

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

BEFORE

C.A. PRICE

E.B. HEALEY

R.C. HARRIS

UNITED STATES

v.

**Mark R. N. DEAL
Electronics Technician Second Class (E-5), U.S. Navy**

NMCCA 200401054

Decided 17 February 2005

Sentence adjudged 26 March 2004. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Submarine Group TWO, Naval Submarine Base New London, Groton, CT.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT BRADLEY NEWBERRY, JAGC, USNR, Appellate Defense Counsel
CDR CHARLES PURNELL, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HEALEY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of attempting to distribute child pornography, receiving child pornography, and possessing child pornography in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The military judge sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence.

We have carefully considered the record of trial, submitted without the assignment of error. We note that the providence inquiry failed to adequately establish facts sufficient to support the specifications under both the Charge and the Additional Charge, but does support findings of guilty to the lesser included offenses under the Charge. Except as noted below, 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.

Receiving and Possessing Child Pornography

The two specifications of receiving and possessing child pornography were charged under Article 134, UCMJ as violations of 18 U.S.C. §§ 2252 and 2252A. We examined the record for a factual determination of whether or not "actual" children were depicted and whether the record objectively supported the pleas on that element. On this point we are guided by the holding in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). After *O'Connor* "the '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 holding in *O'Connor* followed the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Ashcroft* the Supreme Court concluded that the First Amendment prohibits any prosecution under the CPPA based on "virtual" child pornography. *O'Connor*, 58 M.J. at 452.

For us 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).

The appellant lived in a furnished basement off base. A civilian member of the household, on her way to the basement laundry, observed what appeared to be a child pornography video playing on the appellant's computer. Local police were contacted and a search and seizure followed. The appellant's computer had 38 files containing child pornography movies and 4 files containing still images. He received the images through a user shareware program that allowed access to and from personal computers and downloading files. Affirmative action on the part of the appellant was required to download the pornography. The appellant kept the files on the shareware software with the intent that others would be able to access and download from his files.

As to Specification 1 of the Charge, receiving visual depictions, the production of which involved minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252, the military judge gave eight elements, including, that such visual

depictions were real minors engaged in sexually explicit conduct. As to both specifications under the Charge the military judge gave the following element, that under the circumstances the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

After reading the elements of the offenses, the military judge did not define or explain the distinction between "real" or "actual" depictions vice "virtual" depictions. Also, the aspect of "actual" depictions was not addressed with the appellant during the providence inquiry. Therefore, we find that the providence inquiry as to Specifications 1 and 2 under the Charge was insufficient as a matter of law and we hold that the military judge abused his discretion in accepting the appellant's pleas to receiving and possessing child pornography under 18 U.S.C. §§ 2252 and 2252A.

However, our analysis does not stop there. As noted, the military judge did advise the appellant that conduct prejudicial to good order and discipline or service discrediting conduct was an element of the offenses under the Charge. The appellant admitted in his stipulation that receiving and possessing child pornography brings discredit to the U.S. Navy and would tend to lower the public's view of the U.S. Navy. Prosecution Exhibit 1. Also, the appellant, during the plea inquiry, was asked to explain how his behavior was prejudicial to good order and discipline or service discrediting.¹ The appellant admitted that his conduct was service discrediting as to both specifications under the Charge. Record at 28, 31.

Therefore, we find that the appellant provided facts that objectively supported a plea of guilty as to clause 2 of Article

¹ MJ: Can you explain, in your own words, how your behavior was either prejudicial to good order and discipline, or of a nature to bring discredit on the armed forces?

Acc: Sir, by my downloading the child pornography and the community knowing of the fact that I downloaded it, looks upon myself as a member of the United States armed service as a - as not following along with the - the way that the Naval service works, and it looks bad upon the Naval service such that if one person is doing it and getting caught, who else in the Naval service is doing such things. And this could lead to discontent of the Naval service and other armed forces.

MJ: All right. And in your stipulation you stipulated that your actions would tend to lower the public's opinion of the U.S. Navy, is that correct?

Acc: Yes, sir.

Record at 28.

134, UCMJ. See *United States v. Mason*, 60 M.J. 15, 19-20 (C.A.A.F. 2004). As a consequence, the military judge having made no reference to the definitions of child pornography struck down as constitutionally overbroad, we find no substantial basis in law or fact to question the providence of the plea as to wrongfully and knowingly possessing and receiving visual depictions of minors engaging in sexually explicit conduct, in violation of clause 2 of Article 134, UCMJ. See *United States v. Irvin*, 60 M.J. 23, 25-26 (C.A.A.F. 2004). We will take corrective action in our decretal paragraph.

Attempted Distribution

The Specification under the Additional Charge alleged a violation of Article 80, UCMJ, an attempted distribution of child pornography that had been transported in interstate or foreign commerce by computer in violation of 18 U.S.C. §2252A. The military judge as with the previous Article 134, UCMJ, violations, did not define and did not discuss the factual predicate of the "actual" character of the visual depictions. Also, absent from this providence inquiry and the appellant's stipulation of fact was a discussion of conduct prejudicial to good order and discipline or service discrediting conduct that would provide facts that objectively support a plea of guilty as to clause 2 of Article 134, UCMJ, of the offense attempted. Therefore, we find that the providence inquiry was insufficient as a matter of law and we hold that the military judge abused his discretion in accepting the appellant's pleas to an attempted distribution of child pornography. We will take corrective action in our decretal paragraph.

Conclusion

The findings of guilty to the Additional Charge and its Specification are set aside. The Additional Charge and its Specification are dismissed. We affirm the finding of guilty as to Specification 1 of the Charge, except to the words, "in violation of 18 U.S.C. §2252," and substituting, therefore, the words, "which conduct was of a nature to bring discredit upon the armed forces," and we affirm the finding of guilty as to Specification 2 of the Charge, except to the words, "that had been transported in interstate or foreign commerce by computer, or that had been produced using materials which had been transported in interstate or foreign commerce, in violation of 18 U.S.C. §2252A," and substituting, therefore, the words "which conduct was of a nature to bring discredit upon the armed forces."

We have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) and conclude that the sentence as approved by the convening authority is both appropriate and free of any potential prejudice caused by the trial errors. Accordingly, the sentence, as approved by the convening authority, is affirmed. We order that Enclosures (1) and (2) of Prosecution Exhibit 1 be resealed.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court