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

BEFORE

C.A. PRICE **E.B. HEALEY** **C.P. NICHOLS**

UNITED STATES

v.

Richard S. SCHAEFFER
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200101790 Decided 16 November 2004

Sentence adjudged 30 October 2000. Military Judge: R.H. Kohlmann. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Lejeune, NC.

LT JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

NICHOLS, Judge:

A military judge sitting as a general court-martial tried the appellant on 20 September and 30 October 2000. In accordance with his pleas, the appellant stands convicted of conspiracy to commit wrongful appropriation, violating a lawful general order, wrongful appropriation, and receipt and possession of child pornography in violation of Articles 81, 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 921, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 6 months, and reduction to pay grade E-3. The convening authority approved the sentence as adjudged despite the fact that the military judge recommended suspension of the bad-conduct discharge.

We have examined the record of trial, the appellant's sole assignment of error, and the Government's response. For the reasons set forth below, we set aside the findings of guilty to the additional charge, and the sentence, and return the record to the Judge Advocate General for remand to the convening authority with a rehearing authorized.

In his sole assignment of error, the appellant asserts that his guilty pleas to the two specifications of the additional charge were improvident as a result of the military judge's inadequate description of the elements of receipt and possession of child pornography. Specifically, the appellant asserts that the military judge did not explain to him that, "the producers of the material had to use actual children," and "did not address whether actual children were used in the production or whether the images were computer generated or morphed." Appellant's Brief of 27 Aug 2003 at 5-6. The appellant asserts that one must plead, "that actual children were used in the production of the images." *Id.* at 5; *see* 18 U.S.C. § 2256(A).

The military judge described the elements of Specification 1 of the Additional Charge as follows:

> First, that between on or about the 1st of November 1999 and 22 February in the year 2000, on board Marine Corps Base, Camp Lejeune, North Carolina, you knowingly received or distributed child pornography.
>
> Second, that this child pornography had been or was thereafter mailed or shipped or transported in interstate or foreign commerce by the means of computer Internet.

Record at 37. The military judge described the elements for specification 2 under the additional charge as follows:

> That between on or about 1 November 1999 and 22 February of the year 2000, on board Marine Corps Base, Camp Lejeune, North Carolina, you knowingly possessed a book or magazine or periodical or videotape or computer disks or other materials that contained an image of child pornography.
>
> Second, that you knew you were in possession of this book or magazine or periodical or film or videotape or computer disk or other material that contained an image of child pornography.
>
> And third, that you possessed these images in the special maritime territorial – excuse me – maritime and territorial jurisdiction of the United States or on any land or building owned by, leased to or otherwise used by or under control of the United States Government.

Id. at 37-38. The military judge then defined the term "minor" as, "a person who is under the age of 18 years." *Id.* at 38.

The military judge earlier had the following colloquy with the appellant regarding the images at issue:

MJ: Okay. When I use the term “adult” and “minors,” let me tell you about that. And I’m taking this from U.S. Code Section 2252. That’s not ‘52alfa, its ‘52 but I think I can use the definition and cross that border. It has more language in there, more definition on concept. It defines a “minor” as a person who is under the years – under the age of 18 years. Okay? You understand that?
ACC: Yes, sir.

MJ: So a number of these sites had photo displays of adults, women models. Is that right?
ACC: Yes, sir.

MJ: Were any of them engaged in sexual conduct beyond just posing by themselves?
ACC: No, sir.

MJ: And then you said there were also some, well, you described it as child pornography. Is that right?
ACC: Yes, sir.

MJ: Tell me about that.
ACC: They’re sites to get into – I didn’t mean to do it, sir. It just – they just pop up and you go into it and they would be just by themselves with no clothing.

MJ: And what would you judge the age of the children to be in those pictures?
ACC: I would – I would say from six to 17.

MJ: And how would you make that determination?
ACC: By just looking at them, sir. I have five boys of my own, sir, so I – the way they, the way they looked.

MJ: So are we talking about just looking at their faces?
ACC: No. Their – their – their anatomies, sir.

MJ: Well, their faces also?
ACC: Yes, sir.

MJ: And then also body development?
ACC: Right, sir.

MJ: And when we talk about body development – once again a lot of these are obvious questions but I have to make sure we’re on the same page. Okay? Body development, we’re talking about the presence or absence of pubic hair?
ACC: Yes, sir.

MJ: And then maybe body development as far as breasts for girls or just muscular development?

ACC: Yes, sir.

MJ: Were those all things that you saw and noticed in those?
ACC: Yes, sir.

MJ: And based on that, you are convinced that the children that were depicted there were as, some as young as six?
ACC: I would imagine, sir. I can't – I'm not an expert in determining how old they were, sir.

Id. at 29-31. The military judge stated that in accepting the pleas to the specifications of the additional charge, he took into consideration the providence inquiry related to Charge II and the Stipulation of Fact. *Id*. at 43.

The appellant's guilty pleas are improvident because his plea inquiry and the balance of the record do not objectively establish that he received or possessed images of *actual* minors engaging in sexually explicit conduct. In order to establish the factual predicate to any plea of guilty under the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2251-2260 (2000), the plea inquiry and the balance of the record must objectively support the existence of visual depictions of an actual minor engaging in sexually explicit conduct. *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003). A plea of guilt under the CPPA supported by facts and evidence demonstrating that the images at issue depict actual children will not be found improvident because the military judge did not specifically elicit that the images were not virtual images. *United States v. Washburne*, 59 M.J. 866, 872 (N.M.Ct.Crim.App. 2004). Howeveer, we urge military judges to thoroughly explore that factual issue in every child pornography inquiry.

In *O'Connor*, the accused was tried by general court-martial and, pursuant to his pleas, was convicted of two specifications of receiving and possessing child pornography. During his providence inquiry, the military judge asked him why he believed the materials at issue were child pornography. He answered that the occupants in the picture appeared to be under the age of 18. The court held that the guilty plea to the two specifications of receiving and possessing child pornography was improvident. The court reasoned that the plea inquiry and the balance of the record did not objectively support the factual predicate that the images depicted an actual minor engaging in sexually explicit conduct. *O'Connor*, 58 M.J. at 453.

In *Washburne*, the appellant was tried by general court-martial and, pursuant to his pleas, was convicted of two specifications of knowingly possessing child pornography and two specifications of knowingly distributing child pornography. On appeal, he asserted that his pleas of guilty to possessing and distributing child pornography were improvident because the

providence inquiry lacked any factual basis discussing how the images were produced. *Washburne*, 59 M.J. at 867. The court held that the providence inquiry was sufficient to support his guilty pleas. The military judge never specifically asked the accused whether the images at issue were images of actual children or defined the term child pornography before conducting the providence inquiry. However, the accused had previously been exposed to the definition of child pornography found in 18 U.S.C. § 2256 through discussions with his defense counsel; the colloquy between the military judge and the accused demonstrated that the accused was fully aware that the pictures were of actual identifiable minors depicted in sexually explicit conduct; the accused stipulated that the images constituted child pornography; and the accused never indicated that the pictures in question were child pornography only because they appeared to be actual children or that the images were computer-generated. *Id.* at 869-70.

O'Connor is analogous to this case because in both cases, the military judge failed to inquire whether the images at issue depicted actual minors engaged in sexually explicit conduct. As in *O'Connor*, the military judge failed to explain the distinction between virtual and actual images of child pornography. In neither case did the record contain acknowledgment on the part of the accused concerning the distinction between actual and virtual images.

Washburne is distinguishable from this case because the plea inquiry in *Washburne* established that the images at issue were of actual identifiable minors visually depicted in sexually explicit conduct. Here, the record does not establish that the images at issue were of actual children. Also, the accused in *Washburne* stipulated that the images, i.e., visual depictions, that he both possessed and distributed did constitute child pornography, i.e., identifiable minors engaging in sexually explicit conduct. *Id.* at 870. Here, the stipulation of fact stated only that, "none of the images received by SSgt. Schaeffer reflected any person who was an adult at the time the material was produced." Prosecution Exhibit 4 at 2.

O'Connor and *Washburne* hold that in order to establish the factual predicate to any plea of guilty under the CPPA, the plea inquiry and the balance of the record must objectively support the existence of visual depictions of an actual minor engaging in sexually explicit conduct. A plea of guilt under the CPPA supported by facts and evidence demonstrating that the images at issue depict actual children will not be found improvident because the military judge did not specifically elicit that the images were not virtual images. Here, the record does not establish that the images at issue contain images of actual minors engaged in sexually explicit conduct. Therefore, appellant's guilty pleas to the specifications of the additional charge were improvident.

Conclusion

Accordingly, the findings of Charges I, II, III are affirmed. We set aside the findings of the Additional Charge and the underlying specifications. If a rehearing on the Additional Charge and its specifications is deemed impracticable, a rehearing only on the sentence may be ordered.

Senior Judge PRICE and Judge HEALEY concur.

For the Court

R.H. TROIDL
Clerk of Court