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

BEFORE

Charles Wm. DORMAN **R.C. HARRIS** **A. DIAZ**

UNITED STATES

v.

Brandon G. LEAL
Seaman (E-3), U.S. Navy

NMCCA 200202376 Decided 13 April 2005

Sentence adjudged 5 April 2002. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, NAS, Jacksonville, FL.

CAPT ROGER LINN, JAGC, USNR, Appellate Defense Counsel
Maj J.ED. CHRISTIANSEN, USMC, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

DIAZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, violating a lawful general regulation (using a Government computer to view images of children engaging in sexually explicit conduct), damaging nonmilitary property, driving while drunk, larceny, unlawful entry, possessing child pornography, and false swearing, in violation of Articles 86, 92, 109, 111, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 909, 911, 921, and 934, and 18 U.S.C. § 2252(a)(4)(A). The military judge sentenced the appellant to confinement for 40 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence, but suspended all confinement in excess of 30 months for 30 months from the date of the adjudged sentence, in accordance with the terms of the pretrial agreement.

The appellant asserts that his plea to the unlawful possession of child pornography was improvident because the

military judge failed to elicit facts to prove that (1) the images found in the appellant's possession were those of actual children; and (2) that these children were actually engaged in sexually explicit conduct.

We have carefully considered the record of trial, the appellant's sole assignment of error, the Government's response, and the appellant's reply. 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. Arts. 59(a) and 66(c), UCMJ.

Background

From March to August of 2001, the appellant was at sea on board USS HALYBURTON (FFG 40). While on liberty in various overseas ports of call, the appellant accessed child pornography sites on computers provided by Internet cafes. He used computer diskettes that he stole from the ship's inventory to download over 80 images of child pornography. The appellant then brought the diskettes back to the ship and viewed them on a computer located on the vessel. Authorities discovered the diskettes following the appellant's apprehension for unlawfully entering a Mayport, Florida public middle school in the middle of the night and damaging a door leading to the girls' locker room.

Discussion

For this court to set aside a finding based upon a guilty plea, the record of trial must show a substantial basis in law and fact for questioning the guilty plea. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

Where an accused is charged with possessing child pornography under the Child Pornography Prevention Act (18 U.S.C. §§ 2251-2260 (2000))(hereinafter the "CPPA"), our superior court requires that the "actual" character of visual depictions be a necessary factual predicate to any plea of guilty. *United States v. O'Connor,* 58 M.J. 450, 453 (C.A.A.F. 2003).[1] Accordingly, before we may accept the appellant's plea in this case, we must be satisfied that the plea inquiry and the balance of the record objectively support the existence of this factual predicate. *Id.*

[1] The holding in *O'Connor* followed the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition,* the Supreme Court concluded that the First Amendment prohibits any prosecution under the CPPA based on "virtual" or computer-generated simulations of child pornography. *O'Connor*, 58 M.J. at 452.

Specification 1 of Charge VIII alleges that the appellant knowingly possessed one or more computer disks containing visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(A). Because this case was tried before the *Free Speech Coalition* decision established the critical significance between "actual" versus "virtual" child pornography, the military judge did not address this distinction during the appellant's providence inquiry. This omission does not end the inquiry, however, provided that the plea inquiry and the balance of the record otherwise objectively support the plea. We conclude that they do.

As an initial matter, and in marked contrast to the plea colloquy found deficient in *O'Connor,* the military judge here did not read or otherwise refer to the definitions contained in 18 U.S.C. § 2256(8) and found to be unconstitutional in *Free Speech Coalition*. *See United States v. Irvin,* 60 M.J. 23, 26 (C.A.A.F. 2004)(affirming guilty plea to child pornography charge pled as Article 134 Clause 2 offense, in part because the military judge made no reference to unconstitutional language of 18 U.S.C. § 2256(8)). *See also United States v. Escolar,* 60 M.J. 328 (C.A.A.F. 2004)(summary disposition)(affirming conviction on similar grounds).

After listing a number of definitions related to the offense, the military judge advised the appellant as follows:

> MJ: The offense requires you to knowingly possess matter that contains the visual depiction of a minor engaged in sexually explicit conduct, and to have known that the visual depiction was of a minor engaged in such conduct.
>
> . . . .
>
> However, it is not required that you knew the actual age of the person in the visual depiction, but you must have known or believed the person to be a minor.

Record at 81-82.

During the providence inquiry (and as part of a stipulation of fact admitted in evidence), the appellant admitted that he sought out and downloaded images of children engaged in sexually explicit conduct. Record at 83; Prosecution Exhibit 1 at 5. At no point in the inquiry did the appellant suggest that the images depicted anything other than actual children. Instead, the appellant agreed that the term "child pornography" meant the "visual depiction[] of minors engaged in sexually explicit conduct." Prosecution Exhibit 1 at 5. He further admitted that the production of the visual depictions involved the use of minors engaged in sexually explicit conduct. *Id.* at 6.

