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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Wayne D. MCKENZIE
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200101937 Decided 29 March 2004

Sentence adjudged 31 January 2001. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

DAVID P. SHELDON, Civilian Defense Counsel
KAREN L. HECKER, Civilian Defense Counsel
LT MARK FULTON, JAGC, USN, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge sitting alone. Pursuant to his pleas, the appellant was convicted of rape, sodomy, three specifications of committing indecent acts, three specifications of taking indecent liberties, all with a child under the age of 16 years, committing service discrediting conduct on land owned by the United States Government by video-recording himself masturbating for the express purpose of viewing by others, receiving child pornography, possessing child pornography, and two specifications of mailing or transporting child pornography. The appellant's crimes violated Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934, and 18 U.S.C. § 2252A. The appellant was sentenced to confinement for 22 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence and, pursuant to a pretrial agreement, suspended confinement in excess of 20 years for 12 months from the date of trial.

After carefully considering the record of trial, the appellant's six assignments of error, the Government's response, and the appellant's answer, 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.

Insufficient Pleas

In the appellant's first assignment of error, he asserts that each of his pleas of guilty to receiving, possessing, and mailing or transporting child pornography in interstate commerce by computer, in contravention of 18 U.S.C. § 2252A(a)(1) and (2)(A) and (5)(A), cannot be affirmed in light of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and the Court of Appeals for the Armed Forces' decision in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In effect, the appellant is implicitly arguing that the military judge did not sufficiently establish whether he received, possessed, or mailed or transported in interstate commerce by computer, images created using *actual* children, as opposed to *virtual* images. The appellant avers that this court should set aside those findings of guilty, dismiss those specifications, and order a rehearing on sentence. We disagree.

The receipt of images of child pornography by any person is prohibited, in part, if that person knowingly receives:

> (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . . .

18 U.S.C. § 2252A(a)(2). Likewise, the possession of images of child pornography by any person is prohibited, in part, if that person is:

> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government . . . .

18 U.S.C. § 2252A(a)(5). Additionally, the mailing or transporting of images of child pornography by any person is prohibited, if that person:

> (1) knowingly mails, or transports, or ships in interstate or foreign commerce by any means, including by computer, child pornography . . . .

18 U.S.C. § 2252A(a). On 16 April 2002, after the appellant's trial, the Supreme Court decided *Free Speech Coalition*. In *Free Speech Coalition*, the Supreme Court addressed a challenge to two of the four sections of 18 U.S.C. 2256 (Child Pornography Prevention Act (CPPA)), which defines child pornography. Finding

the provisions of 18 U.S.C. § 2256(8)(B) and (D) prohibited a "substantial amount of protected speech," the Supreme Court deemed the challenged language overbroad and unconstitutional. *Free Speech Coalition*, 535 U.S. at 241-42. The Supreme Court's ruling left intact two definitions of child pornography, including the definition in the provision targeting images where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A).

We conclude that, as in 18 U.S.C. § 2252, the various subsections of 18 U.S.C. § 2252A, also "set out the numerous prohibitions designed to prevent child pornography, to forbid every act by which child pornography could adversely affect the United States, and to extend the prohibitions to the maximum extent of Congress' legislative authority under the Commerce Clause." *See United States v. Leco*, 59 M.J. 705, 707-08 (N.M.Ct.Crim.App. 2003).

To prevail here, the appellant must demonstrate "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996)(quoting *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991)). The appellant must "overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson,* 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

The United States Court of Appeals for the Armed Forces has recently set forth its test for the providence of pleas to offenses involving the CPPA in *O'Connor,* 58 M.J. 450, as recently followed by this court in *Leco*, 59 M.J. 705. Our superior court held that, after *Free Speech Coalition*, "[t]he 'actual' character of the visual depictions is now a factual predicate to any plea of guilt under the CPPA." *O'Connor*, 58 M.J. at 453. Our superior court also held that the "plea inquiry and the balance of the record must objectively support the existence of this factual predicate." *Id.* This requirement was not met in *O'Connor*, where the accused merely indicated "the occupants in the pictures *appeared to be* under the age of 18." *Id*.

We now consider whether the military judge's providence inquiry was sufficient to support each of the appellant's pleas to receiving, possessing, and mailing or transporting by computer, images of *actual* children as opposed to *virtual* images, i.e., child pornography, that had been transported in interstate or foreign commerce, or that had been produced using material which had been transported in interstate or foreign commerce. As noted above, the appellant pled guilty to each of the specifications in question.

In effect, the appellant now claims that each of his pleas was improvident, because each of the specifications in question incorporated the unconstitutional definitions of 18 U.S.C. §

2256. The appellant implies that the military judge left open the possibility that he was pleading guilty under an unconstitutional provision of the CPPA, and that the military judge failed to establish a basis for whether the real harm of child pornography was even present in this case, i.e., whether children were actually used to produce the explicit images. With regard to the images that are the subject of the specifications in question, the appellant openly admitted to the military judge that each of the images at issue are child pornography, albeit based on a definition containing the now-unconstitutional portions addressed by the Supreme Court in *Free Speech Coalition*. Record at 138, 151-60. Nonetheless, we are satisfied that the images at issue in the specifications in question meet the constitutional portion of the definition, and are images of child pornography created through the use of *actual* children. This, we base on the military judge's inquiry into those specific offenses and a stipulation of fact. Prosecution Exhibit 1. With regards to the specifications in question, the appellant stipulated that the "visual depictions" that he received, possessed, and later mailed or transported, were of "identifiable minors engaged in sexually explicit conduct, [which] include[ed] sexual intercourse, digital penetration, and oral sex between minor girls and adults[,]" at the time he received and possessed the visual depictions. *Id*. at Paragraphs 26 and 29.

In the appellant's case, as in *United States v. Martens*, 59 M.J. 501, 508 (A.F.Ct.Crim.App. 2003), *pet. granted*, 59 M.J. 30 (C.A.A.F. 2003), the appellant never indicated that the pictures in question were child pornography only because they *appeared to be actual* children, nor does the record indicate that the images in question are "computer-generated" or *virtual* photographs, despite the military judge failing to define suitable terms for the appellant. In short, the facts and evidence adduced by the military judge during the providence inquiry sufficiently demonstrate the images at issue depict *actual* children. There was absolutely no suggestion by the appellant during the providence inquiry or any other evidence offered at trial suggesting the images were computer generated, "morphed," or otherwise fabricated. Nor did the Government proceed on the theory that the images in question were anything other than images depicting *actual* children engaged in sexually explicit conduct.

After conducting our own evaluation of the evidence presented in aggravation for sentencing, Prosecution Exhibit 5, we find that the images show *actual* children. Obviously, in each instance, a sexually-explicit image of an *actual* child was produced using that child. There certainly was no issue concerning how the images were advertised, promoted, presented, described, or distributed. *See* 18 U.S.C. §§ 2252A and 2256.

In order to determine whether there is a substantial basis in law and fact for questioning the appellant's guilty pleas, we must also decide whether the guilty pleas were based, in whole or

in part, upon the portions of the definition of child pornography later struck down in *Free Speech Coalition*, as defined above. After reading the elements of the specification at issue, the military judge asked the appellant whether he understood the elements, to which the appellant replied, "Yes, sir, I do." *Id*. at 142. The military judge then asked the appellant if those elements correctly described what he did, to which the appellant replied, "Yes, sir, they do." *Id*. Finally, the military judge asked the appellant, "do you believe and admit that taken together the elements that I have listed for you, the stipulation of fact [(Prosecution Exhibit 1)], and the matters we discussed correctly describe what you did on each occasion?" *Id*. at 169. To which the appellant replied, "Yes, sir." *Id*. Further, after inquiry into the terms of the appellant's pretrial agreement, the military judge asked the appellant if he had any questions concerning his pleas of guilty, his pretrial agreement, or "anything we have discussed[,]" which included any questions concerning the elements and definitions, to which the appellant responded, "No, sir." *Id*. at 177.

