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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Thomas R. SCHONBORN
Damage Controlman Second Class (E-5), U.S. Navy

NMCCA 200201514 Decided 22 March 2004

Sentence adjudged 30 October 2001. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried by a general court-martial composed of a military judge alone. Pursuant to his pleas, the appellant was convicted of: (1) violating the Department of Defense Joint Ethics Regulation on divers occasions, by wrongfully using a United States Government computer for viewing and storing child pornography; (2) wrongfully impeding an investigation by destroying evidence of child pornography; and, (3) on divers occasions, knowingly possessing child pornography and/or visual depictions of minors engaging in sexually explicit conduct, with the visual depictions or materials having been transported in interstate commerce, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934, and 18 U.S.C. § 2252A.

The appellant was sentenced to confinement for 8 months, reduction to pay grade E-3, and a bad-conduct discharge. The military judge recommended conditional clemency for the appellant in the form of suspending the bad-conduct discharge, provided the appellant "makes substantial effort and progress in a program of therapy and rehabilitation." Record at 73. The convening

authority approved the adjudged sentence and, pursuant to a pretrial agreement, suspended confinement in excess of 240 days for 12 months from the date of trial. In an act of clemency, the convening authority waived the execution of automatic forfeitures of the appellant's pay and allowances for a period of 6 months, the maximum period allowable by law.

After carefully considering the record of trial, the appellant's single assignment of error, in which he asserts that his plea of guilty to possessing child pornography was improvident, 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.

Background

The Joint Ethics Regulation prohibits, in part, "put[ting] Federal Government communications systems to uses that would reflect adversely on DoD or the DoD Component (such as uses involving pornography[.])." DoD Directive 5500.7-R, ¶ 2-301.a.(2)(d). The possession of images of child pornography by any person is prohibited by 18 U.S.C. § 2252A(a)(5)(B), if that person:

> (B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer[.]

On 16 April 2002, after the appellant's trial but before the convening authority acted on the appellant's case, the Supreme Court decided *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Supreme Court addressed a challenge to two of the four sections of 18 U.S.C. 2256 (Child Pornography Prevention Act), which define "child pornography." The petitioners in *Free Speech Coalition* challenged that language which defined child pornography as images in which: (1) the visual depiction "is, *or appears to be*, of a minor engaging in sexually explicit conduct"; or, (2) the image is "advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression*" that it depicts "a minor engaging in sexually explicit conduct." *Id.* at 241-42 (emphasis added); *see also* 18 U.S.C. § 2256(8)(B) and (D). Finding that these provisions prohibited a "substantial amount of protected speech," the Court deemed the challenged language overbroad and unconstitutional. *Free Speech Coalition*, 535 U.S. at 255. The Court's ruling left intact two definitions of "child pornography," including the definition in the provision targeting

images where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A).

Insufficient Providence Inquiry

In the appellant's assignment of error, he summarily asserts that his plea of guilty to Specification 2 of Charge II, possessing child pornography in contravention of 18 U.S.C. § 2252A(a)(5)(B), was improvident because the providence inquiry did not establish whether he possessed images of "actual" children as opposed to "virtual" images. The appellant avers that this court should set aside and dismiss the findings of guilty to Specification 2 of Charge II, and that he should be given sentence relief as appropriate under the circumstances. Appellant's Brief of 31 Oct 2003 at 2-3. We disagree.

As in 18 U.S.C. § 2252, it is this court's opinion that the various subsections of 18 U.S.C. § 2252A, also "[s]et out numerous prohibitions designed to prevent child pornography, to forbid every act by which child pornography could adversely affect the United States, and to extend the prohibitions to the maximum extent of Congress' legislative authority under the Commerce Clause." *See United States v. Leco*, 59 M.J. 705 (N.M.Ct.Crim.App. 2003).

For a military judge to accept an accused's guilty plea, his inquiry must indicate both "that the accused himself believes he is guilty [and] that the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins,* 40 M.J. 67, 68 (C.M.A. 1994)(quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969); *see also* Art. 45(a), UCMJ. This inquiry must elicit sufficient facts to satisfy every element of the offense in question. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. R.C.M. 910 requires the military judge to inform the accused of, and determine that the accused understands, the nature of the offense to which the guilty plea is offered. A military judge, however, is not required "to embark on a mindless fishing expedition to ferret out or negate all possible defenses or potential inconsistencies." *United States v. Jackson*, 23 M.J. 650, 652 (N.M.C.M.R. 1986). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)(quoting *Davenport*, 9 M.J. at 367).

A judge's acceptance of a guilty plea will not be set aside absent an abuse of discretion. *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996). However, a guilty plea does not preclude a constitutional challenge to the underlying

conviction. *Menna v. New York*, 423 U.S. 61 (1975). To prevail here, the appellant must demonstrate "a'substantial basis' in law and fact for questioning the guilty plea." *Eberle,* 44 M.J. at 375 (quoting *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991)). The appellant must "overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson,* 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

"For simple military offenses whose elements are commonly known and understood by servicemembers, an explanation of the elements of the offense is not required to establish the providence of a guilty plea if the record otherwise makes clear that the accused understood those elements." *United States v. Nystrom*, 39 M.J. 698, 701 (N.M.C.M.R. 1993)(citing *United States v. Kilgore*, 21 C.M.A. 35, 44 C.M.R. 89 (1971)). For more complex offenses, failure to explain the elements may result in reversal if the accused was unaware of the elements required to prove his guilt. *Nystrom*, 39 M.J. at 701-02 (citing *United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982)).

We now consider whether the providence inquiry was sufficient to support the appellant's pleas to possessing images of "actual" children as opposed to "virtual" images, i.e., actual child pornography, on his United States Government computer. As noted above, the appellant pled guilty to Specification 2 of Charge II, which alleged a violation of 18 U.S.C. § 2252A(a)(5)(B) on divers occasions, by knowingly possessing child pornography and/or visual depictions of minors engaging in sexually explicit conduct, with the visual depictions or materials having been transported in interstate commerce. The appellant claims that his plea to Specification 2 of Charge II was improvident, because Specification 2 of Charge II incorporated the unconstitutional definitions of 18 U.S.C. § 2256. Appellant's Brief at 2. Specifically, the appellant asserts that the military judge provided definitions in his case that are "consistent with 18 U.S.C. § 2256(8), incorporating both 'actual' and 'virtual' images[,]" and that "[t]he subsequent providence inquiry was in accordance with the definition given. . . ." *Id*. Further, it is the appellant's opinion that the military judge "failed to elicit facts to distinguish whether the images at issue were actual or virtual." *Id*. In effect, the appellant argues that the military judge left open the possibility that the appellant was pleading guilty under an unconstitutional provision of the CPPA, and that the military judge failed to establish a basis for whether the real harm of child pornography was even present in this case, i.e., whether children were actually used to produce the explicit images.

However, with regard to the images that are the subject of Charge II, Specification 2, the appellant openly admitted to the

military judge that the images at issue are "child pornography." Record at 32. The appellant further responded to the military judge that the children in the images were "like, anywhere from 10 to, like, 16, like, 14 to 16 years of age." *Id*. at 33. The appellant also stated to the military judge that there was absolutely "no doubt" in his mind that the children in the images were minors. *Id*. Still further, the appellant admitted to possessing "[f]orty-seven images" of child pornography that involve "sexually explicit conduct" between male and female children and some adults. *Id*. at 33-34. Finally, the appellant admitted to the military judge that the depicted conduct involved genital-to-genital and oral-to-genital contact. *Id*. at 34-35.

In short, the facts and evidence adduced by the military judge during the providency inquiry sufficiently demonstrated that the images at issue depicted "actual" children. There was absolutely no suggestion by the appellant during the providence inquiry or any other evidence offered at trial suggesting the images were computer generated, "morphed," or otherwise fabricated. Nor did the Government proceed on the theory that the images in question were anything other than images depicting "actual" children engaged in sexually explicit conduct. There certainly was no issue concerning how the images were "advertised, promoted, presented, described, or distributed." After conducting our own evaluation of the evidence presented in aggravation for sentencing, Prosecution Exhibits 4-8, we find that the images show "actual" children. Obviously, in each instance, a sexually explicit image of an "actual" child was produced using that child.

In *United States v. O'Connor,* 58 M.J. 450 (C.A.A.F. 2003), the United States Court of Appeals for the Armed Forces recently set forth its test for the providence of pleas to offenses involving the CPPA. *See Leco*, 59 M.J. 705. Our superior court held that, after *Free Speech Coalition*, "[t]he '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. Our superior court also held that the "plea inquiry and the balance of the record must objectively support the existence of this factual predicate." *Id.* This requirement was not met in *O'Connor*, where the accused merely indicated that "the occupants in the pictures *appeared to be* under the age of 18." *Id*. (emphasis in original).

Here, however, we conclude that the actual character of the visual depictions objectively support the providence inquiry. The following colloquy between the military judge and the appellant demonstrates that the appellant was fully aware that

the pictures he accessed, received, viewed, and downloaded were of actual minors visually depicted in sex acts:

MJ: Okay. And would you say the production of those depictions involved the use of minors engaging in sexually explicit conduct?
ACC: Yes, Your Honor.

MJ: And that they appeared to be of minors? I mean, it clearly appeared by the images that they were minors?
ACC: Yes, sir.

MJ: And did this sexually explicit conduct involve genital to genital contact?
ACC: Yes, sir.

MJ: Oral to genital?
ACC: Yes, sir.

Record at 34-35. The appellant also stipulated that the visual depictions in his possession were of minors, "or what appears to be minors," engaging in sexually explicit conduct. Prosecution Exhibit 1 at 2.

The court in *O'Connor* was concerned with the "critical significance" of the distinction between "virtual" and "actual" child pornography. *O'Connor,* 58 M.J. at 453. The facts elicited by the military judge during the appellant's providence inquiry leave no room for doubt that the appellant pled providently to possession of "actual" child pornography. Record at 24-36, 39-41.

The appellant's assertion that the military judge's providence inquiry left open the possibility that he pled guilty under an invalid definition of child pornography is without merit. The Supreme Court's ruling in *Free Speech Coalition* invalidated only two of the four definitions of child pornography under the CPPA. 535 U.S. at 256-57. The provision under the CPPA prohibiting the receipt of visual depictions, the production of which involves minors engaged in sexually-explicit conduct, was untouched by the Court's ruling. The appellant's conduct clearly fell under that category of contraband "speech." The appellant's implicit effort to distinguish the images depicting "actual" children engaged in sexually-explicit conduct as possibly being "virtual" images, merely because the military judge did not specifically elicit from him during the providence inquiry that the images were not "virtual" images, is rejected by this court, as our superior court and other service courts have rejected other such similar efforts in the past. *See United States v. James,* 55 M.J. 297, 300-01 (C.A..A.F. 2001)(finding the appellant's pleas provident, despite any constitutional deficiency with certain parts of the CPPA, given the appellant's admissions during the providence inquiry that the images at issue

depicted "actual" children); *see also United States v. Appeldorn,* 57 M.J. 548, 550 (A.F.Ct.Crim.App. 2002)(finding an appellant's pleas provident as his in-court admissions established his guilt under sections of the CPPA, which were unaffected by the Court's ruling in *Free Speech Coalition*)*; and United States v. Coleman,* 54 M.J. 869, 872 (Army Ct.Crim.App. 2001)(rejecting an appellant's claim that his plea under the CPPA was improvident, because the appellant never explicitly admitted on the record that the images at issue depicted "real" children), *rev. denied,* 55 M.J. 476 (C.A.A.F. 2001).

Notwithstanding the Supreme Court's ruling in *Free Speech Coalition*, and assuming that the CPPA was not applicable to the appellant's conduct, this court nevertheless would approve a conviction of a closely-related offense under either clause 1 or 2 of Article 134, UCMJ, in light of the stipulation of fact and the appellant's unequivocal and incriminating statements offered during the providence inquiry.

Our superior court has approved a conviction under clause 2 of Article 134, UCMJ, where the conviction for a statute incorporated under clause 3 was deemed improvident or improper, yet the record supported a conviction based on an alternative theory. *See United States v. Sapp,* 53 M.J. 90, 92 (C.A.A.F. 2000) and *United States v. Augustine,* 53 M.J. 95, 96 (C.A.A.F. 2000)(affirming clause 2, Article 134, UCMJ, convictions, where the appellants' pleas under 18 U.S.C. § 2252 were deemed improvident). This court has also applied the same rationale to a similar issue. *United States v. Goddard,* 54 M.J. 763, 767 (N.M.Ct.Crim.App. 2000)(finding the appellant guilty to a simple disorder under clause 1 of Article 134, UCMJ, where his plea to maltreatment was deemed improvident). Here, the appellant's conduct was clearly service discrediting, if not prejudicial to good order and discipline. *See, e.g., United States v. Falk,* 50 M.J. 385, 394 (C.A.A.F. 1999)(Sullivan, J., dissenting) ("Possession of 126 computer images of child pornography, lasciviously organized into four directories on a personal computer, in government housing on a military post, is *per se* service discrediting conduct in my view. Affirmance of his conviction for his conduct under Article 134 is warranted, even if no civilian offense was established."). As such, we decline to grant relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court