**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant JERRY J. DROEDER**
**United States Air Force**

**ACM 35100**

**24 October 2003**

Sentence adjudged 20 March 2002 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: Ann D. Shane (sitting alone).

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of receiving child pornography that had been mailed, shipped, or transported in interstate or foreign commerce and one specification of knowing possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A general court-martial, consisting of a military judge sitting alone, sentenced him to be discharged with a bad-conduct discharge, confinement for 10 months, and reduction to E-1. The convening authority approved the sentence as adjudged and waived mandatory forfeitures for the benefit of the appellant's dependents pursuant to a pretrial agreement. The appellant has made one assignment of error, that the guilty plea was improvident insofar as the military judge relied on an unconstitutionally vague and overbroad definition of child pornography

contained in 18 U.S.C. §§ 2256(8)(B) and (D). Finding no errors prejudicial to the appellant's substantial rights, we affirm.

The appellant lived with his family on Tyndall Air Force Base. In August 2001 his wife discovered a computer disc at their home with a picture of a nude young girl. Finding other such images, the appellant's wife notified Security Forces and they notified the Air Force Office of Special Investigations. Subsequent investigation of the appellant's computer hardware, software, and storage devices revealed 94 images of child pornography. A pediatrician examined the images and concluded that 18 of them were of prepubescent girls and 76 were of girls under the age of 18.

In charging the appellant with possessing child pornography, the government alleged a violation of 18 U.S.C. § 2252A, known as the Child Pornography Prevention Act (CPPA). It is the definition of child pornography contained in the CPPA that forms the basis of the appellant's assignment of error.

The standard of review for the providence of a guilty plea 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)). 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). 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).

During the providence inquiry, the military judge advised the appellant as to the definition of child pornography as contained in 18 U.S.C. § 2256(8). At that time, the statute provided that child pornography meant:

> any visual depiction including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where
>
> A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> B) such visual depiction is or appears to be of a minor engaging in sexually explicit conduct;
>
> C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct; or

> D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct . . . .

However, after trial the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down part of the CPPA. Specifically, the Court held that the definitions of child pornography found in 18 U.S.C. §§ 2256(8)(B) and (D) were constitutionally vague and overbroad, in that they would extend to, among other things, "virtual" images of child pornography created on a computer without the use of actual child victims. The Court observed, however, that it is the use of actual victims, which provides the government with its rationale for prohibiting child pornography, insofar as such depictions are, in effect, records of child abuse. Such a rationale is inapplicable to images generated wholly on a computer. *Free Speech Coalition,* 535 U.S. at 250. The Court also concluded that Section 2256(8)(D) fails to pass constitutional muster insofar as it would criminalize even legally innocent images which were, nevertheless, advertised or promoted as child pornography. *Id.* at 257.

Subsequently, our superior court issued its opinion in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In that case, as in the one sub judice, the accused was charged with possessing child pornography in violation of the CPPA. During the providence inquiry, the military judge asked the accused why he believed the material in question constituted child pornography, to which he replied, "the occupants in the pictures *appeared to be* under the age of 18." *O'Connor*, 58 M.J. at 453. Relying on *Free Speech Coalition*, our superior court observed that, "it is unclear from the providence inquiry and record here whether Appellant was pleading guilty to possession of virtual or actual child pornography." *Id.* at 453-54. Therefore, the Court set aside the affected findings and sentence.

In the case sub judice, we acknowledge that, in advising the appellant of the legal definition of child pornography, the military judge utilized terms, which the Supreme Court later found unconstitutional. As such, the advice in the providence inquiry was erroneous. However, during the providence inquiry, the appellant stated to the military judge "I knew it was illegal because I knew the girls were under 18." The appellant stipulated that he "actively browsed the internet to view nude teens" and in his unsworn presentation during the presentencing phase of the trial the appellant stated that by purchasing and downloading the pictures in question he was hurting "other people's children." In addition, the prosecution, in argument prior to sentencing, stated that the children in the pictures "will forever carry the scar of sexual abuse . . . it may take a lifetime to erase."

There is nothing in the providence inquiry to suggest that the appellant relied upon the manner in which the images were advertised, promoted, or presented in explaining why he believed the pictures constituted child pornography. Additionally, and, unlike *O'Connor*, the appellant did not use language drawn directly from the stricken portions of the CPPA by using the phrase "appeared to be" or the like. To the contrary, the material quoted above leaves no serious question as to whether the appellant believed that he was obtaining depictions of actual children under the age of 18 years.

This is confirmed by an examination of the images themselves, which depict obvious minors engaging in a variety of sexual activities and poses. *See United States v. Wolk,* 337 F.3d 997 (8th Cir. 2003); *United States v. Kimler,* 335 F.3d 1132 (10th Cir. 2003). Trial counsel's argument further supports our opinion that the acceptance of the guilty plea was not based on the method of packaging of the pictures or on their possible status as virtual images. Therefore, we conclude that the erroneous portions of the military judge's definition of child pornography were harmless beyond a reasonable doubt and did not create a substantial basis for challenging the plea. *See United States v. Von Bergen*, ACM 34817 (A.F. Ct. Crim. App. 16 Jun 2003) (unpub. op.).

We note one minor point. The photographs that form the basis of the prosecution's case were appended to the record of trial as an appellate exhibit. Normally, evidence used by the military judge to evaluate the providence of a guilty plea is admitted as a prosecution exhibit. However, in this case the military judge explicitly stated that she was going to consider these photographs as evidence of the offense, with no objection from the defense. She expressly admitted the photographs into evidence. Therefore, while it is a technical error to have characterized these pictures as an appellate exhibit, we conclude that this error does not preclude our consideration of them as part of our legal and factual sufficiency review.

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. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court