UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM J. ST BLANC, JR.
United States Air Force

ACM 37206 (f rev)

05 February 2013

Sentence adjudged 26 April 2012 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Nancy J. Paul and Scott E. Harding.

Approved sentence: Bad-conduct discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Nicholas McCue; Major Tiaundra S. Moncrief; Major Shannon A. Bennett; Major Matthew C. Hoyer; Major Matthew T. King; Major Imelda L. Paredes; and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel C. Taylor Smith; Lieutenant Colonel Jeremy S. Weber; Major Michael T. Rakowski and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant, contrary to his pleas, of one specification of attempt to communicate indecent language to a person believed to be under age 16 and one specification of wrongful and knowing possession of 15 images and 4 videos which depict persons who appear to be minors

engaging in sexually explicit conduct, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. The approved sentence consisted of a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1. In *United States v. St. Blanc*, ACM 37206 (A.F. Ct. Crim. App. 2009) (unpub. op.), we affirmed the findings but remanded the case to the convening authority to withdraw an erroneous Action, substitute a corrected Action, and promulgate a corrected court-martial order. On 12 November 2009, the Action and court-martial order were accomplished in accordance with our directions. Having previously affirmed the findings, we approved the sentence. *United States v. St. Blanc*, ACM 37206 (f rev) (A.F. Ct. Crim. App. 2010) (unpub. op.), *rev'd in part*, 70 M.J. 424 (C.A.A.F. 2012). Our superior court affirmed the findings but set aside the sentence based on *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). *St. Blanc*, 70 M.J. at 430.

In *Beaty*, the Court held that the maximum for an offense alleging possession of "what appears to be" child pornography includes only four months of confinement rather than the 10 year maximum used by the military judge who, in accordance with the law at the time of trial, used the analogous federal offense for possession of child pornography. *Beaty*, 70 M.J. at 40, 45. Pursuant to *Beaty*, the maximum confinement for both offenses in this case should have been 2 years and 4 months rather than 12 years. Finding that this disparity could have substantially influenced the sentence adjudged, the Court authorized a rehearing on sentence, which was held on 25-26 April 2012. A panel of officers sentenced the appellant to a dishonorable discharge, confinement for two years and four months, and reduction to E-1. Because the sentence adjudged at the rehearing exceeded the original sentence, the convening authority approved only so much of the sentence as extended to a bad-conduct discharge, confinement for two years, and reduction to E-1.

At the rehearing, the appellant objected to providing the court members any of the images of "what appears to be" child pornography because the military judge in the prior trial had failed to specify which 15 of the 18 charged images she had convicted him of possessing when she made her findings by exceptions and substitutions.[*] The military judge sustained the objection. He instructed the members that the images were not available for their review and that they should not speculate on what the images would look like beyond the fact that, in accordance with the findings of guilty, the images were "visual depictions of what appears to be minors engaging in sexually explicit conduct."

Although the remand order affirmed the findings and authorized a rehearing on sentence only, the appellant requests that we set aside the *finding* of guilty of the Article 134, UCMJ, offense, because the military judge at the first trial failed to specify which 15 of the 18 charged images were included in the finding of guilty. Failing that, he argues that we should set aside the sentence, because the military judge at the second trial "deprived the panel of the opportunity" to view the evidence before deciding an

[*] As we and our superior court noted, a defense expert testified that she was unable to definitely determine that three of the 18 charged images were of minors.

appropriate sentence. We reject both arguments. First, the findings have been previously affirmed and are not within the scope of the remand order. Second, the appellant invited the error now complained of by successfully arguing at his rehearing that the members not be shown the images. "The principle that a party may not invite or provoke error at trial and then complain of it on appeal is long established in both civilian and military jurisprudence." *United States v. Resch*, 65 M.J. 233, 239 (C.A.A.F. 2007) (Stucky, J., concurring) (citations omitted). Not only did the appellant invite the error now complained of, but the military judge removed any material prejudice with a tailored limiting instruction.

The findings have been previously affirmed by this Court and the Court of Appeals for the Armed Forces. The approved sentence is correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c). Accordingly, the approved sentence is

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court