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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Benjamin S. RZADCA
Corporal (E-4), U.S. Marine Corps

NMCCA 200301476 Decided 28 April 2004

Sentence adjudged 5 February 2003. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
Maj J. ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a general court-martial, convicted the appellant, pursuant to his pleas, of committing an indecent act in the presence of a child under the age of 16 years, knowingly using an interactive computer service for carriage of obscene materials (child pornography) in interstate commerce, and knowingly possessing child pornography in a building owned by the United States Government, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and 18 U.S.C. §§ 1462(a) and 2252A(a)(5). The appellant was sentenced to 66 months confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered the punishment executed.

After carefully considering the record of trial, the appellant's two 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.

Insufficient Pleas

In the appellant's first assignment of error, he asserts that his plea of guilty to possession of child pornography in contravention of 18 U.S.C. § 2252A(a)(5) cannot be affirmed, because the military judge failed to establish that the images were of *actual* minors engaging in sexually explicit conduct. The appellant bases this assignment of error on the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and the Court of Appeals for the Armed Forces' decision in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In effect, the appellant is implicitly arguing that the military judge did not sufficiently establish whether the appellant possessed images of child pornography created using *actual* children, as opposed to *virtual* images. The appellant avers that this court should set aside the finding of guilty to Specification 2 of the Additional Charge, and dismiss Specification 2 of the Additional Charge. We disagree.

The possession of images of child pornography by any person is prohibited, in part, if that person is "in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government . . . ." 18 U.S.C. § 2252A(a)(5)(A).

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 (CPPA)), which defines child pornography. Finding that the provisions of 18 U.S.C. § 2256(8)(B) and (D) prohibited a "substantial amount of protected speech," the Supreme Court deemed the challenged language overbroad and unconstitutional. *Free Speech Coalition*, 535 U.S. at 255-56. The Supreme 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).

The various subsections of 18 U.S.C. § 2252A "set out the 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." *United States v. Leco*, 59 M.J. 705, 707-08 (N.M.Ct.Crim.App. 2003).

To prevail here, the appellant must demonstrate "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996)(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).

The United States Court of Appeals for the Armed Forces set forth its test for the providence of pleas to offenses involving the CPPA in *O'Connor,* as recently followed by this court in *Leco*. 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 "the occupants in the pictures *appeared to be* under the age of 18." *Id*. (emphasis in original).

We now consider whether the military judge's providence inquiry was sufficient to support each of the appellant's pleas to possessing, in a building owned by the U.S. Government, images of *actual* children as opposed to *virtual* images, i.e., child pornography, that had been transported in interstate or foreign commerce, or that had been produced using material which had been transported in interstate or foreign commerce. As noted above, the appellant pled guilty to the specification in question.

The appellant now claims that his plea was improvident, because "[t]he stipulation of fact in this case also refers to the images download (sic) and possessed by the [a]ppellant as '*possible* child pornography' containing 'pictures of *possible* minors.'" Appellant's Brief of 27 Jan 2004 at 4 (emphasis in original). The appellant implies that the military judge left open the possibility that he was pleading guilty under the former 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. With regard to the images that are the subject of the specification in question, the appellant openly admitted to the military judge that each of the images at issue was a depiction of child pornography that was not based on a definition containing the now-unconstitutional portions addressed by the Supreme Court in *Free Speech Coalition*. Record at 54. Additionally, we are satisfied that the images at issue in the specification in question meet the constitutional portion of the definition, and are in fact images of child pornography created through the use of *actual* children. We reach this conclusion based upon the military judge's inquiry into this specific offense and a stipulation of fact. Prosecution Exhibit 1. With regards to the specification in question, the appellant stipulated that the "images of child pornography" that he knowingly possessed in a building owned by the U.S. Government "depicted *actual* minors" engaged in "sexually explicit conduct," which means "sexual intercourse, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person[,]" at the time he possessed the visual depictions. *Id*. at 4-6 (emphasis added).

