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

Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MAURICIO R. DELGADO
GAS TURBINE SYSTEM TECHNICIAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201200473
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 July 2012.
Military Judge: Col James G. Bartolotto, USMCR.
Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LCDR K.A. Elkins, JAGC, USN.
For Appellant: Frank J. Spinner, Esq., Civilian Counsel; LT Carrie E. Theis, JAGC, USN.
For Appellee: LT Ian D. MacLean, JAGC, USN.

27 June 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of rape of a child, three specifications of aggravated sexual contact with a child, one specification of aggravated sexual abuse of a child, two specifications of indecent liberty with a child, one specification of sodomy with a child under the age of 12, and two specifications each of

possessing, producing, and distributing child pornography, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The military judge sentenced the appellant to reduction to the pay grade E-1, 75 years confinement, and a dishonorable discharge. The convening authority (CA) approved the sentence.[1] Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 44 years, and as a matter of clemency waived automatic forfeitures.

The appellant assigns five errors: I) that the court-martial lacked jurisdiction because the CA referred the charges to a panel chosen by his predecessor; II) that the military judge abused his discretion in accepting the appellant's pleas to possession and distribution of child pornography in violation of Clause 1, UCMJ, as there was an insufficient factual basis to support the terminal element; III) that the duplicative specifications alleging possession, production, and distribution of child pornography under Clause 1 and again under Clause 2 represent an unreasonable multiplication of charges; IV) that the trial counsel committed prosecutorial misconduct during the sentencing case; and V) that his sentence to confinement for 75 years is inappropriately severe. We agree that those specifications under Charge III alleging violations of Clause 1 must be dismissed as they lack a substantial basis in fact; we take corrective action in our decretal paragraph. Following our corrective action and reassessment, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant raped and committed several other sexual offenses with a seven-year-old girl on multiple occasions over a 16-month period. Additionally, he produced over 500 pornographic videos and images of the child, including videos and photographs of his sexual assaults upon her, and distributed them using peer-to-peer software. Additional facts relevant to the assignments of error are included below.

Discussion

[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

The appellant elected trial by military judge alone,[2] entered unconditional pleas of guilty at his general court-martial,[3] and raised no challenge to the jurisdiction of the court. On appeal, he argues for the first time that the court-martial lacked jurisdiction because the CA referred the charges to a court-martial convened by his predecessor, with no indication that he formed his own judgment that the members on the predecessor's convening order met the criteria in Article 25(d)(2), UCMJ. Whether a court-martial was properly convened is a question of law that we review *de novo*. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006). The appellant's argument relies heavily on *United States v. Allgood*, 41 M.J. 492 (C.A.A.F. 1995), which we have held presented a distinct set of facts involving a redesignation of command. *United States v. Vargas*, 47 M.J. 552, 553 (N.M.Ct.Crim.App. 1997).

The appellant's case is analytically similar to *Vargas*, and we reject this assignment of error for the reasons explained therein. *See id.* at 554 n.4. *See also United States v. Brewick,* 47 M.J. 730, 733 (N.M.Ct.Crim.App. 1997) (holding that "[t]here was no requirement for the referral authority to state that he 'adopted' the members selected by a predecessor in command.") and *United States v. Gilchrist*, 61 M.J. 785, 788 (Army Ct.Crim.App. 2005) ("Absent evidence to the contrary, adoption can be presumed from the convening authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command."). Following our *de novo* review, we hold that the court-martial was properly convened and had jurisdiction.

The appellant next argues that the military judge abused his discretion in accepting the appellant's pleas to the three specifications under Article 134 that allege possession, production, and distribution of child pornography in violation of Clause One. The Government concedes that the Record "contains no evidence demonstrating a direct and palpable impact on good order and discipline," and that the military judge abused his discretion in accepting those particular pleas. Answer on Behalf of Appellee of 10 Apr 2013 at 18. We find a substantial basis in fact for questioning those guilty pleas and will dismiss those specifications in our decretal paragraph. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Dismissal moots the appellant's third assignment of error, which argued that the same specifications were unreasonably multiplied

[2] Record at 22.

[3] *Id.* at 29-30.

with nearly identical specifications alleging that his conduct was service discrediting.

We turn now to the appellant's assertion of prosecutorial misconduct during the sentencing case in aggravation, arising from the following chain of events. The trial counsel sought to elicit background information from a law enforcement agent about the investigation of the appellant. The military judge sustained an objection to some of the foundational questions, apparently on the basis that the information was already before him. Record at 286. Without objection, the trial counsel asked a few more questions, eliciting that investigators seized a large number of electronic media containing "approximately 10 terabytes of data . . . ." *Id*. at 287. The military judge then sustained an objection to a question concerning the type of child pornography found, but asked a number of questions to better understand what 10 terabytes of data actually meant in terms of the volume of images. The defense counsel voiced no objection to the military judge's questions. *Id*. at 288-89. The appellant now claims that the record shows the trial counsel ignored the sustained objections and elicited improper information. We find no support in the record of trial for this assertion.

At trial, the defense counsel did not object to the questions he now complains about, nor did he complain that the trial counsel was ignoring the military judge's ruling. When there is no objection at trial, we review allegations of prosecutorial misconduct for plain error. *United States v. Schroder*, 65 M.J. 49, 57-58 (C.A.A.F. 2007). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice . . . ." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted).

We find no error, much less plain or obvious error. The information that the trial counsel and military judge elicited was proper evidence in aggravation, and not elicited in contravention of any ruling from the military judge. The appellant argues that the agent's testimony that he possessed "tens of thousands" of images somehow improperly exaggerated his criminality. Appellant's Brief at 22. That number is, however, consistent with the appellant's stipulation, entered into evidence without defense objection, that he possessed "more than 25,000 images and videos of child pornography." Prosecution Exhibit 1 at 13. We conclude that this assignment of error is without merit.

Finally, the appellant avers that his sentence to confinement for 75 years is inappropriately severe. Under Article 66(c), UCMJ, we may only approve a sentence which we find appropriate after we have independently reviewed the case and considered the nature and seriousness of the offenses and the character of the offender. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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 accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant committed sexual offenses on his young victim on multiple occasions over a 16-month period. He exacerbated the grave nature of those crimes by recording the assaults and other sexual acts, and distributing them via peer-to-peer networks to countless unknown recipients. Additionally, he accumulated over 25,000 images and videos of child pornography, which he possessed on a wide array of digital media. We have carefully considered the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and those presented by the Government in aggravation. We find the sentence to be appropriate for this offender and the offenses committed. Granting additional sentence relief at this point would be engaging in clemency, a prerogative reserved for the CA, and we decline to do so. *See id.* at 395-96.

Conclusion

The findings of guilty of Specifications 1, 3, and 7 of Charge III are set aside and those specifications are dismissed. We conclude that there has not been a drastic change in the penalty landscape. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we conclude that we are able to reassess. Upon reassessment, we are satisfied that the military judge would not have adjudged a sentence less than that approved by the CA. Further, for sentencing purposes the military judge clearly merged the specifications we have dismissed with nearly-identical specifications alleging that the conduct was service discrediting. The sentence and the remaining findings are correct in law and fact and are affirmed. Arts. 59(a), 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court