UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT W. YOUNG JR.
United States Air Force

ACM 35600

15 November 2005

Sentence adjudged 7 May 2003 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Thomas G. Crossan, Jr.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel David N. Cooper, and Major Shannon J. Kennedy.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of making a false official statement and one specification of possession of child pornography, in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907, 934. The general court-martial, consisting of officer members, sentenced the appellant to a bad-conduct discharge, confinement for 12 months, forfeiture of $600.00 per month for 12

months,[1] and reduction to the grade of E-1. The convening authority approved the sentence except for the adjudged forfeitures.

On appeal, the appellant asserts: (1) His plea of guilty to making a false statement was improvident because the military judge never inquired into the voluntariness of his false confession; (2) His plea of guilty to possessing child pornography is improvident because he did not know whether the images contained actual children at the time he possessed them; and (3) The commander of Ninth Air Force (Provisional) lacked authority to refer the charges against the appellant to court-martial and to take action on the adjudged findings and sentence. The third assignment of error has been addressed by this Court and we find it to be without merit. *See United States v. Hardy*, 60 M.J. 620 (A.F. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 459 (C.A.A.F. 2005). For the reasons set out below, we likewise find no merit in the other assignments of error and affirm.

Background

The Air Force Office of Special Investigations (AFOSI) began investigating the appellant when a "phone sex operator" from California reported to the Federal Bureau of Investigation (FBI) and Air Force law enforcement personnel that she had participated in an internet chat encounter with a man who told her that he was in the Air Force and had had sex with underage girls. The AFOSI and FBI began a joint investigation and were able to identify the appellant through his internet service provider's screen name. The AFOSI subsequently seized the appellant's computer and found approximately 400 different photographs of young children engaged in various sexual acts. Forty-two of these photographs were entered into evidence at trial, along with a short "live video" computer file. The computer file and photographs became the basis for the charge and specification of possession of child pornography, which the government charged as a violation of clauses 1 and 2 of Article 134, UCMJ.

The AFOSI called the appellant in for questioning on three separate days, focusing on the possibility that he had engaged in sexual activities with underage children. Each day, the appellant appeared voluntarily at the AFOSI building, was read his Article 31, UCMJ, 10 U.S.C. § 831, rights, and was given multiple breaks throughout the questioning. In the early afternoon of the third day, he orally and in writing admitted to engaging in sexual activities with three young children. According to AFOSI Special Agent (SA) Shawn McCarthy, who testified during the sentencing phase of the trial, the AFOSI, FBI, and local law enforcement authorities subsequently visited the mothers or guardians of each child and told them that they were investigating "alleged offenses involving an Air Force member possibly having sexual misconduct or some kind of sexual act with their child." After these visits, law enforcement personnel became

[1] This language is taken verbatim from the announcement of the sentence. However, we find no prejudice as the convening authority did not approve the adjudged forfeitures.

convinced that the appellant had lied to them about his sexual acts with these children. When confronted, the appellant admitted that he had lied in order to stop the AFOSI interview sessions.

The appellant was subsequently charged with making a false official statement to AFOSI investigators. When questioned by the military judge, the appellant said he made the statement because he was just telling the AFOSI what they wanted to hear so he could appear cooperative and "get them off [his] back." Apparently this tactic worked, as the investigators indeed stopped questioning the appellant after he signed the statement that later proved to be false.

Law

A military judge's decision to accept a guilty plea is reviewed 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)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts to support the plea of guilty. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Charge I – False Official Statement

The appellant alleges that his plea of guilty to making a false official statement is improvident because the military judge failed to inquire into the voluntariness of the "confession" after the appellant repeatedly told the judge that he felt he had no other way to stop the questioning than to tell investigators what they wanted to hear. At the outset, we note that during the providence inquiry the military judge inquired about the affirmative defense of entrapment in regard to this specification. After consulting his trial defense counsel, the appellant told the military judge he didn't believe the defense applied. On appeal, the appellant again concedes that he was not entrapped.

1. Voluntariness of the Appellant's Statement

Although the appellant argues "it is possible that involuntariness of the false confession would raise a defense to making the false official statement," a mere possibility of a defense does not render a plea of guilty improvident. We do not find, as the appellant urges, the facts in this case to be analogous to the classic "involuntary false confession" situation, largely because the appellant was not charged with the crimes he

"confessed" to. Thus, despite the appellant's invitation, we decline to travel far down that rocky path.

The voluntariness of a confession is a question of law that an appellate court reviews de novo. *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996). In *Bubonics*, our superior court explained that the question is "whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process." *Id.* at 95 (citing *Culombie v. Conneticut*, 367 U.S. 568, 602 (1961)). In reviewing a record of trial for purposes of determining voluntariness of a confession, appellate courts closely examine the "totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *United States v. Ford*, 51 M.J. 445, 451 (C.A.A.F. 1999).

