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.

Aaron W. CANTRELL
Dental Technician Third Class (E-4), U.S. Navy

NMCCA 200401293 Decided 22 February 2005

Sentence adjudged 18 June 2004. Military Judge: D.M. Hinkley. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.

LT LUIS P. LEME, JAGC, USN, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Pursuant to his pleas, the appellant was convicted of attempted sodomy with a child under 12 years of age, larceny of military property, indecent acts with a child under 16 years of age, and receiving child pornography. The appellant's offenses violated Articles 80, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 921, and 934. The conviction of receiving child pornography lies under one provision of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §2252A, and Article 134(3), UCMJ.

A military judge sitting as a general court-martial sentenced the appellant to confinement for 14 years, total forfeiture of pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the adjudged sentence, but suspended confinement in excess of seven years for seven years from the date of trial.

The appellant's sole assignment of error asserts that the military judge failed to establish an adequate factual predicate for the guilty plea to receiving child pornography. We disagree.

We have carefully considered the record of trial, the 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.

Providence of Guilty Pleas - Child Pornography

The appellant's assignment of error focuses on the vexing issue of whether the images of child pornography received over the Internet depicted actual children or "virtual" children. After scrutinizing the record of trial, we conclude that the military judge established an adequate factual basis that the images depicted real and actual children, not virtual children.

In the wake of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), "the relevant provisions of 18 U.S.C. § 2256(8) require that the visual depiction be of an actual minor engaging in sexually explicit conduct. The 'actual' character of the visual depictions is now a factual predicate to any plea of guilty under the CPPA." *O'Connor*, 58 M.J. at 453. In other words, it is no longer legally permissible to convict of receiving images depicting those who *appear to be minors* engaging in sexually explicit conduct or *conveying the impression* of such conduct by minors. *Id.* at 452-53.

In our determination of a factual basis for images of actual minors, we consider the providence inquiry as a whole and the balance of the record. *Id.* at 453. *O'Connor* and its progeny set forth a number of factors that we consider in our analysis: (1) What elements and definitions did the military judge use in describing the offense to the appellant; (2) What does the stipulation of fact, if any, say about the content of the images; (3) What does the colloquy between the military judge and the appellant reveal regarding the content of the images; (4) Where the colloquy or a stipulation refers to the virtual v. actual issue, what do the images themselves depict (if part of the record); and (5) What do other parts of the record, such as evidence in sentencing, tell about the content of the images? *Id.* at 453-455; *United States v. Irvin*, 60 M.J. 23, 25-26 (C.A.A.F. 2004); *United States v. Mason*, 60 M.J. 15, 18 (C.A.A.F. 2004).

In this post-*Free Speech Coalition*, post-*O'Connor* court-martial, the military judge alertly avoided the use of unconstitutional definitions of "child pornography." Record at 57-58. His statement of the elements and his definition of key terms complied with those judicial decisions.

The stipulation of fact used during the providence inquiry reads, in pertinent part:

> The images the accused obtained fit the legal definition of child pornography, as he obtained visual depictions whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct or that such visual depiction was created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct. The accused received actual images of minor children engaged in sexually explicit misconduct.

Prosecution Exhibit 1 at 4. When viewed in conjunction with the elements and definitions, we conclude that this language means that the appellant agreed that the images showed actual minors.

Our conclusion is strengthened by the colloquy between the military judge and the appellant. The appellant assured the military judge that the images he sought and obtained through the Internet and his personal computer were child pornography, as defined by the military judge. This conversation followed:

> MJ: Do you believe that these were pictures of actual children?
> ACC: Yes, sir.
>
> . . .
>
> MJ: Any question in your mind about the fact that these were actual minors?
> ACC: No, sir.

Record at 64-65. Thus, any question about the providence of this guilty plea relative to the question of virtual v. actual minors was resolved by the military judge. Our examination of a sample of the images simply confirms in our minds that the images depict actual minors. Prosecution Exhibits 2-6.

The appellant argues that the guilty plea is improvident because the military judge did not ask the appellant why he believed that the images depicted actual minors. He also contends that the military judge was obliged to engage the appellant in a detailed discussion of the difference between virtual and actual minors to ensure that the appellant understood the difference. We note that the appellant provides no supporting authority for these arguments.

We do not doubt that some providence inquiries on this issue may require more detailed discussion than others. However, based on the record before us, we decline to establish more onerous requirements for military judges than already exist. In light of the explanation of the elements and definitions of key terms, the stipulation of fact, the images included in the record and the colloquy between the military judge and the appellant, we hold

that no substantial basis in law and fact exists to question the providence of these guilty pleas. *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)).

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed. We direct that Prosecution Exhibits 2-6 be resealed.

Judge HEALEY and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court