The appellant's implicit assertion that the military judge's providence inquiry left open the possibility that he pled guilty under an invalid definition of child pornography is without merit. The provision under the CPPA prohibiting the receipt of visual depictions, the production of which involves minors engaged in "sexually-explicit" conduct, was untouched by the Supreme Court's ruling. The appellant's conduct clearly fell under that category of contraband "speech." The appellant's implicit effort to distinguish the images depicting *actual* children engaged in "sexually-explicit conduct" as possibly being *virtual* images, merely because the military judge did not specifically elicit from him during the providence inquiry that the images were not *virtual* images, is rejected by this court, as our superior court and other service courts have rejected other such similar efforts in the past. *See United States v. James,* 55 M.J. 297, 300-01 (C.A.A.F. 2001); *see also United States v. Appeldorn,* 57 M.J. 548, 550 (A.F.Ct.Crim.App. 2002)*; and United States v. Coleman,* 54 M.J. 869, 872 (Army Ct.Crim.App. 2001), *rev. denied,* 55 M.J. 476 (C.A.A.F. 2001).

At this juncture, we conclude that the stipulation of fact and the providence inquiry, which sufficiently describe the actual character of the visual depictions charged, objectively support the appellant's pleas. Therefore, we decline to grant relief. Further, we find the appellant's fifth assignment of error, that all of his guilty pleas are improvident, to be without merit. We conclude that the military judge did not abuse his discretion when he accepted the appellant's guilty pleas. As such, we decline to grant relief.

Cruel and Unusual Punishment

In the appellant's second assignment of error, he asserts that he was subjected to pretrial punishment, constituting,

perhaps, cruel and unusual punishment, when the conditions of his confinement violated Article 13, UCMJ, and that he should have been provided personal access to a law library. The appellant avers that this court should order 4-days credit for each day of the 251 days he spent in pretrial confinement under these conditions. Alternatively, the appellant opines that we should order a fact-finding hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) into this matter. We disagree.

Article 13, UCMJ, states:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Article 13, UCMJ, "prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial." *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000), *cert. denied*, 531 U.S. 993 (2000). Normally,

> [F]ailure at trial to seek sentence relief for violations of Article 13 waives that issue on appeal absent plain error. Having said that, however, we urge all military judges to remember that nothing precludes them from inquiring *sua sponte* into whether Article 13 violations have occurred, and prudence may very well dictate that they should.

United States v. Inong, 58 M.J. 460, 465 (C.A.A.F. 2003).

Article 55, UCMJ, pertaining to cruel and unusual punishment, states:

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel and unusual punishment, may not be adjudged by a court martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purposes of safe custody, is prohibited.

Concerning the issue of whether the appellant has been punished in violation of Article 55, UCMJ, or the Eighth Amendment to the United States Constitution, we review *de novo*. *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002)(citing *United States v.*

White, 54 M.J. 469, 471 (C.A.A.F. 2001). Generally, military courts look to federal case law interpreting the Eighth Amendment to decide claims of an Article 55 violation. *Id.; see also United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000). As such, we will consider the appellant's claims of an Eighth Amendment violation and an Article 55 violation, together.

"Pretrial confinement, imposed and administered in a lawful manner, is not *per se* cruel or unusual." *Smith*, 56 M.J. at 292 (citing *Avila*, 53 M.J. at 101-02 (pretrial confinement, even in solitary confinement, not *per se* cruel or unusual)). An appellant must present evidence that he was treated in a cruel or unusual manner while in pretrial confinement. *Id*.

Before sentencing arguments, the military judge conducted the following colloquy with the trial counsel and both the civilian defense counsel and the appellant concerning pretrial confinement:

> MJ: [I] calculate 251 days. Is that what both sides come up with also?
> TC: Yes, sir.
> CC: Yes, sir.
>
> MJ: Okay. Has there been any other type of pretrial restraint in this case?
> TC: No, sir.
> CC: No, sir.
>
> MJ: Has there been any other [sic] type of pretrial punishment in this case?
> CC: No, sir.
>
> MJ: And you agree with that [trial counsel]?
> TC: Yes, sir.
>
> MJ: And Staff Sergeant McKenzie, you agree with that also, you've not been subject to any other [sic] punishment in this case other than the pretrial confinement?
> ACC: No, sir.
>
> MJ: No. No as in there has been no other [sic] pretrial punishment; right?
> ACC: Yes, sir.

