UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ROBERT S. DEIHL
United States Air Force

ACM 34674

16 March 2004

Sentence adjudged 18 July 2001 by GCM convened at Dover Air Force Base, Delaware. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Patricia A. McHugh, and Major Natasha V. Wrobel.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo and Lieutenant Colonel Lance B. Sigmon.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

ORR, Judge:

The appellant pled guilty to one specification of violating a lawful general regulation by wrongfully using a government computer to access the Internet to view teenage girls' profiles in violation of Article 92, UCMJ, 10 U.S.C. § 892; one specification of knowingly receiving child pornography that had been transported in interstate commerce via the Internet, contrary to 18 U.S.C. § 2252A(a)(2)(A); one specification of knowingly possessing a computer hard drive and computer disks containing images of child pornography that had been transferred in interstate commerce, contrary to 18 U.S.C. § 2252A(a)(5)(B); and one specification of committing indecent acts upon a female under the age of 16, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting alone, accepted the appellant's pleas and sentenced him to

a dishonorable discharge, confinement for 3 years, and reduction to E-1. The convening authority approved the sentence as adjudged.

After the appellant's trial, the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), concerning the constitutionality of portions of the Child Pornography Prevention Act (CPPA) of 1996, 18 U.S.C. §§ 2251-2260. As a result, the appellant now argues that his guilty pleas to Specifications 2 and 3 of Charge I were improvident. The appellant asks this Court to set aside the findings of guilty to Specifications 2 and 3 of Charge I (receiving and possessing child pornography) because they were based on definitions of child pornography found in 18 U.S.C. § 2256(8)(B) and (D) which the Supreme Court found unconstitutionally overbroad. We find error but no prejudice, and affirm.

As previously noted, the appellant pled guilty to one specification of receiving child pornography on divers occasions and one specification of knowingly and wrongfully possessing a computer hard drive and computer disks containing images of child pornography. As required by Rule for Courts-Martial (R.C.M.) 910(e), the military judge questioned the appellant at length about his understanding of the offenses to which he pled guilty, and the factual basis for the plea. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). The military judge advised the appellant of the definition of child pornography using a definition similar to the one articulated in 18 U.S.C. § 2256(8). Specifically, he said:

> "Child pornography" means any visual depiction including any photograph, film, video, picture, or computer or computer generated images or pictures, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct; or *such visual depiction is of a minor engaging in sexually explicit conduct*; or such visual depiction has been created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or *such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.*

(Emphasis added.) Significantly, the military judge did not include the "appears to be" language from 18 U.S.C. § 2256 (8)(B) that formed part of the basis for legal error in *Free Speech Coalition.* Additionally, the military judge omitted the language "that conveys the impression," found in the definition from 18 U.S.C. § 2256 (8) (D). However, the military judge's instructions did include the language about how the depiction was advertised or distributed, later struck down by the Supreme Court.

The appellant agreed to a detailed stipulation of fact, explaining how he committed the charged offenses. According to the stipulation of fact, the appellant told agents of the Air Force Office of Special Investigations (AFOSI) that he received and viewed images of child pornography via the Internet on his personal computers and he knew it was wrong. The appellant stipulated that he knew the images were or appeared to be of people under the age of 18. The appellant also accepted as fact a report prepared by a pediatrician stating that 67 of the images depicted children under 18 years of age. Additionally, the appellant stipulated that many of the 100 image files recovered were pictures of pre-pubescent children that were in various stages of undress and sexual situations. Most of the images involved females either posing nude or engaged in sexual acts alone or with other males or females. The appellant also stipulated that his government computer also contained profiles indicating that the appellant had accessed many teenage girl websites on a regular basis. Even though the appellant's counsel acknowledged that the images contained in Prosecution Exhibit 4 came from the appellant's personal computer or floppy disks, he would not stipulate that the images were sexually explicit. However, during his providence inquiry the appellant stated that he viewed images of minors on his computer engaged in sexually explicit conduct. Moreover, he repeatedly advised the military judge that the images in question met the definition of child pornography as defined by the military judge.

