIONS AND THE FINDINGS.

V. AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS NOT APPROPRIATE FOR AN APPELLANT WHO DURING THE FIVE YEARS SEPARATING HIS ORIGINAL TRIAL FROM HIS REHEARING COMPLETELY REHABILITATED HIMSELF.

VI. [THE] APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING.

forfeiture of pay and allowances, reduction to pay grade E-1, and confinement for a period of five years. Record at 38. The military judge also stated for the record that the topic of maximum punishment had been the subject of RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) conferences. *Id.* During the providence inquiry, the military judge discussed with the appellant that "the government's theory" of his offense was that it was similar in nature to Title 18 United States Code, Section 2252A(a)(5)(A). Record at 59. The appellant admitted that his counsel explained to him how clause 1 and 2 of Article 134, UCMJ, worked and that the existence of the federal statute provided a guide to charge him under clause 1 or 2 of Article 134, UCMJ. Record at 59-60.

During the providence inquiry, the appellant admitted that on more than one occasion between August 2000 and January 2001, after work, he went back to his barracks room on Camp Foster, Okinawa, Japan, and downloaded child pornography from the internet into his computer. The appellant further admitted that his conduct was both prejudicial to good order and discipline and service discrediting.

#### **Maximum Authorized Punishment**

In his first assignment of error, the appellant asserts that the military judge erred in calculating the maximum imposable sentence by using the CPPA. Specifically, the appellant contends that since the CPPA lacks extraterritorial jurisdiction, it was inapplicable to the appellant's case as his offense occurred in Okinawa, Japan. Appellant's Brief of 14 Dec 2006 at 4-5. The appellant further contends that "[w]ith the references to the CPPA removed, the Charge is closely related to service discrediting disorderly conduct under paragraph 73 of Article 134 of the UCMJ", and therefore, the maximum punishment should have been based on that paragraph rather than the CPPA. *Id.* at 5. We disagree.

Subsequent to the appellant filing his brief, our superior court resolved this issue in *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007). The *Leonard* decision specifically rejects the appellant's argument, by finding that a military judge may properly calculate the maximum punishment for an offense charged under clauses 1 and 2, Article 134, UCMJ, by reference to the maximum punishment for a violation of a federal statute that proscribes and criminalizes the same criminal conduct and mental state, even in the absence of the jurisdictional element. *Id.* at 384. *See also United States v. Hays*, 62 M.J. 158, 168 (C.A.A.F. 2005).<sup>3</sup> Applying *Leonard* in this case, we find that the military

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<sup>3</sup> In *Hays*, 62 M.J. at 168, our superior court held that the appellant was not prejudiced as to sentence, after it amended four CPPA-based specifications to remove references to the CPPA in light of its holding in *Martinelli*, and replace them with references to service-discrediting conduct under clause 2 of Article 134, since the alteration did not "alter the essential nature" of the offenses.

judge properly calculated the maximum punishment by referencing the CPPA. The 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 offense proscribed by the CPPA, for which the maximum punishment was five years. This assignment is without merit.

### **Improvident Plea**

In his second assignment of error, the appellant asserts that the Government has not established that the appellant's conduct was to the prejudice of good order and discipline or of a nature to bring discredit to the armed forces. Appellant's Brief at 6. This assignment of error, properly framed, attacks the providence of the appellant's plea. We conclude his guilty plea was provident.

"For a guilty plea to be provident, the accused must be convinced of, and be able to describe, all of the facts necessary to establish guilt." *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)(citing R.C.M. 910(e), Discussion). "In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Id.* (quoting *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). The accused must demonstrate that he clearly understands the nature of the prohibited conduct. *Hays*, 62 M.J. at 167 (quoting *United States v. Reeves*, 62 M.J. 88, 95 (C.A.A.F. 2005)). When an appellant challenges the providence of his guilty plea on appeal, we consider whether there is a "substantial basis in law and fact for questioning the guilty plea." *Jordan*, 57 M.J. at 238 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

During the providence inquiry, the appellant expressly admitted that his possession of child pornography was service discrediting and prejudicial to good order and discipline. The appellant left no doubt on the record as to his awareness of the criminal nature of his conduct deriving from its character as service discrediting and prejudicial to good order and discipline. His responses to the military judge's questions were sufficient to demonstrate an understanding that his conduct constituted a military offense, and his responses were not merely affirmative responses to leading questions. Record at 60-61. Accordingly, we conclude that there is no basis in law and fact to question the appellant's guilty plea.

