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.

Ike D. SIMMONS
Private (E-1), U.S. Marine Corps

NMCCA 200400955 Decided 11 July 2005

Sentence adjudged 30 December 2003. Military Judge: M. J. Griffith. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Lejeune, NC.

LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a general court-martial, convicted the appellant, pursuant to his pleas, of a 16-month unauthorized absence terminated by apprehension, carnal knowledge of a child under the age of 16 years on divers occasions, sodomy with a child under the age of 16 years on divers occasions, possessing obscene depictions of children engaged in sexually explicit conduct on divers occasions, and possessing child pornography in a Government building on divers occasions, in violation of Articles 86, 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 920, 925, and 934, and 18 U.S.C. §§ 1466A(b) and 2252A(a)(5). The appellant was sentenced to confinement for 7 years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 4 years in accordance with the terms of a pretrial agreement.

We reviewed the record of trial, submitted without specific assignment of error. Following our review, we specified four issues for briefing by appellate counsel: (1) Whether the charged

violation of 18 U.S.C. § 2252A(a)(5) (Charge II) is multiplicious with the charged violation of 18 U.S.C. § 1466A(b) (Additional Charge I); (2) Whether Charge II is an unreasonable multiplication of charges with Additional Charge I; (3) Whether the providence inquiry by the military judge into Additional Charge I was sufficient on the element of obscenity; and, (4) Whether 18 U.S.C. § 1466A(b) is constitutional in light of the United States Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Upon receipt of briefs by appellate counsel, we have again reviewed the record of trial, the appellant's brief on the four specified issues and a supplemental assignment of error,[1] and the Government's response. We conclude that the military judge conducted an inadequate providence inquiry into Additional Charge I when he failed to accurately describe the elements of the offense alleged therein. We also conclude that the providence inquiry by the military judge failed to establish that the appellant violated 18 U.S.C. § 2252A(a)(5) "on divers occasions" as alleged in the Specification under Charge II. Accordingly, we will take corrective action in our decretal paragraph. Following that corrective action, we conclude that the findings and sentence are correct in law and fact and that no error remains that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Providence Inquiry

In response to this court's third specified issue, the appellant avers that his plea of guilty to Additional Charge I is improvident because it was based upon an erroneous definition of obscenity. We agree.

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, 253 (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, 217 (C.M.A. 1972)). The accused "must be convinced of, and able to describe all the facts

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[1] In his brief on the issues specified by this court, the appellant also raised the following assignment of error:

> Whether Private Simmons' plea of guilty to Additional Charge I is improvident because the military judge did not establish that the offense was committed in a special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

Appellant's Brief of 18 Feb 2005 at 12.

necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 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); *see* R.C.M. 910(e).

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, R.C.M. 910(j), 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.

In conducting the providence inquiry, the military judge has a duty to accurately inform the appellant of the nature of his offense. *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)(citing *Care*, 40 C.M.R. at 247). "An essential aspect of informing Appellant of the nature of the offense is a correct definition of legal concepts. The judge's failure to do so may render the plea improvident." *Id.*; *see also United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)(holding plea improvident due to erroneous definition of child pornography); *United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982)(holding plea improvident where military judge failed to define substantive elements of a complex offense). However, we note that such an error will not render the plea improvident where "the record contains 'factual circumstances' that 'objectively support' the guilty plea to a more narrowly construed statute or legal principle. . . ." *Negron*, 60 M.J. at 141 (citing *United States v. James*, 55 M.J. 297, 300 (C.A.A.F. 2001) and *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996)). We consider the entire record in evaluating the providence of a guilty plea. *Id.* (citing *United States v. Jordan*, 57 M.J. 236, 238-39 (C.A.A.F. 2002)).

In the case before us, the providence inquiry into Additional Charge I was deficient because the military judge used an erroneous definition of obscenity. After the appellant pled guilty to possessing obscene depictions of children engaged in sexually explicit conduct, as alleged in the Specification of Additional Charge I, the military judge recited the following definition of obscenity:

> [I]t means a lot of things, but the primary legal definition that one would find in Black's Law Dictionary or prevailing legal precedent is that it means to the average person applying contemporary community standards, the predominant appeal of the matter taken as a whole is to prurient interest, that is a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary

> limits of candor and description or representation of such matters and is matter which is utterly without redeeming social importance.

Record at 73. During the ensuing colloquy with the military judge, the appellant indicated that he understood this definition of obscenity and believed that it correctly described the depictions he had possessed. The appellant explained that he believed these depictions to be obscene because "[t]hey were sexually oriented, sir. They were -- if the community would find them offensive, and there was no artistic literal [sic] or literary value to them, sir." *Id.* at 74.

Unfortunately, the definition of obscenity recited by the military judge was the same definition expressly rejected by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 23 (1973). Eschewing the obscenity test set forth in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), the Court held that the basic guidelines for determining whether material is obscene are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (internal citations omitted).[2]

As the military judge failed to "accurately inform Appellant of the nature of his offense," we must find his plea improvident. *Negron*, 60 M.J. at 141. In reaching this conclusion, we are mindful that we could accept the appellant's guilty plea despite the military judge's error if we were to find that the record nonetheless yielded objective support for the plea. *Id.* However, our review of the record reveals that the military judge conducted no inquiry into whether the appellant believed that the depictions he possessed lacked serious literary, artistic, political, or scientific value, nor did he advise the appellant that he must be convinced of these facts in order to plead guilty. *See* R.C.M. 910(e). Although the appellant did spontaneously mention that he believed the depictions had no artistic or literary value, we find this conclusory and unexplored statement insufficient to provide a factual basis for his guilty plea. *See Outhier*, 45 M.J. at 331 (citing *Terry*, 45

[2] We note here that despite the military judge's citation to Black's Law Dictionary for the erroneous definition he provided, the most recent edition of that publication in print at the time of the appellant's trial properly cited *Miller* for the prevailing legal definition of the term "obscene." *See* BLACK'S LAW DICTIONARY 1104 (7th ed. 1999).

C.M.R. at 217). Accordingly, we cannot accept the appellant's guilty plea to Additional Charge I.

Although not raised by the appellant as error, we also find that the providence inquiry into Charge II failed to establish more than one violation of 18 U.S.C. § 2252A(a)(5). Much to the contrary, the record appears to establish quite convincingly that the appellant is guilty of only one continuous instance of possessing child pornography in a Government building. During the providence inquiry into Charge II, the appellant testified that he acquired six or seven images of child pornography during his 16-month unauthorized absence and stored these images on his personal computer at his home in Fayetteville, North Carolina. The appellant also testified that his violation of 18 U.S.C. § 2252A(a)(5) occurred when he brought the computer containing the images into his barracks room at Camp Lejeune, North Carolina, following his return from unauthorized absence. The record is bereft of any evidence that the appellant acquired additional images of child pornography after moving the computer to Camp Lejeune, and the military judge conducted no inquiry into whether the appellant believed he had violated the statute on more than one occasion. We, therefore, find no factual basis in the record to support a finding of guilty to the words "on divers occasions" in the specification of Charge II.

Conclusion

The findings of guilty as to Additional Charge I and its specification are set aside. That charge and specification are dismissed. The words "on divers occasions" in the specification of Charge II are excepted and dismissed. With these modifications, the findings are affirmed.

Our action on the findings renders moot the first and second specified issues and the appellant's supplemental assignment of error. We do not reach the fourth specified issue.

As a result of our action on the findings, we must reassess the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having done so, we affirm only that portion of the sentence extending to confinement for 5 years and a bad-conduct discharge.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court