Record at 183. We find this colloquy more than sufficient to determine what, if any, Article 13 and Article 55, UCMJ, issues existed in the appellant's case.

With regards to the appellant's assertion that he should have been provided personal access to a law library, his argument is simply not well-founded. First, throughout his court-martial, pretrial, trial, and post-trial, the appellant has been

continuously provided and represented by a full-time trial defense counsel. Whether, on appeal to this court, the Court of Appeals for the Armed Forces, or the United States Supreme Court, the appellant is provided and represented by a full-time appellate defense counsel. Art. 70, UCMJ; *see also United States v. Grostefon,* 12 M.J. 431, 436-37 (C.M.A. 1982).

Because the appellant has been continuously provided with free legal representation throughout the pretrial, trial, post-trial, and now, appellate phases of his case, the Government has had no specific duty to also provide him with a law library. Based on the aforementioned, we find that the appellant's pretrial confinement conditions were not more rigorous than necessary to ensure his presence at trial, nor did those conditions amount to cruel and unusual punishment. Furthermore, we find that the appellant affirmatively waived this issue and, finding no plain error, he is not entitled to relief. *Inong*, 58 M.J. at 461.

In the appellant's sixth assignment of error, he asserts that he was subjected to cruel and unusual punishment while in post-trial confinement. The appellant avers that this court should order 1-day credit for each day of the 462 days he spent in the old United States Military Disciplinary Barracks in post-trial confinement under conditions constituting cruel and unusual punishment. We disagree.

Our superior court has held that the military courts of criminal appeals have jurisdiction to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55, UCMJ. *United States v. Washington*, 54 M.J. 469, 472 (C.A.A.F. 2001). An appellant who asks this court to review prison conditions must establish a "clear record of both the legal deficiency in administration of the prison and the jurisdictional basis for action." *United States v. Miller,* 46 M.J. 248, 250 (C.A.A.F. 1997). "[A] prisoner must seek administrative relief prior to invoking judicial intervention. In this regard, the appellant must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938." *Id*. (quoting *United States v. Coffey,* 38 M.J. 290, 291 (C.M.A. 1993). Article 138, UCMJ, concerning complaints of wrongs, provides that:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior officer, who *shall forward* the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction *shall examine* into

> the complaint and take proper measures for redressing the wrong complained of; and he *shall*, as soon as possible, *send* to the Secretary concerned a true statement of that complaint, with the proceedings had there on.

(Emphasis added).

In *Estelle v. Gamble,* 429 U.S. 97 (1976), the Supreme Court said that the framers' intent behind the Eighth Amendment was to prevent barbaric and torturous forms of punishment. More recently, the standard for what constitutes cruel and unusual punishment has developed into more than physical torture. Instead, the current standard is that the Eighth Amendment prohibits "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' . . . or which 'involve the unnecessary and wanton infliction of pain[.]'" *Id.* at 102-03 (citations omitted).

In *Farmer v. Brennan,* 511 U.S. 825, 832 (1994), the Supreme Court held that the Eighth Amendment "does not mandate comfortable prisons," but "neither does it permit inhumane ones[.]" The Court defined two factors that are necessary for an Eighth Amendment claim to succeed regarding conditions of confinement. First, there is an objective component, where an act or omission must result in the denial of necessities and is "objectively, sufficiently serious." *Id.* at 834 (quoting *Wilson v. Seiter,* 501 U.S. 294, 298 (1991)). The second component is subjective, testing for a culpable state of mind. "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety[.]" *Id.* (quoting *Wilson*, 501 U.S. at 302-03). Under the standard articulated by the Supreme Court in *Farmer,* "the prison guards and officials must be consciously aware of the risk or danger to the inmate and choose to ignore it; they must have been aware of the harm or risk of harm caused appellant, and continued anyway." *United States v. Sanchez,* 53 M.J. 393, 396 (C.A.A.F. 2000).