In the appellant's case, as in *United States v. Martens*, 59 M.J. 501, 508 (A.F.Ct.Crim.App. 2003), *rev. granted*, 59 M.J. 30 (C.A.A.F. 2003), the appellant never indicated that the pictures in question were child pornography only because they *appeared to be actual* children, nor does the record indicate that the images in question are "computer-generated" or *virtual* photographs, despite the military judge failing to define suitable terms for the appellant. In short, the facts and evidence adduced by the military judge during the providence inquiry sufficiently demonstrate the images at issue depict *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.

After conducting our own evaluation of the evidence presented in aggravation for sentencing, Prosecution Exhibit 3, we find that the images show *actual* children engaged in sexually-explicit conduct. There certainly was no issue concerning how the images were advertised, promoted, presented, described, or distributed. *See* 18 U.S.C. §§ 2252A and 2256.

In order to determine whether there is a substantial basis in law and fact for questioning the appellant's guilty pleas, we must also decide whether the guilty pleas were based, in whole or in part, upon the portions of the definition of child pornography previously struck down in *Free Speech Coalition*, as defined above. After reading the elements of the specification at issue, the military judge asked the appellant if they correctly described what he did, to which the appellant replied, "Yes, sir." Record at 42. After defining terms and concepts, the military judge then asked the appellant if he had any questions about the terms and concepts that relate to this offense, to which the appellant replied, "No, I don't, sir." *Id*. at 44. The military judge also asked the appellant if he understood how they relate to this offense, to which the appellant replied, "Yes, sir." *Id*. Finally, the military judge asked the appellant, "do you believe and admit that taken together the elements that I listed for you, the matters that we discussed, and the stipulation of fact -- that is Prosecution Exhibit 1 -- correctly describes what you did for each of these offenses?" *Id*. at 58-59. To which the appellant replied, "Yes, sir." *Id*. at 59. Further, after inquiry into the terms of the appellant's pretrial agreement, the military judge asked the appellant if he had any questions concerning his pleas of guilty, his pretrial agreement, or "anything that we have discussed[,]" which included any questions concerning the elements and definitions, to which the appellant responded, "No, sir." *Id*. at 69.

The appellant's implicit 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 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 Supreme 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); *see also United States v. Appeldorn,* 57 M.J. 548, 550 (A.F.Ct.Crim.App. 2002)*; and United States v. Coleman,* 54 M.J. 869, 872 (Army Ct.Crim.App. 2001), *rev. denied,* 55 M.J. 476 (C.A.A.F. 2001).

At this juncture, we conclude that the stipulation of fact and the providence inquiry, which sufficiently describe the actual character of the visual depictions charged, objectively support the appellant's pleas. *See United States v. Washburne*, ___ M.J. ___, No. 200300123 (N.M.Ct.Crim.App. 9 April 2004). Therefore, we decline to grant relief.

Sentence Appropriateness

In the appellant's second assignment of error, he asserts that his approved and unsuspended sentence to 66 months confinement is inappropriately severe for these offenses. The appellant avers that this court should not affirm any sentence that includes confinement in excess of 18 months. We disagree.

A court-martial is free to impose any legal sentence it deems appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964); RULE FOR COURTS-MARTIAL 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). On review, a court of criminal appeals "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Further, courts of criminal appeals are tasked with determining sentence appropriateness vice granting clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). Clemency, which involves bestowing mercy, is the prerogative of the convening authority. An appropriate sentence results from an "individualized consideration" based on "the nature and seriousness of the offense and the character of the offender." *United States v. Rojas*, 15 M.J. 902, 919 (N.M.C.M.R. 1983) (citing *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982)), *aff'd*, 20 M.J. 330 (C.M.A. 1985).

The record of trial well supports the appropriateness of the appellant's sentence. We are confident that the appellant received the individualized consideration required based on the seriousness of his offenses and the nature of his character -- that is all that the law requires. *Rojas*, 15 M.J. at 919. The appellant's assignment of error amounts to nothing more than a request for clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395-96; R.C.M. 1107(b). In this regard, the convening authority has fulfilled his obligations under the pretrial agreement. As such, we are unwilling to provide further relief.

Conclusion

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

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court