UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DAVID K. BOWERS
United States Air Force

ACM 36691

3 April 2007

Sentence adjudged 15 March 2006 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 13 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain John S. Fredland, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Donna S. Rueppell.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of wrongfully and knowingly possessing one or more images of minors engaging in sexually explicit conduct;[1] and acquitted him of wrongfully and knowingly transmitting one or more images of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 18 months, and reduction to E-1. The convening authority approved a sentence consisting of

[1] The appellant pled guilty to and was found guilty by the military judge of violating clause 1 and/or 2 of Article 134, UCMJ, 10 U.S.C. § 934; conduct prejudicial to good order and discipline or of a nature to bring discredit to the armed forces by possessing child pornography.

a bad-conduct discharge and confinement for 13 months.[2] On appeal, the appellant asserts that his plea was improvident because the military judge failed to define "sexually explicit conduct" and the record fails to show that he understood its definition.

Background

In May 2005, the Innocent Images Unit of the Federal Bureau of Investigation (FBI) was conducting a national investigation targeting the transmission of child pornography over peer-to-peer (P2P) networks. Unfortunately for the appellant, his IP address surfaced and his identity was released by his internet provider per a subpoena. The FBI coordinated with the Hickam Air Force Base Office of Special Investigations (OSI), and on 3 Jun 2005, the appellant was interviewed. He made a voluntary statement to OSI and confessed to downloading, viewing and possessing images of children engaged in sexually explicit conduct. He also admitted using the search terms "young" and "teen". His residence was searched, and his desktop computer, with an internal hard drive, and a separate hard drive were seized. A media analysis was conducted by the FBI which revealed 421 "suspicious" images. Thirty of the images (some were redundant but had unique file-paths) were identified as positive matches with the National Center for Missing and Exploited Children. The images contained in the record of trial depicted young boys and girls involved in oral sex and intercourse.

Discussion

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providency inquiry must reflect the accused understood the nature of the prohibited conduct. *See United States v. Sapp,* 53 M.J. 90, 92 (C.A.A.F. 2000). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

During the providency inquiry, the military judge correctly instructed the appellant on each of the elements of the offense. The appellant admitted that his conduct involved two elements: 1) that on the island of Oahu, Hawaii, between on or about 13 May 2005 and on or about 3 June 2005, he wrongfully and knowingly possessed one or more visual depictions of minors engaging in sexually explicit conduct; and 2) under the

[2] Although not raised as an error, the action and court-martial order will be addressed in this opinion.

circumstances, his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. The military judge did not specifically define "sexually explicit conduct". However during the *Care*[3] inquiry, the appellant stated that using general search terms such as "teen" or "young", he was able to download images of minors engaging in sexual activity. He could tell they were children because they looked like children. When queried why his actions were wrongful, he explained the images were on his computer and were of children engaging in sexual activity. Several times during the inquiry, the military judge referenced the stipulation of fact which had been entered into evidence.

The appellant was questioned as to his voluntariness in entering into the stipulation and advised as to how the stipulation would be used. In the stipulation, the appellant admitted to possessing images of children engaged in "sexually explicit conduct" and/or "child pornography" at least six times. Additionally, he admitted to masturbating while looking at the images. A CD, originally attached to the stipulation, marked and admitted as a government exhibit, contained images of children engaged in oral sex and/or sexual intercourse.

It is apparent the appellant understood the definition of "sexually explicit conduct". The *Care* inquiry, stipulation of fact, and the CD support this finding. "[I]f the factual circumstances as revealed by the accused himself objectively support [the] plea" the requisite 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). We have no doubt the appellant clearly understood the elements of the crime to which he pled guilty, why his acts were prohibited, and why those acts were prejudicial to good order and discipline and service discrediting. Having examined the photographs ourselves, we are convinced, as the appellant was at trial, that his actions violated Article 134, UCMJ.

An issue not raised, but addressed by this Court, is the Court-Martial Order (CMO). The order does not accurately reflect Specification 2 of the Charge and, more importantly, it does not accurately reflect the action of the convening authority. The appellant pled to and was found guilty of knowingly possessing images *between on or about 13 May 2005 and on or about 3 June 2005.* (emphasis added). The CMO reports appellant's misconduct occurred *on or about 13 May 2005.* (emphasis added).

The convening authority's action clearly stated he approved a bad-conduct discharge and 13 months confinement. Additionally, he deferred the reduction in grade retroactively until action, and waived total forfeitures of pay and allowances for six months. On the other hand, the CMO approved the reduction to E-1; deferred the forfeitures of pay and allowances from 29 March 2006 until date of the action; waived

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

required forfeitures of pay and allowances for 6 months or release from confinement, whichever is sooner; and specified a dollar amount of $1,273.50 pay per month to be paid to the appellant's wife and the appellant's unborn dependant child.

A convening authority may modify any action any time before the accused has been officially notified. Rule for Courts-Martial (R.C.M.) 1107(f)(2). He may also recall and modify any action at any time prior to forwarding the case for review, as long as the modification does not result in action less favorable to the accused than the earlier action. *Id.* When so directed by a higher reviewing authority or The Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial. *Id.* If an action is ambiguous, it needs to be remanded to the initial convening authority. *United States v. Gosser,* 64 M.J. 93, 96 (C.A.A.F. 2006). The action sub judice is not incomplete, ambiguous, void or inaccurate.

Considering the entire record, and paying special attention to the providency inquiry and the stipulation of fact, we find no "'substantial basis' in law [or] fact for questioning the guilty plea." *Jordan,* 57 M.J. at 238 (citing *Prater*, 32 M.J. at 436). We hold that the military judge did not abuse his discretion by accepting the guilty plea. *See Eberle*, 44 M.J. at 375.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Additionally, based on the foregoing, we order the promulgation of a corrected Court-Martial Order in accordance with this opinion. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator