

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

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TIMOTHY S. EDWARDS
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200700980
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 July 2007.

Military Judge: Maj Valerie Danyluk, USMC.

Convening Authority: Commanding General, 2d Marine
Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col M.J. Bourdon,
USMCR.

For Appellant: Capt Kyle Kilian, USMC.

For Appellee: CDR Karen Gibbs, JAGC, USN; Capt Geoffrey
Shows, USMC.

19 August 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Senior Judge:

This case is before the court on appeal under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. On appeal, the appellant raises one assignment of error, namely that his sentence warrants relief under Article 66(c), UCMJ, because the adjudged dishonorable discharge is unjustifiably severe when compared with similar sentences in similar cases.

After carefully considering the record of trial, the appellant's assignment of error, and the Government's answer, we

conclude the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

I. Background

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of violating Article 134, UCMJ, 10 U.S.C. § 934, by possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), and communicating indecent language. The appellant was sentenced to confinement for two years, reduction to pay grade E-1, and a dishonorable discharge. In accordance with a pretrial agreement, the convening authority suspended confinement in excess of 12 months for the period of 12 months from the date of his action.

Between January 2005 and December 2006, the appellant possessed 369 electronic images of child pornography. Prosecution Exhibit 1 at 2. The images depicted young children engaged in various explicit sexual acts, including intercourse, fellatio and cunnilingus, with adults and other children. Record at 28-32. Some pictures depicted the children bound in chains, or tied with ropes. PE 3.

Additionally, the appellant "chatted" online with "Linda D7890," a Los Angeles Detective whom he believed to be a 14-year-old girl. Record at 40-41. In an effort to engage "Linda" in a sexual discussion, the appellant told "Linda" that he had engaged in sexual acts, including sodomy, with his 14-year-old niece. *Id.* at 36, 38. He also told "Linda" that his 14-year-old niece "loves anal" and that his "penis is pretty large." *Id.* at 36. The appellant's online profile, available to users of the Internet chat service that the appellant employed to communicate with "Linda," included a picture of the appellant in his U.S. Marine Corps service dress blue uniform with the caption: "One of the Few, the Proud, the Marines." PE 1; Record at 43.

II. Discussion

A. Principles of Law.

This court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Article 66 is "'a sweeping congressional mandate to ensure a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 284 (C.A.A.F. 2005)(quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct.Crim.App. 2001)); see also *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

In reviewing a case for sentence appropriateness, this court is required to compare sentences in specific cases only "in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)(quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)); see also *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001).¹ To trigger the requirement for this court to compare sentences in specific cases, the appellant must show specific cases are "closely related" to his, and that the sentences in those cases are "highly disparate." *Lacy*, 50 M.J. at 288.

"To be closely related, 'the cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design.'" *United States v. Stotler*, 55 M.J. 610, 612 (N.M.Ct.Crim.App. 2001)(quoting *United States v. Kelly*, 40 M.J. 558, 570 (N.M.Ct.Crim.App. 1994)). "The mere similarity of offenses is not sufficient" to demonstrate that cases are "closely related." *United States v. Washington*, 57 M.J. 394, 401 (C.A.A.F. 2002); *United States v. Swan*, 43 M.J. 788, 793 (N.M.Ct.Crim.App. 1995). "A disparity between the sentences in closely related cases will warrant relief from this court only when it is so great as to exceed relative uniformity, or when it rises to the level of an obvious miscarriage of justice or abuse of discretion. *Stotler*, 55 M.J. at 612; *Swan*, 43 M.J. at 792.

B. Analysis.

The appellant cites seven child pornography cases which he contends are closely related to his case, and in which the sentences are highly disparate from his sentence.² In each cited case, the accused was sentenced to a bad-conduct discharge. The appellant, however, fails to carry his burden to show these cases are closely related to his own. First, he has done no more than attempt to show similarity of offenses, which as noted above is insufficient. Further, the cited cases materially differ from

¹ In cases where the court is not *required* to compare sentences in specific cases, it may of, course, nevertheless do so. *Lacy*, 50 M.J. at 288.

² *United States v. Smith*, No. 200600327, 2007 CCA LEXIS 19, unpublished op. (N.M.Ct.Crim.App. 12 Jan 2007); *United States v. Greene*, No. 200401272, 2007 CCA LEXIS 109, unpublished op. (N.M.Ct.Crim.App. 29 Mar 2007), *rev. denied*, 65 M.J. 326 (C.A.A.F. 2007); *United States v. Snook*, No. 200201598, 2007 CCA LEXIS 307, unpublished op. (N.M.Ct.Crim.App. 8 Aug 2007), *aff'd*, 2008 C.A.A.F. LEXIS 307 (C.A.A.F. May 12, 2008); *United States v. Frank*, No. 200600894, 2007 CCA LEXIS 6, unpublished op. (N.M.Ct.Crim.App. 9 Jan 2007), *rev'd*, 66 M.J. 375 (C.A.A.F. 2008); *United States v. Keeton*, No. 200602471, 2007 CCA LEXIS 453 unpublished op. (N.M.Ct.Crim.App. 27 Nov 2007); *United States v. Dunn*, No. 200602264, 2007 CCA LEXIS 447, unpublished op. (N.M.Ct.Crim.App. 30 Oct 2007); *United States v. Rowe*, No. 200600184, 2007 CCA LEXIS 226, unpublished op. (N.M.Ct.Crim.App. 26 Jun 2007), *aff'd*, 2008 CAAF LEXIS 783 (C.A.A.F. June 24, 2008).

the appellant's. Six of the cited cases involve possession of child pornography alone -- unlike the appellant's case, which includes a charge of communicating indecent language. While the appellant asserts the additional indecent language charge in his case does not justify the claimed disparity, the fact of an additional charge is important to deciding whether the appellant's case truly is closely related to the cases he cites for comparison, especially given that a military accused is adjudged a single sentence for all the misconduct of which he is convicted.

