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

BEFORE

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

UNITED STATES

v.

Matthew M. MOORE
Corporal (E-4), U.S. Marine Corps

NMCCA 200300108 Decided 22 June 2005

Sentence adjudged 11 March 2002. Military Judge: J.G. Baker. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3rd Marine Division (-)(Rein), Okinawa, Japan.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR MARY GRACE MCALEVY, JAGC, USNR, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a general court-martial, convicted the appellant, in accordance with his pleas, of violating the Department of Defense Joint Ethics Regulation, a lawful general order prohibiting the use of U.S. Government communication systems to access pornographic material, making a false official statement, and three specifications of wrongfully receiving child pornography. The appellant's crimes violated Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934, and 18 U.S.C. § 2252A. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 40 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the adjudged sentence and, in accordance with the terms of a pretrial agreement, suspended confinement in excess of 24 months for the period of confinement served plus 12 months.

We have examined the record of trial, the appellant's single assignment of error that the military judge conducted an insufficient providence inquiry into the appellant's wrongfully

receiving child pornography, and the Government's response. We conclude that the providence inquiry conducted by the military judge into Specifications 1, 2, and 3 of Charge III (receiving child pornography) under 18 U.S.C. § 2252A was deficient *ex post facto*. We shall take corrective action in our decretal paragraph. We conclude that, subject to our corrective action below, no error materially prejudicial to the substantial rights of the appellant remains. *See* Arts. 59(a) and 66(c), UCMJ.

Providence Inquiry

In the appellant's single assignment of error, he asserts that his pleas to Specifications 1, 2, and 3 of Charge III, wrongfully receiving child pornography, were improvident, because the military judge failed to establish a factual basis that the images the appellant "possessed" (sic) were of "actual" children. The appellant avers that this court should set aside the findings of guilty to Specifications 1, 2, and 3 of Charge III and reassess the sentence. We only agree that the military judge did not, *ex post facto*, conduct an inquiry sufficient for findings of guilty under Charge III for violations of 18 U.S.C. § 2252A. We, however, do not agree that Specifications 1, 2, and 3 of Charge III must be dismissed.

Specifications 1, 2, and 3 of Charge III allege the receipt of child pornography, as defined in 18 U.S.C. § 2256(8). In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002), decided shortly after the appellant's trial, the Supreme Court held that the ban on sexually explicit images that *appeared to* depict minors, but were not produced using minors, as child pornography under 18 U.S.C. § 2256(8)(B), was constitutionally overbroad since it proscribed speech which was neither actual child pornography nor obscene and thus abridged the freedom to engage in a substantial amount of lawful speech. The Supreme Court further held that the definition of child pornography under 18 U.S.C. § 2256(8)(D) as depictions of sexually explicit conduct that were described or pandered in a manner that *conveyed the impression that* the material was child pornography was substantially overbroad and unconstitutional. *Id*. at 257-58.

Prior to *Free Speech Coalition*, the knowing receipt of child pornography, virtual or actual, was sufficient to establish one of the factual predicates for a guilty plea under 18 U.S.C. § 2252A. As the Court of Appeals for the Armed Forces stated in *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003), "[t]he 'virtual' or 'actual' character of the images was not, in and of itself, a factual predicate to a guilty plea –- criminal liability could arise under either circumstance." Our superior court went on to hold that "[i]t is no longer enough . . . to knowingly possess, receive[,] or distribute visual depictions that 'appear to be' of a minor engaging in sexually explicit conduct[,]" because "[t]he actual character of the visual depictions is now a factual predicate to any plea of guilty under [18 U.S.C. § 2252A]." *Id*. Therefore, in order for this court to

find the appellant's pleas provident, "his plea inquiry and the balance of the record must objectively support the existence of this factual predicate." *Id*. After review of the appellant's plea inquiry and the balance of the record, we conclude that they do not support the plea.

Before accepting an appellant's guilty plea, the military judge must explain the elements of each offense and ensure that a factual basis for each guilty plea exists to satisfy every element of each offense. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Care*, 40 C.M.R. 247, 251-53 (C.M.A. 1969); *see* RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see also* Art. 45(a), UCMJ. 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). An accused "must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion.

The military judge has broad discretion in determining that an appellant's guilty plea has a factual basis. *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). A military judge may not, however, "arbitrarily reject a guilty plea." *United States v. Pennister*, 25 M.J. 148, 152 (C.M.A. 1987). Any rejection of such a guilty plea on appellate review requires that the record of trial 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). 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 prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j).

The military judge's decision to accept a guilty plea is generally reviewed for abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). So long as the factual circumstances disclosed by the accused objectively support the plea, a military court of criminal appeals will not reject it. *See Faircloth*, 45 M.J. at 174. Only when we find a substantial conflict, not the mere possibility of conflict, between the plea and the appellant's statement or the evidence of record will we take remedial action. *Id.*

Having carefully reviewed the record of trial and applying the above standards of review, we find a substantial basis in law and fact *ex post facto* for questioning the appellant's pleas of guilty to Specifications 1, 2, and 3 of Charge III as violations of 18 U.S.C. § 2252A. Prior to conducting the providence inquiry into the specifications under Charge III, the military judge defined child pornography that contained the now unconstitutional passages. As a result, during the providence inquiry the military judge did not distinguish with specificity whether the images depicted "actual" children. But that does not end our

review. We find the military judge's inquiry into Specifications 1, 2, and 3 of Charge III to be sufficient for findings of violations of lesser included offenses under Clauses 1 and 2 of Article 134, UCMJ, conduct both prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. *See United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004)(upholding a conviction under Clauses 1 and 2 of Article 134, UCMJ, because the military judge secured an admission from the accused that his conduct was both prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

In the appellant's case, the military judge, supported by the appellant's stipulation of fact, Prosecution Exhibit 1, conducted an inquiry into whether the appellant's conduct was either prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. Based on the appellant's responses and the stipulation of fact, the military judge found the appellant's conduct to be both prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. The appellant also did not couch his responses to the military judge's inquiry in terms of images that "appeared to" be child pornography. *See United States v. Irvin*, 60 M.J. 23, 26 (C.A.A.F. 2004)(affirming the appellant's conviction under Clauses 1 and 2 of Article 134, UCMJ, where the appellant's responses to the military judge's inquiry was not cast in terms of images that "appear to be" child pornography). As such, we shall reassess the sentence.

Conclusion

Accordingly, we affirm the findings as to Charges I and II and their specifications. We only affirm the findings as to violations of Clause 1 and 2 of Article 134, UCMJ, under Charge III and its three specifications. We reassess the sentence. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). Having reassessed the sentence, we affirm the adjudged sentence, as approved by the convening authority. *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 427-29 (C.M.A. 1990).

Chief Judge DORMAN concurs.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge PRICE did not participate in the decision of this case.