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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Shawn D. CROCKETT
Intelligence Specialist Second Class (E-5), U.S. Navy

NMCCA 200201142 Decided 20 April 2005

Sentence adjudged 22 August 2001. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

REDCLIFF, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial of wrongful possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and 18 U.S.C. § 2252A(a)(5)(B). The military judge sentenced the appellant to confinement for 15 months, reduction to pay grade E-1, and a bad conduct discharge. The convening authority approved the sentence and, pursuant to the pretrial agreement, suspended confinement in excess of 12 months.

We have carefully examined the record of trial, the assignment of error contending that the appellant's plea of guilty to unlawful possession of photographs depicting child pornography was improvident, and the Government's response. We 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 was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Providence Inquiry

The appellant now contends that he did not admit that the images were of actual children and that, therefore, his pleas were improvident under *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). We find otherwise.

We begin our analysis noting that this is a guilty plea case. A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)(citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

A military judge, however, may not "arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for acceptance of the plea. *United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995).

Because this guilty plea was to a charge of possession of child pornography, we are also 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,* "[t]he 'actual' character of the visual depictions is now a factual predicate to any plea of guilty under the CPPA [Child Pornography Prevention Act]." *Id*. at 453. The appellant was convicted of violating 18 U.S.C. § 2252A(a)(5)(B), which is one section of that act. The holding in *O'Connor* was driven by the Supreme Court's decision in *Free Speech Coalition*, which struck down some of the definitional sections of the CPPA, but not the one relevant to the case before us. *See O'Connor*, 58 M.J. at 451.

In our review of the record, we determined that the military judge accurately listed the elements and defined the terms contained in the elements for the offense to which the appellant plead guilty. Although this case was tried before the Supreme Court decided *Free Speech Coalition*, the military judge anticipated the definitional issues concerned and addressed them with the trial defense counsel. The trial defense counsel expressly stated that the charge against the appellant did not involve violation of CPPA subparts b or d, prohibiting images "appearing to be or conveying the impression" of minors engaged in sexually explicit conduct. Record at 15.

We also determined that the appellant indicated an understanding of the elements of the offense and the pertinent legal definitions, stating that the elements correctly described the offense he committed. Record at 20-21. The appellant expressly agreed that the photos he possessed were encompassed by the definition of child pornography provided by the military judge, namely, that they were of "identifiable" minors who were "actual" persons recognizable "by the person's face, likeness, or other distinguishing characteristic such as a unique birthmark or other recognizable feature." Record at 18-20. We further note that the military judge conducted a lengthy and probing inquiry into the providence of the appellant's guilty plea. During this inquiry the appellant clearly stated, in his own words, the circumstances surrounding his possession of child pornography.

Specifically, the appellant admitted that he downloaded 185 photographic images and 18 "video clips" of children engaged in sexually explicit conduct and saved them on a "jaz" disk. Record at 27. The appellant obtained the images from the internet using "different chat programs and different web sites and news groups ...." *Id.* at 22. He possessed the images from May 1998 to August 1999. *Id.* He planned to take the disk containing the images on board USS ABRAHAM LINCOLN. Before he could do so, the disk was discovered by the appellant's wife, who notified local authorities. *Id.* at 29; Prosecution Exhibit 2. The appellant expressly acknowledged that he knew the images were of children under the age of 16, stating "You look at the pictures and **you could tell that the people engaged in the pictures were indeed minors**." *Id.* at 28 (emphasis added). Conceding that each of the images depicted someone under the age of 16, the appellant also admitted, "All of the pictures here, they were of minors undressed or engaged in sexual activity, sir." *Id.* at 29-30.

Based upon our review of the entire record, including the images and video clips, we find there is no basis to question the appellant's admissions that they were of actual minors and that his plea of guilty is provident. *See United States v. Coleman*, 54 M.J. 869, 873 (Army Ct.Crim.App. 2001). Thus, we find no merit in the assigned error.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court