In *Free Speech Coalition*, decided after the trial in this case, the Supreme Court found that some language within 18 U.S.C. § 2256 defining child pornography unconstitutionally infringed upon free speech. Specifically, the Court found that the language of § 2256(8)(B), proscribing an image or picture that "appears to be" of a minor engaging in sexually explicit conduct, and the language of § 2256(8)(D), sanctioning visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Id.* at 256-58. Nonetheless, the Supreme Court reiterated that the government could constitutionally prohibit pornography involving actual children. *Id.* at 240. *See generally New York v. Ferber*, 458 U.S. 747 (1982); 18 U.S.C. § 2256(8)(A) and (C).

In determining whether a guilty plea is provident, the standard of review is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. James*, 55 M.J. 297, 298 (C.A.A.F. 2001); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999). 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 *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 (C.A.A.F. 1996). "We will not overturn a military

judge's acceptance of a guilty plea based on a 'mere possibility' of a defense." *Faircloth*, 45 M.J. at 174. This Court will not "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). Of course, a guilty plea does not preclude a constitutional challenge to the underlying conviction. *Menna v. New York*, 423 U.S. 61 (1975).

We are constrained from reversing a finding on the ground of an error, even constitutional error, unless that error "materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998). "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

In the case sub judice the appellant pled guilty. In order to determine whether there is a "'substantial' basis in law and fact for questioning the guilty plea," *Milton*, 46 M.J. at 318, we must decide whether the guilty plea was based, in whole or in part, upon the portions of the definition of child pornography later struck down in *Free Speech Coalition.* We turn first to the definition contained in 18 U.S.C. § 2256(8)(D) concerning images that were "advertised, promoted, presented, described," as child pornography. As noted above, the military judge omitted the "conveys the impression" language. Nonetheless, the remaining language is arguably overbroad, in that it could include material which did not include actual minors. Reviewing the factual matters discussed in support of the plea, it does not appear that the appellant thought the images were child pornography because of the way they were advertised, promoted, or presented. Some of the websites had names suggestive of child pornography, containing such terms as "tinytwat," "teen," and "baby," but the appellant did not indicate he believed that the images were child pornography because of these advertisements or descriptions. To the contrary, it is clear the appellant concluded the images contained child pornography based upon his review of the images themselves. We are convinced that the definition in 18 U.S.C. § 2256(8)(D) did not play a part in this case. *United States v. Appeldorn*, 57 M.J. 548 (A.F. Ct. Crim. App. 2002). We conclude beyond a reasonable doubt, that any error of law in providing that definition did not create a substantial basis for challenging the plea.

We turn next to the definition of child pornography contained in 18 U.S.C. § 2256(8)(B), relating to an image that "appears to be" a minor engaging in sexually explicit conduct. The Supreme Court found the language of 18 U.S.C. § 2256(8)(B) overly broad because it would include "computer-generated images," "a Renaissance painting depicting a scene from classical mythology," or scenes from Hollywood movies which did not involve any children in the production process. *Free Speech Coalition*,

535 U.S. at 241. The Supreme Court also took note of the Congressional findings following 18 U.S.C. § 2251 that new technology makes it possible to create realistic images of children who do not exist. *Id.* at 240. Here, the images in question were not Renaissance paintings or scenes from Hollywood movies involving actresses over 18 years old.

As previously stated, the military judge did not include the "appears to be" language from 18 U.S.C. § 2256(8)(B) in the definition of "child pornography" explained to the appellant at trial. Instead, the military judge referred to "minors" throughout the providence inquiry. The appellant's plea to possessing images of "minors" provides sufficient factual circumstances to support the plea that "actual minors were in appellant's pictures." *United States v. James*, 55 M.J. 297, 300 (C.A.A.F. 2001) (citing *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996)).

In *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003), our superior court ruled:

> It is no longer enough, however, to knowingly possess, receive or distribute visual depictions that "appear to be" of a minor engaging in sexually explicit conduct. In the wake of *Free Speech Coalition*, the relevant provisions of 18 U.S.C. § 2256(8) require that the visual depiction be of an actual minor engaging in sexually explicit conduct. The "actual" character of the visual depictions is now a factual predicate to any plea of guilty under the CPPA.
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> In order to find Appellant's plea provident, his plea inquiry and the balance of the record must objectively support the existence of this factual predicate.