When the military judge advised him that it was the Government's burden to prove that the appellant knew the material he possessed was of a minor engaged in sexually explicit conduct, the appellant responded that he understood, but that he was willing to admit that fact. Record at 84. At that point, the following colloquy ensued:

> MJ: How did you know that?
> ACC: It was obvious.
>
> MJ: It was obvious, they looked like children, right?
> ACC: Yes, sir.
>
> MJ: No question in your mind?
> ACC: No, sir.
>
> MJ: And, clearly, the conduct they were engaging in was sexually explicit conduct, no doubt at all?
> ACC: No, doubt.[2]

Record at 84.

The appellant seizes on this portion of the inquiry, arguing that his concession that "they looked like children" merely suggests his uncertainty as to whether they were actual or virtual minors. Appellant's Reply Brief of 8 July 2004 at 2. That claim, however, misapprehends the context of the military judge's inquiry. The clear focus of the military judge's question was to dispel any uncertainty as to the ***age*** of the individuals depicted in the images, so as to satisfy himself that the appellant knowingly possessed child pornography. While the military judge's choice of language was perhaps unfortunate in the subsequent constitutional glow of *Free Speech Coalition,* we conclude that it does not raise a substantial basis for questioning the appellant's plea.

In any event, even if the military judge's question raises some doubt on this issue (notwithstanding the military judge's understandable failure to discuss the actual/virtual distinction with the appellant), the subsequent statements of the appellant and his counsel in this record effectively dispel any basis for rejecting the plea.

O'Connor directs this Court to review both the plea inquiry and the "balance of the record" when considering the factual predicate for the appellant's plea. 58 M.J. at 453. In this case, we find the appellant's unsworn statement given during the

[2] This admission by the appellant is sufficient to dispose of the second prong of the assigned error, i.e. that the military judge failed to determine whether the images actually portrayed sexually explicit conduct. Indeed, the graphic images themselves (attached as Prosecution Exhibit 5) leave little room for doubt.

presentencing portion of the trial, as well as his trial defense counsel's sentencing argument, particularly telling.

Before proceeding further, however, we pause to consider the relevant legal principles. We are well aware of those cases requiring appellate courts to scrutinize an appellant's unsworn statement for inconsistencies related to the plea. *See generally Prater,* 32 M.J. at 436; *United States v. Jemmings,* 1 M.J. 414 (C.M.A. 1976). That said, we see no reason why this court may not also consider such statements to confirm the factual basis for a plea. *See, e.g., United States v. Rios,* 33 M.J. 436, 440 (C.M.A. 1991)(rejecting the accused's effort to invalidate his plea to attempted robbery on the basis of statements made during the providence inquiry suggesting a defense of voluntary abandonment, finding that there were sufficient uncontested facts--contained either in the "guilty-plea responses, the stipulation of fact, or [the accused's] unsworn sentencing statement -- to demonstrate, *as a matter of law*," that the accused's plea was provident)(emphasis in original).[3]

In his unsworn statement, the appellant apologized to the children depicted in the images, telling the military judge that "these kids had a horrible childhood." Record at 136. Such an apology would have been disingenuous at best if the appellant truly believed (as he now contends) that the children in the images did not exist. Moreover, in his sentencing argument, the appellant's defense counsel conceded to the military judge that the damage to these children "has already been done, the children are damaged long before the accused ever opened that file." *Id.* at 146. Thus, at trial, both the appellant and his trial lawyer effectively disavowed the factual basis for the very issue that the appellant now champions on appeal.

In rejecting this assignment of error, we also note that the military judge considered the images in question as part of the Government's case in aggravation, and he concluded that they were in fact images of children. *Id.* at 153. After reviewing the same images, we are convinced that they depict actual children. *United States v. Leco,* 59 M.J. 705, 709, (N.M.Ct.Crim. App. 2003); *United States v. Martens,* 59 M.J. 501, 508 (A.F.Ct.Crim.App.), *rev. granted,* 59 M.J. 30 (C.A.A.F. 2003). Accordingly, on the basis of the entire record, we find that the military judge did not abuse his discretion in accepting the appellant's guilty plea and we discern no substantial basis for rejecting the plea on appeal.

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[3] While we recognize that the appellant was not under oath during this portion of trial, we do not find this anomaly particularly relevant. The requirement of an oath during the plea colloquy is "not designed to benefit an accused, but to subject an accused to the possibility of a perjury prosecution for false testimony rendered in the providence inquiry." *United States v. Riley,* 35 M.J. 547, 548 (A.C.M.R. 1992)(affirming accused's conviction notwithstanding the military judge's failure to place the accused under oath during the providence inquiry).

Conclusion

Accordingly, for the reasons set forth above, we affirm the findings and sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court