

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KEVIN R. EVANS
SHIP'S SERVICEMAN SEAMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201100169
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 January 2011.

Military Judge: CDR Sherry King, JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: CDR T.F. DeAlicante,
JAGC, USN.

For Appellant: CAPT Diane L. Karr, JAGC, USN.

For Appellee: CDR Monte G. Miller, JAGC, USN; Maj William
C. Kirby, USMC.

19 July 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS A PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of receiving child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for three years and a dishonorable discharge. The convening authority (CA) approved the adjudged sentence.

In his sole assignment of error, the appellant alleges that his adjudged sentence, specifically the dishonorable discharge, is too severe. After careful consideration of the record of trial and the parties' briefs, 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.

Sentence Appropriateness

The appellant argues that, in light of his youth, remorse, requirement to register as a sex offender, and similar cases in which the accused were adjudged bad-conduct discharges, the adjudged dishonorable discharge was too severe. We are not persuaded by the appellant's argument.

It is well-settled that a court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). We also recognize that it is within our discretion to consider and compare other court-martial sentences in reviewing a case for sentence appropriateness and relative uniformity. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). This does not mean, however, that a miscarriage of justice has occurred simply because in other cases decided by this court a bad-conduct discharge was awarded.

Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This assessment is made based on an "'individualized consideration' . . . 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). It is further noted that determining sentence appropriateness is distinguishable from granting clemency, which is a bestowing of mercy, and this court will not intrude on the prerogative of the CA. *Healy*, 26 M.J. at 395.

We recognize that a dishonorable discharge is a harsh punishment with serious ramifications but, in this case, it was appropriate. Despite the appellant's characterization of his behavior as a "youthful indiscretion," the record demonstrates that he repeatedly used terms such as "kiddy," "underage," and "child porn" to search for child pornography. Prosecution Exhibit 1. The appellant downloaded movies and images of children engaged in sexual acts or posing in sexually provocative poses and although he could not recall the exact number of movies and images he downloaded, he admitted that there were 133 movies and 51 images of child pornography downloaded to his computer. The fact that the appellant would knowingly seek out these images and view them warrants severe punishment.

We are not moved to grant the appellant relief based on the consequences he faces as a result of state sex offender registry requirements. State legislatures have seen fit to impose these requirements for certain offenses, such as the appellant's. The appellant was cognizant of the illegality of his behavior when he downloaded the materials and he must face the necessary consequences of his actions.

The appellant faced a jurisdictional maximum punishment of 20 years confinement, a dishonorable discharge, total forfeiture of pay and allowances, and reduction to the lowest enlisted pay grade. After reviewing the entire record, we find that the adjudged sentence was appropriate for this offender and his offense. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 298.

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

For the Court

R.H. TROIDL
Clerk of Court