UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GEORGE HOFELE
United States Air Force

ACM 36003

27 February 2006

Sentence adjudged 27 May 2004 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Mary M. Boone (sitting alone).

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

Appellate Counsel for Appellant: Lieutenant Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major Andrew S. Williams, and Captain David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Nurit Anderson.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of violating a lawful general regulation by wrongfully storing, displaying, or transmitting pornographic and sexually explicit images via a government computer and of possessing child pornography,[1] in violation of Articles 92, and 134, UCMJ, 10 U.S.C. §§ 892, 934. Relying on *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and its progeny, the appellant asserts that his pleas of guilty to possessing child pornography were improvident.

[1] The appellant pleaded 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.

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[.]" *Jordan*, 57 M.J. at 238 (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)).

During the providence inquiry, the military judge correctly instructed the appellant on each of the elements of the offense and properly defined the appropriate terms, including the definitions of "minor," "conduct prejudicial to good order and discipline," and "service discrediting conduct." Neither the military judge nor the appellant made any reference to virtual images or depictions of child pornography that "appear to be" of minors engaging in sexually explicit conduct. *See United States v. Irvin*, 60 M.J. 23, 25-26 (C.A.A.F. 2004). To the contrary, the appellant told the judge that the pictures "were of minors engaging in sexual [sic] explicit conduct . . . I believe that the pictures were of actual children."

The appellant also explained that he felt his conduct was service discrediting in that "If people found out that a military member possessed child pornography, that would make the Air Force and the military look bad." A short time later the military judge paraphrased the appellant's statement regarding why his actions were service discrediting, and the appellant agreed that the military judge's understanding of his earlier statement was correct. Throughout the course of the providence inquiry the military judge asked the appellant several times whether he understood the elements of the offense and gave him ample time to ask questions or consult with his trial defense counsel. 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 service discrediting. Having examined the photographs ourselves, we are convinced, as the appellant was at trial, that his actions violated Article 134, UCMJ.

Considering the entire record, and paying special attention to the providence inquiry and the stipulation of fact, we find no "'substantial basis' in law [or] fact for questioning the guilty plea." *See United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (citing *Prater*, 32 M.J. at 436). We hold that the military judge did not abuse her discretion by accepting the guilty plea. *See Eberle*, 44 M.J. at 374.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court