UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JOSHUA S. BURNETTE
United States Air Force

ACM 36377

23 February 2007

Sentence adjudged 15 June 2005 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Karen L. Hecker, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a military judge, sitting alone as a general court-martial, of one specification of wrongfully possessing child pornography and one specification of obstruction of justice, both in violation of Article 134, UCMJ, 10 U.S.C. § 934. His adjudged and approved sentence consists of a bad-conduct discharge, confinement for 10 months, and reduction to the grade of E-1.

The appellant, pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), raises four assignments of error for our review: (1) that his pleas were improvident, (2) the seizure of his computer was illegal, (3) the evidence was factually insufficient, and

(4) the military judge was biased and informed of the terms of the pretrial agreement.[*] We have reviewed the record of trial, the assignments of error, and the government's answer thereto.

Background

The evidence adduced at trial established that the appellant downloaded a number of child pornography images to his personal computer. The appellant admitted, during his providence inquiry, to searching the Internet using terms such as "teen boy" and "young gay male". Upon realizing he may be under investigation, the appellant reformatted his hard drive in an attempt to erase all the images. His computer was seized and analyzed.

The appellant entered into a pretrial agreement. One of the terms of the pretrial agreement was to waive all waivable motions. A motion to suppress was specifically referenced in the pretrial agreement. The military judge queried the appellant on the record about this particular term, and his understanding and agreement thereto.

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 basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Id.* (quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)). 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)). The appellant's plea of guilty to this offense was provident; his statements during the providency inquiry were sufficient to establish his guilt. *See United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969).

Barring plain error, a motion to suppress evidence illegally seized is waived by an unconditional guilty plea. We find no plain error in this case. *See United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998) (Plain error means error that is plain or obvious and that materially prejudices the substantial rights of the appellant).

We may affirm only those findings of guilty that we determine are correct in law and fact and, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether, when the evidence is

[*] The only supporting evidence the appellant provides on this issue is that trial counsel argued for 11 months and 30 days of confinement, which in some way signaled the military judge as to the terms of the agreement.

viewed in the light most favorable to the government, a rational factfinder could have found the appellant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). We conclude that there is sufficient competent evidence in the record of trial to support the court's findings. Furthermore, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c).

There is no evidence presented at trial or on appeal that suggests or supports the contention the military judge was bias and/or informed of the terms of the pretrial agreement. At most, there is conjecture.

Conclusion

The approved 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; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator