IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Brendan C. FORNEY
Lieutenant Junior Grade (O-2), U.S. Navy

NMCCA 200200462 Decided 19 July 2005

Sentence adjudged 2 April 2001. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Norwest, Silverdale, WA.

EUGENE FIDELL, Civilian Appellate Counsel
MATTHEW S. FREEDUS, Civilian Appellate Counsel
LT ADAM STOFFA, JAGC, USNR, Appellate Defense Counsel
Capt E. TIPON, USMC, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A general court-martial composed of members convicted the appellant, contrary to his pleas, of conduct unbecoming an officer and a gentleman and two specifications of wrongfully possessing child pornography, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934, and 18 U.S.C. § 2252(A).[1] The appellant was sentenced to 12 months confinement and a dismissal. The convening authority

[1] After the announcement of findings by the members, the military judge dismissed Specification 1 of the Additional Charge, ruling that this offense was "subsumed" by the greater offense of the original Charge and its sole specification. The military judge also "excepted" certain language contained in Specification 2 of the Additional Charge as an "unreasonable multiplication of charges," concluding that the "excepted" language was duplicated by the Specification of the original Charge. Record at 849-50. The members were appropriately instructed of these modifications to their findings prior to deliberating on the sentence. *Id.* at 879.

approved the sentence as adjudged. There was no pretrial agreement.

We have carefully considered the record of trial and the appellant's seven assignments of error, contending that the lack of tenure for judges of this court violates the 5th Amendment, that Title 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) are unconstitutional, that the evidence was insufficient to sustain his conviction for possession of child pornography, that the trial counsel's sentencing argument constituted plain error, that the staff judge advocate failed to respond to legal errors raised in the appellant's clemency submission, that the appellant is entitled to relief due to post-trial processing delays, and that the sentence is inappropriately severe. We have also considered the Government's response and the appellant's reply to the Government's answer.

We conclude that the findings of guilty to the Additional Charge must be set aside and dismissed. After taking corrective action, we further find that the remaining findings of guilty and the sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of the Evidence

The appellant contends that the evidence supporting his conviction for possessing child pornography is factually and legally insufficient because similar pictures are commercially available; therefore, the images he possessed do not constitute child pornography. We disagree.

We begin by noting that at the time of his offenses the appellant was an Ensign in the U.S. Naval Reserve, serving on active duty as the Auxiliaries Officer onboard USS DAVID R. RAY (DD- 971). Along with his shipmates, the appellant was assigned a user name and password to access the ship's computer system and was permitted to store files on the computer's shared drive. While conducting routine system maintenance in March 2000, Fire Controlman Second Class (FC2) "H," the ship's computer system administrator, noticed that the appellant's home directory contained a excessively large number of picture files. FC2 H scanned the appellant's directory along with its contents and discovered suspected child pornography. FC2 H also monitored the appellant's computer usage over the next few days and traced the pornographic photos to the computer workstation located in the appellant's stateroom. Record at 439-48.

Upon the ship's return to port, agents from the Naval Criminal Investigative Service (NCIS) took over the investigation. After analyzing the information provided by FC2 H concerning the appellant's shipboard computer account, these agents seized a computer hard drive, zip drive, and a floppy disk

from the appellant's stateroom. Forensic examination of these items revealed over 50,000 image files, some of which contained female minors in sexually suggestive posses, along with numerous Internet "shortcuts" to child pornography websites. Also found were temporary Internet files for teen and preteen pornography websites entitled "Lo-li-ta.com," "youngandwild.com," and "underage.org."

After being advised by the NCIS agents that he was suspected of possessing child pornography, the appellant waived his Article 31b, UCMJ, rights and admitted that he browsed the Internet for images of naked young girls. He further admitted that he found these images "erotic" and looked for "girls primarily aged 10-13." As he stated, "I was interested in their whole package-their face and their body. I liked and was stimulated by girls both with a little body development and pubic hair and some with no development or public hair. During this time, I would masturbate sometimes while looking at the images. I would become aroused by images of the girls naked." Prosecution Exhibit 13, p. 2.

From October 1999 until his illicit computer files were discovered, the appellant downloaded child pornography from the Internet using the computer in his shipboard stateroom, as well as a computer in the Engineering Log Room. *Id.* The appellant conceded that this activity lasted for nearly 13 months, stating that the images he viewed and downloaded "... became more graphic with the girls having their genitalia exposed and/or engaged in sex acts with adults - some oral copulation and some in sexual intercourse." *Id.*

Following his initial confession to the NCIS agents, the appellant permitted them to search his off-base apartment. This search yielded additional computer drives and disks containing child pornography (some of which duplicated photos discovered on the appellant's ship board account), as well as computer printouts of photographs of nude girls. In a follow-up confession to NCIS, the appellant explained that he downloaded 1700-1800 images while on board the USS DAVID R. RAY and that they were of girls "ranging in age from 10-15." PE 19, p. 2. He also admitted that at the time he accessed these images, he knew that it was a crime and that "5%" of the images were of child pornography. *Id.* at 3.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd.*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did

the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

Child pornography is any visual depiction, including photographs and pictures, which depict minors engaging in sexually explicit conduct. *See* 18 U.S.C. § 2256(8)(A) (2000). Sexually explicit conduct includes "sexual intercourse" and "lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2256(2)(A)(v). Lascivious exhibition includes all depictions featuring children, clothed or unclothed, as sexual objects, to arouse or satisfy sexual cravings. *United States v. Knox*, 32 F.3d 733, 745-46 (3d Cir. 1994); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

Obscene material is not afforded constitutional protection; however, material that has artistic value is protected. *Miller v. California*, 413 U.S. 15, 24 (1973). The pictures submitted with the appellant's clemency matters[2] were purportedly published in photography books as bona fide artistic expression.[3] In contrast, the images presented as evidence against the appellant as Prosecution Exhibits 4-7, 9, 11, 17, and 18 depict young females prominently displaying their genitals and exposed pubic areas. The young females depicted in many of the images were posed "specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer." *Knox*, 32 F.3d at 747. Several of the disputed images also involve young females engaged in sexual intercourse and oral sodomy.

Furthermore, the accused acknowledged in his statement to NCIS that he believed the images contained child pornography because he searched for females between the ages of 10-13 and that he was sexually aroused by the images. And while the images offered by the appellant in his clemency submission may have been commercially available, we reject his argument that this necessarily places them beyond the pale of child pornography prohibited by statute. Simply put, child pornography is likewise readily available on the Internet and elsewhere, commercially and otherwise. Such a feature provides no constitutional imprimatur for their possession. Moreover, the images that the appellant downloaded and possessed are easily distinguishable from the "art works" presented by the appellant on appeal. This assignment of error is without merit.

---

[2] See Mr. Fidell's letter to the convening authority dated October 12, 2001.

[3] DAVID HAMILTON, TWENTY-FIVE YEARS OF AN ARTIST (May 1998). We need not decide whether the photographs contained in this collection fall outside the realm of child pornography because the photos possessed by the appellant are qualitatively distinct given their focus on the children's genitalia and the sexual acts that several of the photographs depict.

Child Pornography Conviction

The appellant contends that the findings and sentence must be set aside because the definitions applicable to the child pornography statute under which he was convicted are unconstitutional. We agree, in part, and will take corrective action in our decretal paragraph.

We are guided by the holding of our superior court in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). After *O'Connor* "the 'actual' character of the visual depictions is now a factual predicate to any plea of guilty under the [Child Pornography Prevention Act] (CPPA)." *Id.* at 453. Although ours is not a guilty plea case, the appellant was convicted of violating Article 134, UCMJ, by possessing child pornography, as defined by 18 U.S.C. § 2256, in violation of 18 U.S.C. § 2252(a)(5)(B), *i.e.*, the CPPA. The holding in *O'Connor* was driven by the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, which struck down some of the definitional sections of the CPPA, including some of the definitions relevant to the case before us. *See Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). Since both *Free Speech Coalition* and *O'Connor* were decided after the appellant's trial, the military judge had no reason to deviate from the applicable, albeit unconstitutional, statutory definitions of child pornography contained in the CPPA. Thus, the Additional Charge and Specification 2 under that charge must be set aside and dismissed.

This result, however, does not end our review of the appellant's conviction because he was also found guilty of conduct unbecoming an officer, in violation of Article 133, UCMJ, by possessing child pornography. The elements of Article 133 are relatively straightforward:

> (1) That the accused did or omitted to do certain acts; and
>
> (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming and officer and gentleman.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 59(b).

We have no difficultly concluding that at a minimum the appellant attempted to wrongly possess child pornography. We reach this determination by examining the pictures properly admitted as Prosecution Exhibits, coupled with the appellant's admissions that he searched the Internet for pictures of nude girls, ages 10-15, engaged in sex acts with adults. He found these photographs erotic, became sexually aroused by them, and masturbated while viewing them. We also have no difficulty concluding that the appellant's conduct, under the circumstances proven by the prosecution, constituted conduct unbecoming an officer and gentleman. First, the appellant's attempted possession of child pornography was facilitated by his status as an officer and his authorization to use Government computers at

several locations on board USS DAVID R. RAY. And second, the appellant's collection of pornography was so extensive as to draw the attention of the ship's enlisted computer systems administrator during routine system maintenance.