### **Improper Trial Counsel Argument**

In his third assignment of error, the appellant contends that during trial counsel's argument on sentencing, he argued facts not in evidence which were inflammatory and constituted plain error. Appellant's Brief at 8-9. Consequently, the

appellant asks this court to return the case to the CA for a rehearing on sentence. *Id.* at 9. The Government responds that, even assuming, *arguendo*, the argument was improper, the defense counsel failed to object to it, and the argument did not amount to plain error. Answer on Behalf of the Government of 16 Jan 2007 at 7-10. We agree with the Government and conclude that the issue was waived.

Failure to object to argument at trial constitutes waiver of the issue, absent plain error. R.C.M. 1001(g); *see United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Powell*, 49 M.J. 460, 462-63 (C.A.A.F. 1998). To overcome waiver, the appellant must convince this court that the argument was error, that the error was plain or obvious, and that the error materially prejudiced his substantial rights. *United States v. Jenkins*, 54 M.J. 12, 19 (C.A.A.F. 2000)(citing *Powell*, 49 M.J. at 464-65).

During argument on sentence, the trial counsel stated:

So what do we do about it? Well, the government isn't aware of, you know, how you can rehabilitate someone so that they never have this desire again to view child pornography.

Record at 114. The trial defense counsel did not object to these comments. *See id.* Instead, the defense counsel presented his closing argument, during which he counter-argued to the trial counsel's comments, stating:

Rehabilitation of the wrongdoer, sir, the third principle of sentencing. One of the notes I had written down in the trial counsel's statement is the government isn't aware of how you can rehabilitate somebody in a crime like that. If that's the case, then we should just pack up and go home. We should just dismiss that principle of sentencing. Because it doesn't apply. It doesn't apply because the government says it doesn't apply. Well, the defense begs to differ, sir. It applies because this Marine has been reflective. He's understood what he did was wrong. He took affirmative steps to get back on the right track, getting a job, accepting responsibility, first of all by pleading guilty, but coming back pleading guilty again.

*Id.* at 117.

In determining whether a trial counsel has committed error in argument, we view the argument in the context of the entire court-martial rather than focusing on the words used in isolation. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). "When arguing . . . the trial counsel is at liberty to strike hard, but not foul, blows." *Id.* at 237.

Trial counsel is charged with being a zealous advocate, and may argue the evidence of record as well as all reasonable inferences fairly derived therefrom. However, arguments aimed at inflaming the passions or prejudices of the members, or in this case the military judge, are improper. *Id.*

It has long been held that if the Government's closing argument "has a tendency to be inflammatory, we must make certain it is based on matters found within the record. Otherwise it is improper. The issues, facts, and circumstances of the case are the governing factors as to what may be proper or improper." *United States v. Doctor*, 21 C.M.R. 252, 259 (C.M.A. 1956)(citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)). We will evaluate the trial counsel's argument in light of the entire record. *Id.* at 260.

In this case, the trial counsel's comments regarding rehabilitative potential went beyond the facts established in the record, and failed to make clear that counsel was calling for an inference reasonably drawn from the evidence in the record. As such, the comments constituted error. However, even if there was error here, the defense counsel waived any error in the argument by failing to make a timely objection at trial. Contrary to the appellant's assertion in his appeal, the record plainly establishes that the defense counsel did not object to the rehabilitation portion of the argument, even though defense counsel objected to the "deterrence" portion of the trial counsel's argument. See Record at 119.

When considered in context, even if improper, the comments do not rise to the level of plain error, since the appellant has failed to establish that the error was plain and obvious, or that it materially prejudiced a substantial right. The improper argument in this case was before a military judge sitting alone, who is presumed to know the law and apply it correctly. *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F. 2004)(citing *United States v. Mason* 45 M.J. 483, 484 (C.A.A.F. 1997)). In assessing the impact of the trial counsel's comments, we note that there is nothing in the record to indicate that the military judge was swayed to adjudge an overly harsh sentence by the trial counsel's argument. The sentence adjudged was reasonable. The appellant could have been sentenced to receive a dishonorable discharge and confinement for 5 years. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 20 months, a \$5,000.00 fine, and reduction to pay grade E-1. We are certain that even without the language that the appellant now argues is objectionable, the military judge would not have adjudged a lesser sentence for the offense in this case. Under the circumstances, we conclude that the error did not prejudice the substantial rights of the appellant. Thus, finding no

plain error, we hold that the issue was waived. The appellant is not entitled to relief.