The record in the case sub judice reveals that at the time of trial, the appellant was a 25-year-old Senior Airman who had been in the Air Force for over four years. His enlisted performance reports indicate that he had performed his duties satisfactorily during his enlistment. He had also received numerous accolades from his superiors and positive feedback from the customers with whom he interacted. As to his interrogations, the record shows that he was questioned on three separate days after reporting voluntarily each day to the AFOSI detachment office. The AFOSI agents advised the appellant of his Article 31, UCMJ, rights each day. He was given "many" breaks, according to SA McCarthy, and was allowed to leave the AFOSI office at the end of each day. Prior to making each of his two written statements, the appellant indicated, in writing, that he understood his right to counsel and his right to remain silent. At trial, the appellant assured the military judge that he understood these rights at the time of the interrogation. Therefore, we find that the totality of the circumstances surrounding the appellant's statements clearly indicate they were the product of a free and unconstrained choice on his part, and his will was clearly not overborne by the AFOSI agents.

2. Providency of the Plea

The record in this case supports the appellant's guilty plea and there is no evidence in substantial conflict with the plea of guilty. During the providence inquiry the military judge fully discussed with the appellant each element of the false official statement specification, and focused intently on the specific element that the appellant now attacks as insufficiently addressed – the intent to deceive. The following colloquy took place between the military judge and the appellant:

> MJ: Okay. So at the time they read you your rights, did you understand you had a right to remain silent?

ACC: Yes, your honor.

MJ: Did you also understand that when you waive your rights and agree to talk to an investigator, that you have no right to lie to the investigator?

ACC: Yes, your honor.

. . . .

MJ: Now, approximately how many times did you tell them that on more than one occasion in 2000 you had sexual contact with female children . . . under the age of ten?

ACC: Two to three times, your honor.

. . . .

MJ: Did you know at the time you made the statement that it was false?

ACC: Yes, your honor.

MJ: How did you know that it was false?

ACC: Because I never committed those crimes, your honor.

MJ: What was your intent in making the statement?

ACC: Just to get [AF]OSI off my case, your honor.

MJ: Was your intent to deceive [AF]OSI?

ACC: Yes, your honor.

MJ: Was it to purposely mislead them?

ACC: Yes, your honor.

MJ: Did you want the [AF]OSI agents to believe as true, something that was false?

ACC: Yes, your honor.

MJ: Did you know that what you were doing was wrong when you made that false statement?

ACC: Yes, your honor.

MJ: How did you know that?

ACC: Because I said it just to remain silent. I was just cooperating with them, your honor, so I didn't really feel like I needed not to say anything because I was being cooperative. It's just after a while, even though I realized it was all false, that it was my only way for them to relieve me on any more questioning, your honor.

MJ: It was your choice to make the statement?

ACC: Yes, your honor.

MJ: No one forced you to make that statement?

ACC: No, your honor.

. . . .

MJ: Do you believe and admit that the false statements were made with the intent to deceive?

ACC: Yes, your honor.

The military judge's discussion with the appellant established the factual predicate for the specific intent to deceive, and any allusion by the appellant to being "coerced" into making a false statement – thereby negating his specific intent – was fully explored during the above colloquy. The appellant acknowledged his understanding of the intent element and explained that his intent was to deceive and purposefully mislead investigators so they would stop questioning him. His argument on appeal – that his reason for lying to investigators somehow negates his specific intent to do so – is without merit. We conclude that the providence inquiry did not raise evidence that substantially conflicted with his plea of guilty to the specification of making a false official statement, nor did it raise a cognizable defense that should have been examined further by the military judge.

Charge II – Possession of Child Pornography

The appellant alleges that his plea of guilty to possession of child pornography is improvident, as being contrary to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). However, unlike the defendant in that case, this appellant was not charged with violating 18 U.S.C. § 2251 *et seq*., popularly known as the Child Pornography Prevention Act. Rather, his misconduct was alleged to have violated clauses 1 and 2 of Article 134, UCMJ. 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 definition of "minor." 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). The appellant said he thought the children in the images were minors because "they don't look grown up enough to be 18." The military judge then asked him if the females in the photographs were "anywhere near 18 in your mind?" The appellant answered "no," and then stated that he thought they were 10 to 13 years old. Later in the providence inquiry, the appellant explained to the military judge why he felt his possession of these photographs was both service discrediting and prejudicial to good order and discipline in the armed forces.

The appellant was correctly advised of the elements under clauses 1 and 2 of Article 134, UCMJ, and admitted that his misconduct met those elements. We conclude, therefore, that the fact that the appellant never stated during the providence inquiry that *he knew* the victims in the pictures were minors, does not affect the sufficiency of his plea. *See United States v. Mason*, 60 M.J. 15, 19-20 (C.A.A.F. 2004); *Irvin*, 60 M.J. at 25-26; *United States v. Anderson*, 60 M.J. 548, 554 (A.F. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 403 (C.A.A.F. 2004). We thus find no substantial basis in law or fact to question the providence of the appellant's plea to possession of child pornography.

Conclusion

Accordingly, we conclude the 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). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court