We reach these determinations notwithstanding the definitional limitations imposed by *Free Speech Coalition* and *O'Connor. See United States v. Bilby,* 39 M.J. 467 (C.M.A. 1994)(affirming a conviction for violation of Article 133, UCMJ, conduct unbecoming an officer and gentleman, of an officer who solicited the distribution of child pornography, despite finding the underlying statute to be arguably unconstitutional); *see also United States v. Sollmann,* 59 M.J. 831 (A.F.Ct.Crim.App. 2004) (citing *Bilby* to sustain a conviction based on an enlisted accused's guilty plea to possessing child pornography under Article 134, UCMJ, despite finding the underlying statute to be unconstitutional), *rev. denied*, 60 M.J. 369 (C.A.A.F. 2004).

In summary, as described above, the appellant searched for, and received, images of unseemingly child pornography. He also continued to maintain possession, and to access, these contraband images on his computer drives and Government computer account to arouse his sexual desires. We are convinced that the appellant's underlying conduct of possessing and receiving these images on board a Navy warship "independently satisfied the requirements of Article 133, UCMJ, regardless of the constitutionality of the federal statute." *Sollmann,* 59 M.J. at 835. As held by our superior court in *Bilby:*

> [w]e do not believe that it seriously can be doubted that a military officer's act ... to violate a Federal statute is disgraceful and dishonorable conduct, *see Parker v. Levy,* 417 U.S. 733, 761, 94 S.Ct. 2547, 2564, 41 L.Ed.2d 439 (1974), without regard for the nature of the statute (that is, what it prohibits) or for the lawfulness of the statute (that is, whether it is ultimately upheld as constitutional). *It is not necessary, under Article 133, that the conduct of the officer, itself, otherwise be a crime.*

Bilby, 39 M.J. at 470 (emphasis added)(citation omitted).

After examining the entire record, we are convinced that the findings of guilty are legally and factually sufficient to support the appellant's conviction of the original Charge and its specification. We are satisfied that there was evidence upon which a factfinder could find beyond a reasonable doubt that the appellant's conduct constituted conduct unbecoming an officer and gentleman. This court is also convinced beyond a reasonable doubt of the appellant's guilt. Therefore, we find that the appellant violated Article 133, UCMJ, by attempting to possess, child pornography on board USS DAVID R. RAY during the period of October 1999 to March 2000.

Improper Sentencing Argument of Government Counsel

During argument on sentencing, the Government counsel argued that the appellant's misconduct increased the "market and demand" for child pornography. Record at 882. The trial defense counsel did not object to this argument nor did he request a curative instruction. The appellant now contends that the Government counsel committed plain error. We disagree.

A prosecutor has a duty to be a zealous advocate for the Government. *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003)(citing *United States v. Nelson*, 1 M.J. 235, 238 (C.M.A. 1975)). However it is improper for Government counsel to attempt to "inflame the passions or prejudices of the court members." *Id*. (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). To demonstrate plain error, the appellant must show that the alleged error was plain and obvious and that it materially prejudiced his substantial rights. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

While the Government counsel's sentencing argument exceeded the evidence properly admitted at trial, we find no plain error. Taken in context, the comments reflect the realities of child pornography, simply, that so long as there is a demand for such depictions, children will continue to be abused. Thus, we find that the trial counsel's argument is a logical inference from the nature of the offenses of which the appellant was convicted.

Even assuming the argument was improper, the trial defense counsel did not object to it or request a curative instruction. The appellant faced a maximum confinement sentence of 6 years, the Government counsel urged a sentence of 30 months confinement, and the members sentence the appellant to confinement for only 12 months. We decline to find plain error under these circumstances and, considering the argument as a whole, we conclude that it did not materially prejudice any substantial right of the appellant. *See* Art. 59(a), UCMJ.

Sentence Appropriateness

The appellant also contends that his sentence to a dismissal is inappropriately severe. While we acknowledge that a dismissal is severe punishment, we find it appropriate for this appellant and his offense.

Sentence appropriateness involves the "'*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)(emphasis added)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully considering the evidence admitted on the merits, in aggravation and in mitigation, including the appellant's unsworn statement, we

conclude that the appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ.