While the military judge did not ask the appellant whether the pictures were of actual children, the appellant's responses make it clear that they were. During his providence inquiry the appellant stated:

> ACC: I'm sorry. I received images of nude minors at my home computer here in Delaware. I got these images through news groups, which then, you know, would link to web sites. And I was using America Online. Many of these images of nude minors were obviously taken at like nudist camps. As I was stating, sir, it was obvious that a lot of these nude minors' pictures were taken at nudist camps, beaches, and campgrounds. However, several or more of the images I received and downloaded involved nude minors engaging in sexually explicit conduct. I believed that it was sexually explicit because of the way they were posed or the sexual act they were engaged in at the time. While I don't know any of the people in these

> pictures or images, I believe that they appear to be minors because of their body and faces. I also reviewed these images with my attorneys, who have stated that they were reviewed by a doctor who estimated their ages.

In this response the appellant used the words "appears to be." The appellate defense counsel argues simply that when the appellant stated, "I believe that they appear to be minors " he failed to admit that the images contained actual children. However, when taken in proper context, the "appear to be minors" language refers to their age, not to whether the people were actual or virtual. Nothing in the record indicates the images in question are "computer-generated" or "virtual" photographs. In fact, his responses during the providence inquiry convince us otherwise. Specifically, he stated that, "the minors' pictures were taken at nudist camps, beaches and campgrounds" and that "I don't know any of the people in the pictures or images."

We are not convinced that employment of the adjectives "actual" or "real" in describing the minors is determinative. Indeed, 18 U.S.C. § 2256(8)(A), which passed constitutional muster under *Free Speech Coalition*, does not use either word to modify the term "minor." We are confident that the appellant believed the people in the images were minors because he stated, "Once again, between November 1997 and November 1999, I possessed these images of the nude minors under the age of 18." He also discussed the ages of the minors in the images with his attorneys and stipulated that some of the images found on the computer and floppy disks were of individuals under the age of 18. Additionally, the appellant was not a casual viewer of pornography. The AFOSI found 100 images on the appellant's computer and floppy disks and many of them depicted children in sexual situations. As a frequent viewer of pornography, the appellant should have developed some "expertise" in determining the approximate age of the person in the image and whether an image was real or virtual. Even if the appellant developed no expertise, he viewed at least 67 files containing minors engaged in sexually explicit acts. Given this number of files, probability and common sense dictate that some of these images were of actual children. *O'Connor*, 58 M.J. at 457 (Crawford, C.J. dissenting). Given the number of images found on the appellant's computer and floppy disks, coupled with his meticulous attempts to delete the images after viewing them to prevent their discovery, it is not difficult to conclude that the appellant believed that the images were of actual children.

The parties agreed to the introduction of some of the images in question, and representative samples of the images were included in the record in Prosecution Exhibit 4. This also provides a factual basis for this Court to determine whether the appellant's pleas are provident. *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) ("We have examined the images shown to the jury. The children depicted in those images were real; Of that we have no doubt whatsoever."), *cert. denied*, 537 U.S. 1138 (2003). "[I]n the guilty-plea context, the Government does not have to introduce evidence to prove the elements of the charged offense beyond a reasonable doubt;

instead, there need only be 'factual circumstances' on the record 'which "objectively" support' the guilty pleas, i.e. that actual minors were in appellant's pictures." *James*, 55 M.J. at 300 (citing *Shearer*, 44 M.J. at 334). Having viewed the images, we conclude beyond a reasonable doubt that the children depicted in those photographs are real, not virtual. We also find that the pictures and the balance of the record provide a factual predicate to support the appellant's guilty plea. *O'Connor*, 58 M.J. at 453. We find beyond a reasonable doubt, that any error of law in including the language from 18 U.S.C. § 2256(8)(D) did not create a substantial basis for challenging the plea.

"Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense." Article 59(b), UCMJ. Considering our disposition above, however, it is not necessary to consider whether the evidence was sufficient to support a conviction for the attempted possession of child pornography under 18 U.S.C. § 2252A(b)(2), or a general disorder under Article 134, UCMJ.

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,10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 27, 31 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner