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

BEFORE

Charles Wm. DORMAN **W.L. RITTER** **M.J. SUSZAN**

UNITED STATES

v.

David E. CRAWFORD
Chief Warrant Officer 4 (W-4), U.S. Navy

NMCCA 200100806 Decided 30 September 2004

Sentence adjudged 7 September 2000. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel
LT IAN THORNHILL, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was convicted, pursuant to his pleas, by a general court-martial of the following offenses: carnal knowledge, sodomy, and indecent acts, all with the same 15-year-old female and all on divers occasions, and possession of child pornography. The appellant's crimes violated Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934, and 18 U.S.C. § 2252A(a)(5)(B). The military judge sentenced the appellant to confinement for 4 years, forfeiture of all pay and allowances, and a dismissal from the United States Navy. In arriving at this sentence, the military judge considered the sodomy and indecent act offenses to be multiplicious for sentencing purposes. The convening authority approved the sentence and, except for the dismissal, ordered the punishment executed. In taking action, the convening authority granted the appellant clemency by suspending confinement in excess of 2 years for a period of 2 years from the date of trial, by suspending all adjudged forfeitures of pay and allowances, and

waiving all the automatic forfeitures of pay and allowances for a period of 6 months from the date of his action.[1]

The appellant has raised four assignments of error in his appeal before this court. He asserts that the approved sentence is inappropriately severe, that the financial aspects of the sentence violate the Eighth Amendment because the appellant is retirement eligible, that his guilty plea to possession of child pornography is not provident, and that he was deprived of the effective assistance of counsel with respect to his counsel's pretrial investigation of the case and by failing to bring a motion to suppress. We have carefully considered the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that the findings and the 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.

The Sentence

The appellant's first two assignments of error seek sentencing relief. First, he argues that the approved sentence is inappropriately severe. Second, he argues that the sentence to total forfeiture of pay and allowances constitutes an excessive "fine" in violation of the Eighth Amendment, because it applies to the appellant's retirement pay. The appellant asserts that due to the sentence he stands to forfeit in excess of $800,000.00. Appellant's Brief of 30 Apr 2003 at 3-7.

In determining the appropriateness of a sentence we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "nature and seriousness of the offense and the character of the offender." *United v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Without question this requires a balancing of the offense against the character of the offender. We have conducted that balancing in this case and conclude that the approved sentence is appropriate for this offender in light of his very serious offenses.

We conclude that the appellant's Eighth Amendment argument has been considered in *United States v. Reed*, 54 M.J. 37 (C.A.A.F. 2000), and rejected. The appellant's argument, alleging that his loss of retirement benefits results from that portion of the sentence imposing total forfeiture of pay and allowances, is not well taken. First, even without that portion of his sentence the appellant would not be entitled to retirement pay because he was also sentenced to a dismissal. Second, the convening authority suspended that portion of the sentence adjudging forfeiture of all pay and allowances, and the appellant

[1] There is no indication that the convening authority deferred the automatic forfeitures of pay and allowances prior to his action.

has not presented any evidence that the suspension was vacated. Accordingly, we find no merit in the appellant's second assignment of error.

Providence

In his third assignment of error, the appellant alleges that his guilty plea to possession of child pornography is not provident. The essence of the appellant's argument is that at trial he admitted to possessing only 5 images of child pornography, Prosecution Exhibits 6-10. Upon further examination, he now questions whether these images depict pornographic activity, and relying upon testimony from the appellant's Article 32, UCMJ, Investigation, he questions whether the individuals in the images are minors. Appellant's Brief at 9-10.

We begin our analysis noting that this is a guilty plea case. 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 (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 (C.M.A. 1972)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 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); R.C.M. 910(e).

A military judge may not "arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). 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, 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; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995).

Because this guilty plea was to a charge of possession of child pornography, we are also guided by the holding of our superior court 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 [Child Pornography Prevention Act] (CPPA)." *Id.* at 453. The appellant was convicted of violating 18 U.S.C. § 2252(a)(5)(B), which is one section of that act. The holding in *O'Connor* was driven by the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down some of the definitional sections of the CPPA, but not the one relevant to the case before us. *See United States v. Cream*, 58 M.J. 750, 756 (N.M.Ct.Crim.App. 2003).

In our review of the record, we determined that the military judge accurately listed the elements and defined the terms contained in the elements for the offense to which the appellant plead guilty. We also determined that the appellant indicated an understanding of the elements of the offense and the legal definitions, and stated that the elements correctly described the offense he committed. Furthermore, the military judge conducted a sufficient inquiry into the providence of the appellant's guilty plea. During this inquiry the appellant clearly stated, in his own words, the circumstances surrounding his possession of child pornography. He also stipulated to facts that supported his plea. In considering the adequacy of guilty pleas, we consider the entire record to determine whether the requirements of Article 45, UCMJ, R.C.M. 910, and *Care* and its progeny have been met. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

In explaining the elements to the appellant, the military judge gave this advice:

> First, that at or near San Diego, California, on or about 31 January 2000, you knowingly possessed a computer hard-drive containing certain visual depictions;
>
> The second element is that such visual depictions were produced using materials having been transported in interstate commerce by any means, including by computer;
>
> The third element is that the production of such visual depictions involved the use of minors engaging in sexually explicit conduct;
>
> The fourth element is that such visual depictions are or were of minors actually engaged in sexually explicit conduct; and
>
> The last element is that you were in knowing possession of such visual depictions, was in violation of Title 18, United States Code, Section 2252A, subparagraph (a)(5)(B).

Record at 51. The military judge them provided the following definitions to the appellant to ensure he understood the offense:

> The word "knowingly" means that you had actual knowledge extending to both the sexually

> explicit nature of the material and the minority status of one or more of the performers.
>
> In this regard, a "minor" is any person under the age of 18.
>
> "Sexually explicit conduct" means actual or simulated sexual intercourse, including genital/genital, oral/genital, anal/genital, genital/oral or anal activity, whether between persons of the same or opposite sex. It also includes masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area of any person.

Id. at 52. The military judge gave other relevant definitions as well, but they need not be set out here.

After advising the appellant of the elements of the offense and of the relevant definitions, the military judge engaged the appellant in a discussion of what the appellant had done. Additionally, the appellant entered into a stipulation of fact. Prosecution Exhibit 1. The relevant portion of the stipulation provides:

> On or about 31 January 2000, while on active duty, I knowingly possessed multiple images of minor females engaging in sexually explicit conduct. I possessed several of these images on my computer hard drive while living in San Diego, California. By sexually explicit conduct I mean lascivious exhibition of the genitals or pubic area. I downloaded some of these images from various internet web sites. I also asked people whom I met on the internet to send me pictures of minor females via e-mail. I received these images through the use of my internet account on my home computer. I then downloaded themes images to my home computer and saved them on my computer's hard drive.

Id. at 2-3. The appellant acknowledged that "everything in the stipulation [is] the truth." Record at 45. The appellant then discussed the facts of that particular charge and specification with the military judge. *Id*. at 62-68, 309-10. During that dialog the appellant admitted that he possessed five images of females whom he believed were under the age of 18, images he received over the internet after he asked for others to send him their "youngest pictures." *Id*. at 63. Some of these images depicted the females exposing their genitals. The appellant further admitted that the images he possessed met the definition of child pornography. *Id*. at 66, 310.

Applying the applicable standards, set out above, we do not find a substantial basis in law and fact for questioning the appellant's guilty plea to this offense. Rather, what is exhibited in this record, and in this assignment of error is the appellant's attempt to rationalize and minimize his misconduct. Such rationalization and minimization, however, does not invalidate an otherwise legally sufficient guilty plea. *United States v. Penister*, 25 M.J. 148, 153 (C.M.A. 1987)(Cox, J., concurring). We conclude that all of the appellant's guilty pleas are provident.

Effective Assistance of Counsel

In his last assignment of error, the appellant asserts that he was denied effective assistance of counsel, alleging that his trial defense counsel did not properly investigate the circumstances surrounding the appellant's interrogation. The appellant further asserts he was denied effective assistance of counsel when his trial defense counsel did not move to suppress the appellant's pretrial statements and evidence seized as a result of those statements. Appellant's Brief at 10.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for reviewing claims of ineffective assistance of counsel on appeal. The Court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. These same standards are equally applicable before this court. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987), and are applicable to our *de novo* review of this issue in those cases where the appellant pled guilty at trial. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002); *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000). It is strongly presumed that counsel is competent in the performance of

representational duties. *United States v. Cronic*, 466 U.S. 648, 658 (1984). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). Moreover, we will "strongly presume that counsel has provided 'adequate assistance.'" *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998)(quoting *Strickland*, 466 U.S. at 690). Thus, in order to demonstrate ineffective assistance of counsel, an appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). Similar standards are set forth in *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). *Polk*, however, makes clear that the appellant cannot overcome the presumption unless he can show that absent the ineffective assistance there would have been a reasonable doubt respecting guilt. *Id*. at 153.

The appellant has failed to meet his burden of overcoming the presumption that he was afforded effective assistance of counsel. First, we note that we have absolutely no evidence before us to suggest that his counsel failed to properly investigate the circumstances surrounding the appellant's pretrial statements to investigators. Secondly, we also have no evidence before us suggesting that a motion to suppress the appellant's pretrial statements and evidence seized as a result of those statements would have been granted. *See United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge RITTER and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court