In only one of the seven cases that the appellant cites was the accused charged with an offense in addition to receipt or possession of child pornography: *United States v. Rowe*, No. 200600184, 2007 CCA LEXIS 226, unpublished op. (N.M.Ct.Crim.App. 26 Jun 2007). In *Rowe*, the accused was similarly adjudged a dishonorable discharge, but the convening authority approved only a bad-conduct discharge, pursuant to a pretrial agreement. *Id.* *Rowe*, however, is not a closely related case. While *Rowe's* attempt to actually meet a child for sexual purposes is arguably more serious than the appellant's communication of indecent language, it appears that the child pornography that *Rowe* possessed (31 images and 12 videos) was images of naked children. *Id.* The appellant, by contrast, possessed 369 images of child pornography, many of them hardcore depictions of explicit sexual abuse of children by adults.

Additionally, the appellant's case is distinguished from the cited cases by the fact that he appears to be the only one who publicly identified himself as a United States Marine, even including a photograph of himself in his dress uniform in his online user profile. See *United States v. Gibson*, No. 200100585, 2002 CCA LEXIS 164, unpublished op. (N.M.Ct.Crim.App. 31 Jul 2002)(impact on crew was distinguishing factor in sentence appropriateness where child pornography was discovered on-board submarine).

Even assuming the appellant could demonstrate his case was "closely related" to the cases he cites, he also fails to demonstrate his sentence is "highly disparate." While the appellant focuses on seven child pornography cases where bad-conduct discharges were approved, a broader survey of child pornography cases reveals that dishonorable discharges are not uncommon for charges similar to the appellant's.³ When viewed in

³ *United States v. Fisher*, No. 200700688, 2008 CCA LEXIS 217 unpublished op. (N.M.Ct.Crim.App. 17 Jun 2008)(dishonorable discharge and eight months confinement for 27 images, and one video of child pornography); *United States v. Burrell*, No. 200700404, 2008 CCA LEXIS 97, unpublished op. (N.M.Ct.Crim.App. 27 Mar 2008)(dishonorable discharge and 10 months confinement for 18 specifications of possession of child pornography and an orders violation for possessing child pornography); *United States v. Campos*, No. 200602523, 2008 CCA LEXIS 7, unpublished op. (N.M.Ct.Crim.App. 17 Jan 2008)(dishonorable discharge and four years confinement for 20 images of child pornography); *United States v. Martin*, No. 20060225, 2007 CCA LEXIS 152, unpublished op.

this broader context, it becomes clear that the award of a dishonorable discharge for charges similar to the appellant's is not so unusual that his sentence to such a discharge exceeds relative uniformity. See *Stotler*, 55 M.J. at 612. Nor do we find, on the facts of this case, that the appellant's sentence rises to the level of an obvious miscarriage of justice or an abuse of discretion. See *id.*

Further, even assuming the appellant had demonstrated a wide disparity of sentences in closely related cases, we conclude "good and cogent reasons" exist for any disparity. See *Swan*, 43 M.J. at 793. The particular types of images possessed by the appellant, the nature of his indecent communication, and the damage he did to the image of the United States Marine Corps, provide a rational basis for any disparity.

Finally, we are satisfied that the appellant's sentence is appropriate to this offender and his offenses. *Baier*, 50 M.J. 282; *Healy*, 26 M.J. at 395-96; *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

III. Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Judge STOLASZ concurs.

For the Court

R.H. TROIDL
Clerk of Court

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

Senior Judge VINCENT did not participate in the decision of this case.

(N.M.Ct.Crim.App. 24 Apr 2007)(dishonorable discharge and 12 months confinement for 75 images of child pornography); *United States v. Flores*, No. 200501199, 2007 CCA LEXIS 73, unpublished op. (N.M.Ct.Crim.App. 15 Mar 2007) (dishonorable discharge and 36 months confinement for child pornography, attempted indecent communications with a minor, and indecent communications with a minor); *United States v. Goldberg*, No. 200601093, 2007 CCA LEXIS 8, unpublished op. (N.M.Ct.Crim.App. 24 Jan 2007)(dishonorable discharge and seven years confinement for 700 images and 70 videos of child pornography), *rev. denied*, 2008 CAAF LEXIS 656 (C.A.A.F. May 28, 2008); *Gibson*, 2002 CCA LEXIS 164 (dishonorable discharge and four months confinement for "100-350" images of child pornography); *United States v. Smith*, 47 M.J. 588 (N.M.Ct.Crim.App. 1997)(dishonorable discharge and 12 months confinement for four specifications of child pornography). We do not contend that the foregoing list of cited cases are "closely related" to the appellant's, but rather, only that a broader survey of cases involving child pornography reveals that the sentence in this case does not exceed "relative uniformity." See *Stotler*, 55 M.J. at 612.