The appellant served as a commissioned officer on board a combatant ship of the U.S. Navy. While on board that vessel, he viewed and downloaded so many images that the ship's computer systems administrator became concerned. The system administrator's subsequent intervention yielded hundreds of depictions of apparent child pornography, including not only nude girls ranging in age from 10-15, but also young females engaged in sex acts with adults. The appellant's actions reflect a profound lack of integrity and abuse of Government resources entrusted to his use and constitute severe misconduct warranting a severe punishment. Despite the extensive evidence provided in mitigation by the appellant and by others on his behalf, especially when viewed in the context of the nature of the affirmed findings, we do not believe that his dismissal or sentence of 12 months confinement is inappropriately severe.

Defense Clemency Submissions

The appellant next contends that a supplemental staff judge advocate's recommendation (SJAR) is required because the staff judge advocate (SJA) failed to comment on legal errors raised in the appellant's clemency package submitted by his trial defense counsel. We disagree.

A convening authority must consider matters submitted by an accused under RULES FOR COURTS-MARTIAL 1105 and 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). *See United States v. Stephens*, 56 M.J. 391, 392 (C.A.A.F. 2002). Our superior court has held that "speculation concerning the consideration of such matters simply cannot be tolerated in this important area of command prerogative." *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989)(citing *United States v. Siders*, 15 M.J. 272, 273 (C.M.A. 1983)). The staff judge advocate must include in the SJAR a statement as to whether any corrective action on the findings or sentence is warranted if the appellant alleges legal error in matters submitted pursuant to R.C.M. 1105. R.C.M. 1106(d)(4).

In this instance, the SJA submitted two supplemental SJARs, the second of which noted legal errors raised by the appellant's voluminous clemency package, specifically citing the pertinent sections of those packages. The SJA also provided his assessment concerning these purported legal errors, recommending no corrective action regarding the findings or sentence. Supplemental SJAR dated 14 Nov 2001. On these facts, we find that an additional supplemental SJAR was not required.

Furthermore, the convening authority's action specifically notes that he considered the numerous clemency submissions from the appellant's military and civilian defense counsel, as well as the recommendations of the SJA. Thus, we find that the appellant's assertion of error is without merit.

Post-Trial Processing Delay

The appellant also contends that he was denied speedy post-trial review of his conviction because the trial counsel held the record of trial for 3 months before forwarding it to the military judge for authentication. He also complains about a 3-week delay in mailing the convening authority's action to his trial defense counsel, speculating that "but for" these delays, the appellant would have been released on parole before the expiration of his sentence to 12 months confinement. Lastly, the appellant complains about the period of time taken by this court to complete its statutory review of his court-martial. Because of these delays, he requests that we disapprove his dismissal. We decline to do so.

In determining if post-trial delay violates the appellant's due process rights, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 1972)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* at 83. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.*

Here, there was a delay of 2 years from the date of sentence to the date the six-volume record of trial was docketed with this court for review. There was an additional delay of nearly 2 years from the date the case was initially briefed by counsel until the decision of this court. We find that the largely unexplained delay alone is facially unreasonable, triggering a due process review. Since there are no explanations for the delay in the record aside from a comment in the SJAR that portions of the record were originally omitted when it was sent to the military judge for authentication, we look to the third and fourth factors. In his response to the SJAR, the appellant first sought sentencing relief due to post-trial delay. Mr. Fidell's letter dated October 8, 2001. He

again raised the issue in his response to the supplemental SJAR. Mr. Fidell's letter dated October 16, 2001. The appellant did not raise the issue again until the submission of his initial brief on 23 September 2002. Nevertheless, we find no evidence of prejudice to the appellant beside his speculative assertion that he "might" have been given parole prior to completing his sentence of 12 months confinement. While we do not condone the largely unexplained delays in this case, including the time required to carefully assess the appellant's assignments of error, we conclude that there has been no due process violation due to the post-trial delay under the circumstances of this case. Granting relief under the facts of this case would be granting a windfall to the appellant.

We are also aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, but we decline to do so. *Id.; United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey* 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Remaining Assignment of Error

We have also carefully considered the appellant's remaining assignment of error contending that the lack of fixed terms for judges of this court violates the 5th Amendment. We find no merit in this contention and decline to provide the requested relief.

Conclusion

Accordingly, we set aside and dismiss the findings of guilty to the Additional Charge and Specification 2 thereunder. The remaining findings of guilty, as approved by the convening authority, are affirmed.

We have reassessed the sentence in accordance with the principles articulated in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). In reassessing the sentence, and in consideration of our corrective action on the findings, we conclude that the appellant is not entitled to any sentencing relief. Having thus reassessed the sentence, we affirm the adjudged sentence, as approved by the convening authority. We order that the supplemental promulgating order accurately

reflect the findings, as modified hereby, of the offenses of which the appellant stands convicted.

Chief Judge DORMAN and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge REDCLIFF participated in the decision of this case prior to transferring from the Court.