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

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSHUA E. BURTON
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800454
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 March 2008.
Military Judge: Maj Brian Kasprzyk, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MARFORPAC, San Diego, CA.
Staff Judge Advocate's Recommendation: Col V.A. Ary, USMC (19 May 2008); LtCol K.J. Brubaker, USMC (19 May 2009);
Addendum: Maj G.R. Hines, USMC (10 Jun 2008).
For Appellant: Maj Christian Broadston, USMC; LT Michael Maffei, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

29 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of wrongfully transporting child pornography and one specification of wrongfully possessing child pornography, in violation of 18 U.S.C. § 2252A under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was

sentenced to a dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 48 months.[1] Following a remand from this court ordering new post-trial processing,[2] the convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed, but suspended all confinement in excess of 48 months.

The appellant's remaining assignment of error avers that his sentence to fifteen years confinement and a dishonorable discharge was inappropriately severe, and argues that a bad-conduct discharge is more appropriate.[3] We decline to grant relief.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and 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)).

---

[1] The pretrial agreement states, ". . . all confinement in excess of 48 months will be suspended for the period of 12 months from the date of the convening authority's action, at which time, unless sooner vacated, the suspended portion will be remitted without further action." AE XIV, ¶ 2. In the initial post-trial processing, the convening authority took his action on 16 June 2008. As discussed herein, an assignment of error alleging ineffective assistance of counsel compelled new post-trial processing. A second convening authority's action was taken 11 June 2009. The corrective action ordered by this court following the finding of ineffective assistance of counsel did not reset the clock on the date of the convening authority's action, thereby adding another year to the appellant's period of suspension. To the extent it is otherwise unclear, we specifically find that the period of suspension was fully remitted by operation of the pretrial agreement on 16 June 2009, one year from the original convening authority's action, and there is currently no remaining suspended portion of confinement.

[2] The appellant previously raised an assignment of error alleging ineffective assistance of counsel by failing to execute the appellant's desire to submit matters in clemency generally and failing to attempt to obtain additional pretrial confinement credit for the appellant as a consideration for clemency. The case is now before us following new post-trial processing which included consideration of a substantial clemency submission by the appellant, wherein substitute detailed defense counsel took a different tack on presenting confinement issues to the convening authority.

[3] Submitted citing *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant was convicted of transporting and possessing child pornography. The underlying facts in support of these convictions detail the appellant's actions in amassing a collection of greater than 1500 images and 20 videos over a ten month period. These images included children age six on up being raped, orally sodomized, and sexually molested. After reviewing the entire record, acknowledging the extensive submissions of the appellant both during and post-trial, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling,* 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority, and we decline to do so. *Healy*, 26 M.J. at 395-96.

We therefore 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 remains. Arts. 59(a) and 66(c), UCMJ. Accordingly, we affirm the findings and the sentence.

For the Court

R.H. TROIDL
Clerk of Court