UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JASON P. GARLICK
United States Air Force

ACM 35298

10 June 2004

Sentence adjudged 5 August 2002 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Ann D. Shane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 199 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his plea, of one specification of possessing pictures of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and reduction to E-1. The convening authority approved 199 days of confinement but otherwise approved the sentence as adjudged. The appellant has submitted two assignments of error: (1) that the appellant's due process rights were violated when the prosecution failed to disclose the existence of false information in a probable cause affidavit used in support of a warrant to search the appellant's computer; and (2) that his guilty plea to possessing child pornography on divers occasions was

improvident because the military judge did not elicit facts from the appellant to support a finding of "divers occasions." We find error and order corrective action.

I. Background

The appellant was a member of an Internet group (Egroup) called Candyman, an electronic forum devoted to child pornography. The appellant was a subscriber from 15 January 2001 to 28 January 2001. An investigation by the Federal Bureau of Investigation (FBI) revealed that the appellant was in possession of numerous images of child pornography at his home near Eglin Air Force Base, Florida. These images were discovered during a search authorized by a civilian federal magistrate pursuant to a probable cause affidavit submitted by the FBI. Trial in the case took place on 5 August 2002.

The appellant avers that on 12 August 2002, a week after his court-martial ended, the trial counsel notified the trial defense counsel by memorandum that a statement contained in the FBI's probable cause affidavit was untrue. Trial defense counsel appended this memorandum to the appellant's clemency submissions, which are attached to the record of trial. The statement in question is as follows: "Every e-mail sent to the [Candyman] group was distributed to every member automatically. Therefore, when an individual transmitted child pornography to the Candyman group via e-mail, those images were transmitted to every one of the group members." According to the trial counsel's memorandum, however, automatic receipt of e-mails was only the default setting for subscribers to the group, and individuals were able to elect not to receive e-mails if they so chose. According to this memorandum, this information was known to the FBI prior to trial in the appellant's case.

II. Failure to Provide Discovery

We review this issue de novo. Failure of the prosecution to provide discoverable information to the defense violates the constitutional guarantee of due process "where the evidence is material either to guilt or to punishment." *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). If information is improperly withheld, the test for prejudicial error is "whether there 'is a "reasonable probability" of a different result' had the suppressed evidence been disclosed to the defense." *United States v. Figueroa*, 55 M.J. 525, 528 (A.F. Ct. Crim. App. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). "When there has been an error of constitutional dimension, this Court may not affirm unless it is satisfied that the error was harmless beyond a reasonable doubt." *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001) (citing *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991)).

Counsel for the appellant asserts that, had the information about the false statement been provided to the defense prior to trial, it could have formed the basis of a

motion to suppress the results of the search of the appellant's home. This search yielded the inculpatory evidence forming the basis of the government's case. In addition, the false statement could have been used to impeach the testimony of government witnesses. The appellant asserts no bad faith by the trial counsel.[1]

We acknowledge that the prosecution should have provided this information to the defense. However, "a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt . . . ." Rule for Courts-Martial 910(j). *See United States v. Dusenberry*, 49 C.M.R. 536, 539 (C.M.A. 1975) ("[N]o legal or practical purpose can be served by reviewing the propriety of allegedly illegal police conduct which only produces some evidence of a fact now conclusively established and judicially admitted by an accused in his plea of guilty."); *United States v. Lopez*, 42 C.M.R. 268, 270 (C.M.A. 1970) (a plea of guilty "waives all nonjurisdictional defects in all earlier stages of the proceedings" against the accused); *United States v. Hamil*, 35 C.M.R. 82 (C.M.A. 1964). Therefore, we hold that this issue has been waived by the appellant's plea of guilty.

Even if the issue has not been waived, however, we conclude that the appellant is not entitled to relief. Examining the probable cause affidavit attached to the record as part of the evidence considered at the preliminary investigation, we find no basis to conclude that, but for the allegedly untrue statements, the evidence obtained during the search would have been suppressed.[2]

The affidavit provides a considerable amount of information on the practices of child pornographers in general and the Candyman Egroup in particular.[3] Specifically, it avers that persons interested in child pornography tend to retain it for lengthy periods of time, that they do not destroy or get rid of such material except in the course of trading it with others, that such persons often use on-line resources to obtain pornography, that evidence of child pornography is often found on home computers, and that the appellant was of his own volition a member of an Egroup dedicated to providing members with access to images of child pornography.

All in all, even if the incorrect information was excluded, the affidavit contains enough information to establish probable cause that the appellant's home computer would contain images of child pornography. We find no reasonable probability that, had the appellant been informed about the inaccurate sentences in the probable cause affidavit, the evidence seized from his computer would have been suppressed. *See*

[1] This FBI operation resulted in numerous civilian prosecutions. A similar issue to the one raised in the case sub judice was addressed in *United States v. Perez*, 247 F. Supp. 2d 459 (S.D.N.Y. 2003) and *United States v. Strauser*, 247 F. Supp. 2d 1135 (E.D. Mo. 2003), submitted by the appellant in support of his brief.

[2] We are considering this affidavit only as to the limited question pertaining to discovery.

[3] Much of this information was contained in a shell affidavit that was sent to numerous FBI offices nationwide as part of their investigation of the Candyman Egroup.

United States v. Bailey, 272 F. Supp. 2d 822 (D. Neb. 2003); *United States v. Coreas*, 259 F. Supp. 2d 218 (E.D.N.Y. 2003). Neither do we find any reasonable probability that the impeachment value of the information was sufficiently strong to produce a different trial result. Therefore, we hold that the failure of the prosecution to provide the information in question was harmless beyond a reasonable doubt.

III. Providence of the Guilty Plea

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. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997). If the "factual circumstances as revealed by the accused himself" objectively support the 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).

In the case sub judice, the appellant was charged with divers possession of child pornography. However, the military judge did not define "divers" for the appellant, nor did she elicit from him any mention of his having obtained child pornography on more than one occasion. Therefore, we hold the military judge abused her discretion in accepting the plea to divers occasions. We conclude that we can correct this error by excepting the phrases "on divers occasions" and "visual depictions of a minor engaging in sexually explicit conduct" from the finding of guilty, substituting therefore "thirty-four visual depictions of minors engaged in sexually explicit conduct, as referenced in Prosecution Exhibit 1 and as illustrated by the thirteen attachments to that exhibit." *See United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003).

Because we have found error we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

We conclude that we can reassess the sentence. Our corrective action does not require us to exclude any evidence considered by the military judge on sentencing. As

such, we conclude that, even given the modified finding, the military judge would have imposed the same sentence.

IV. Conclusion

The findings, as modified, and sentence, as reassessed, 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, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator