UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant CHARLES M. BLAKE
United States Air Force

ACM 34969

20 December 2004

Sentence adjudged 5 November 2001 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Steven A. Gabrial.

Approved sentence: Confinement for 1 year, forfeiture of all pay and allowances for 12 months, and reduction to E-6.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

This opinion is subject to editorial correction before final release.

MALLOY, Senior Judge:

The appellant was tried by general court-martial composed of officer and enlisted members. Consistent with his pleas, he was acquitted of eight specifications of various offenses involving displaying obscene material on his government computer, assault, and indecent conduct toward his two stepdaughters, charged under Articles 92, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 928, 934. On defense motion, the military judge dismissed two specifications charged under Article 134, UCMJ.

Contrary to his pleas, the members convicted the appellant of a single specification of possessing child pornography, in violation of 18 U.S.C. §

2252A(a)(5)(A), charged as a noncapital federal offense under clause 3 of Article 134, UCMJ. The appellant was sentenced to confinement for 1 year, forfeiture of all pay and allowances for 12 months, and reduction to E-6. The convening authority approved the sentence as adjudged, and the case is now before this Court for mandatory review under Article 66, UCMJ, 10 U.S.C. § 866.

The appellant has raised two assignments of error for our consideration: (1) Whether his conviction for possessing child pornography must be set aside because it is based on overbroad and unconstitutional definitions of child pornography; and (2) Whether appropriate action should be taken to ensure that the intent of the convening authority is satisfied with respect to waiver of mandatory forfeitures while fulfilling the requirements of *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Both of these issues have merit but we find it necessary to address only the first.

The appellant's prosecution occurred prior to the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Ashcroft*, the Court held that the definitions of child pornography found in 18 U.S.C §§ 2256(8)(B) ("appears to be") and 2256(8)(D) ("conveys the impression") overbroad and unconstitutional. The military judge included these definitions in his instructions to the members without objection from the defense. Furthermore, the military judge did not instruct on the lesser included offenses under clauses 1 or 2 of Article 134, UCMJ. *See generally United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004).

Although the military judge's instructions were proper at the time, we now know that the inclusion of the two definitions found unconstitutional in *Ashcroft* was error. This error was not plain at the time it occurred and there is no suggestion in the record that anyone involved in the trial believed the pornographic images were anything other than those of real children. Indeed, the government called an expert in adolescent medicine to establish the chronologic ages of the children.

Nonetheless, we are compelled to reach three conclusions based on the state of military law post-*Ashcroft*: (1) The error was not waived by lack of defense objection at trial; (2) It is not possible to apply constitutional harmless error analysis to find that the error was harmless beyond a reasonable doubt, and (3) Notwithstanding Article 59(b), UCMJ, 10 U.S.C. § 859(b), it is not possible to find the appellant guilty of the lesser included offense because the elements of conduct prejudicial to good order and discipline, or of a nature to bring discredit upon the armed forces, were not before the members. *United States v. O'Connor*, 58 M.J. 450, 455 (C.A.A.F. 2003); *United States v. Tynes*, No. 03-0467/AR (9 Sep 2004) (summary disposition); *United States v. Sanchez*, No. 04-0157/AF (9 Sep 2004) (summary disposition). Accordingly, the appellant's conviction for possessing child pornography cannot be affirmed. Because this case involves a change in the law and not a failure of proof, a rehearing is authorized. *United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003).

The findings of guilty as to Specification 1 of Charge III and Charge III, and the sentence are set aside. A rehearing is authorized.

OFFICIAL

ANGELA M. BRICE
Clerk of Court