#### **Staff Judge Advocate's Recommendation Error**

In his fourth assignment of error, the appellant asserts that the staff judge advocate's recommendation (SJAR) was misleading because it failed to indicate that the appellant's prior court-martial had been set aside by our superior court, and that such error constituted plain error and was not waived by the trial defense counsel's failure to object to it. Appellant's Brief at 9-10. We disagree.

The required contents of the SJAR shall include information as to any records of previous convictions. R.C.M. 1106(d)(3)(C). The appellant's counsel must bring errors and omissions in the SJAR to the attention of the CA after a copy of the SJAR is delivered or, in the absence of plain error, they are waived. *United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005); R.C.M. 1106(f)(6). In this instance, the appellant's counsel did not comment after receiving a copy of the SJAR.

There is a three-fold requirement in order for the appellant to prevail under a "plain error" analysis: (1) an error must exist; (2) it must be plain or obvious; and (3) it must materially prejudice a substantial right of the appellant. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *Powell*, 49 M.J. at 463, 465. The third prong of the plain error analysis is satisfied if an appellant presents "some colorable showing of possible prejudice." *Kho*, 54 M.J. at 65 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

Upon reviewing the record, we find that the appellant has not met his burden of establishing a colorable showing of possible prejudice as a result of this error. Even with the failure to advise the CA that the prior conviction was set aside, in taking action, the CA specifically stated that he had considered the record of trial, which is replete with evidence that the first court-martial's findings and sentence had been set aside. Moreover, in his action, the CA specifically stated that he had awarded day for day confinement credit "for the 6 months already served by the accused pursuant to his original sentence awarded on 10 July 2001 on the same offense." CA's Action of 13 Sep 2006 at 2. Thus, it is unlikely that the CA was misled by the error in the SJAR. Accordingly, without a colorable showing of possible prejudice, the assigned error was waived. *United*

*States v. Lowry*, 33 M.J. 1035 (N.M.C.M.R. 1991); *United States v. Ruiz*, 30 M.J. 867, 869-70 (N.M.C.M.R. 1990).

### **Inappropriate Sentence**

In his fifth assignment of error, the appellant contends that his bad-conduct discharge was not appropriate in light of the evidence of his rehabilitation during the five years separating his original trial from the rehearing. Appellant's Brief at 10-11. The appellant requests that this court "set aside the bad-conduct discharge or alternatively, that it remand the case to the convening authority with instructions to approve no more than a suspended bad-conduct discharge." Appellant's Brief at 12-13. We decline to do so.

Sentence appropriateness requires the court to assure that justice is done and that the accused receives the punishment deserved. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We consider the nature and seriousness of the offense as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Without deference to the military judge, we independently determine the appropriateness of the sentence under the circumstances of each case. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We do not, however, award clemency, as it is the exclusive command prerogative of the CA. *Baier*, 60 M.J. at 383; *Healy*, 26 M.J. at 396.

The appellant's possession of images of child pornography, while living in the barracks in Okinawa, Japan, is a serious offense and deserving of harsh punishment. Nothing in the record renders the appellant's punitive discharge inappropriate. Accordingly, we find the sentence appropriate for this offender and his offense, and decline to grant relief. To do otherwise at this point would be to engage in clemency, a prerogative reserved for the CA. *Healy*, 26 M.J. at 395-96.

### **Post-Trial Delay**

In his final assignment of error, the appellant claims that his right to speedy post-trial review was materially prejudiced by unreasonable delay in post-trial processing. Appellant's Brief at 13. We disagree.

We are aware, as the appellant contends, that nearly five years have elapsed since the adjournment of his first trial and the docketing of the record of trial for his second appeal; and that over seven months elapsed from the date of the first sentencing, and the first CA's action. Appellant's Brief at 14. Of specific note, however, is the fact that just 300 days elapsed between the date the appellant's case was remanded by our superior court for a rehearing and the date it was again docketed at this court. Of those 300 days, only 113 days elapsed between the rehearing and re-docketing of the case with this court.

While the delay between sentencing and docketing is facially unreasonable, the post-trial delay in the appellant's case does not rise to the level of a due process violation. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)); see also *United States v. Moreno*, 63 M.J. 129, 141 (C.A.A.F. 2006). Even assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. *Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of the factors we explained in *United States v. Brown*, 62 M.J. 602, 607 (N.M.Ct.Crim.App. 2005)(*en banc*), we find that the delay does not effect the findings and sentence that "should be approved" in this case. See Art. 66(c), UCMJ.

### **Conclusion**

Accordingly, the findings of guilty and sentence, as approved by the CA, are affirmed.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court

Judge FREDERICK participated in the decision of this case prior to detaching from the court.