Before being entitled to relief based on a claim of unlawful punishment, an appellant must demonstrate he has exhausted all administrative remedies available, including the prisoner grievance system and the complaint process under Article 138, UCMJ. *White,* 54 M.J. at 472. We find that the appellant has neither made nor attempted such a showing. The appellant has failed the exhaustion requirement, which is to encourage the resolution of these issues early and to develop an adequate record upon which reviewing authorities can rely. *See Miller,* 46 M.J. at 250. Further, the appellant's imprudent attempt to base his aforementioned arguments partly grounded on a general court-martial judge's decision on a pretrial motion for appropriate relief in an unrelated case[1] as authority that would implicitly

[1] Appellant's Motion to Attach Appellate Exhibits of 30 Sep 2003 (Appellate Exhibit 3 (*United States v. ET2 D.H. Maxon II, U.S. Navy*, Atlantic Judicial Circuit, Navy-Marine Corps Trial Judiciary)).

bind this court or our superior court, is not well-received. Accordingly, we decline to grant relief.

Post-Trial Delay

In the appellant's third assignment of error, he asserts that he is entitled to sentence credit due to unwarranted post-trial delay. The appellant avers that this court should order sentence credit of 12 months. We disagree.

A military appellant has a right to timely review of the findings and the sentence. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001), *cert. denied*, 534 U.S. 1169 (2002). In order to obtain relief as an error of law under Article 59(a), UCMJ, however, the appellant must show actual prejudice in addition to unreasonable and unexplained delay. *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993). The appellant, who did not raise the issue before the convening authority acted, has not shown that the delay was unreasonable. Accordingly, we find that the unexplained delay was not unreasonable *per se*; and, even assuming *arguendo* that there has been unreasonable and unexplained delay, the appellant still has failed to show any evidence of actual prejudice.

Our superior court has concluded that this court may grant sentence relief for unreasonable and unexplained delay under Article 66(c), UCMJ, even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Here, we find no harm of any kind related to the delay, nor do we see any other basis for affording the appellant relief for any post-trial processing delays that occurred in his case. Therefore, we decline to grant relief on this ground. *United States v. Bigelow*, 57 M.J. 64, 69 (C.A.A.F. 2002).

Sentence Appropriateness

In the appellant's fourth assignment of error, he asserts that his sentence is inappropriately severe. The appellant avers this court should only approve a sentence that includes confinement for 12 years. We disagree.

A court-martial is free to impose any legal sentence that it determines is fair and just. *United States v.Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964); R.C.M. 1002. "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 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)). The appellant has been afforded that right. As such, we decline to grant relief.

Court-Martial Order

Although not assigned as error by the appellant, we note that his court-martial order incorrectly indicates that the appellant was found not guilty of Additional Charge II, even though he was found guilty of Specifications 2 and 3 of Additional Charge II. While we are convinced that no error materially prejudicial to the substantial rights of the appellant was committed, the appellant is entitled to have his "official records correctly reflect the results of [his] proceedings." *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Accordingly, we shall order corrective action in our decretal paragraph.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority. We order that the supplemental promulgating order accurately reflect the findings of the appellant's court-martial. We further order Investigative Exhibits 9 and 11 of the Article 32, UCMJ, investigation and Prosecution Exhibits 3, 4, and 5, sealed.

Judge VILLEMEZ concurs.

DORMAN, Chief Judge (concurring in the result):

I concur in the result reached by the court. I write separately concerning the appellant's second and sixth assignments of error. I would summary dispose of the second assignment of error based in waiver. *United States v. Inong,* 58 M.J. 460 (C.A.A.F. 2003). I would summarily dispose of the appellant's sixth assignment of error based upon his failure to exhaust administrative remedies. *United States v. Miller*, 46 M.J. 248 (C.A.A.F. 1997).

For the Court

R.H. TROIDL
Clerk of Court