UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant BARRY L. HAMILTON
United States Air Force

ACM 35053

5 March 2003

Sentence adjudged 6 February 2002 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Jeffrey A. Vires.

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

Before

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

On 6 February 2002, a military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of violating Article 134, UCMJ, 10 U.S.C. § 934, by knowingly receiving child pornography that had been transported in interstate commerce, contrary to 18 U.S.C. § 2252A. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The convening authority approved the sentence, but reduced the period of confinement to 4 months.

The appellant argues that his guilty plea was improvident and that his sentence to a bad-conduct discharge was inappropriately severe. We find no error that materially prejudices the appellant's rights, and affirm.

Providence of the Plea

As noted above, the appellant challenges the providence of his plea of guilty to receiving child pornography that had been transported in interstate commerce. Specifically, he contends that his conviction may have rested upon a prohibition of certain material as child pornography later found to be unconstitutional by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

A witness advised an agent of the Air Force Office of Special Investigations (AFOSI) that the appellant had images of child pornography on his home computer. The AFOSI agent interviewed the appellant, who admitted accessing and downloading images of child pornography from the Internet on several occasions. AFOSI agents executed a search warrant of the appellant's residence on base, and seized his computers. They found about 2,500 pornographic images, including about 500 they believed to be of minors engaged in sexually explicit conduct.

The appellant pled guilty, and entered into a stipulation of fact detailing how he committed the charged offenses. The appellant stipulated that while browsing the Internet, he happened upon a site containing child pornography. He knew it was illegal, but opened the files to see if he could access the material and then downloaded several images from the site. Sometime later he returned to the site and downloaded video files showing minor females engaging in sexual acts with adult males. Later, he joined a web site that featured images of minor females engaging in sexually explicit conduct. The appellant also stipulated as fact that Captain Barbara Craig, a physician at the Armed Forces Center for Child Protection, reviewed the images and "evaluated a total of 105 children as prepubertal (not having entered puberty), and assessed 41 as going through puberty, but less than 18 years old."

Pursuant to the requirements of Rule for Courts-Martial (R.C.M.) 910(e), the military judge questioned the appellant in depth about his understanding of the charged offense and the factual basis for his plea. The military judge advised the appellant of the definition of child pornography contained in 18 U.S.C. § 2256(8), specifically:

> "Child pornography" means 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—I'm going to give you an a, b, c, d:

a) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; or

b) Such visual depiction is or appears to be of a minor engaging in sexually explicit conduct; or

c) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. And that means morphing sometimes, that kind of stuff, as well; 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.

The appellant repeatedly advised the military judge that the images in question were child pornography.

MJ: In other words, from the description here, they were pictures of young children, oftentimes quite young in age—part of the stipulation says five to seven years—engaged in various sexual acts, or if we talk about lascivious conduct. So maybe they're posed coyly or those sorts of things. Is that your understanding of that?

ACC: Yes, Your Honor.

MJ: Okay. So then when you went back to the site again, that's also what you downloaded—pictures of minors engaged in various sexual acts or in such behavior or depictions, either the way they dressed or whatever, that they were involved in sexually explicit conduct?

ACC: Yes, Your Honor.

. . .

MJ: Okay. So, I went through the definition, and, you understand, minors are any child or children under the age of 18. So, do you feel comfortable that the various ones—and it appears that these were examined by a nurse or a medical corps doctor, in the U.S. Navy Medical Corps, and evaluated by this Captain Craig, and she found a total of 105 children in what they call pre-pubescence, prior to entering puberty, and that there were 41 others who were going through puberty. So that would be 18 years, but at least at

the age of puberty, when they are starting to develop more sexually. Do you feel comfortable that you had at least this many photos that depicted as the Captain has indicated?

Acc: Yes, Your Honor.

After the trial in the appellant's case, the Supreme Court released its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). 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).

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 (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 (2001); *United States v. Bickley*, 50 M.J. 93, 94 (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 (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 (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 (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).

The military judge's definition of child pornography was correct as a matter of law at the time of trial. *See James* 55 M.J. at 299-300. However, reviewing the issue de novo in light of the Supreme Court's decision in *Free Speech Coalition*, we must find that portions of the instruction were erroneous.

In order to determine whether there is a substantial basis in law or fact for questioning the guilty plea we must next 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 first consider the definition contained in 18 U.S.C. § 2256(8)(D) concerning images that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the material was child pornography. 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. The appellant did not indicate that he believed that this was child pornography because of advertisements or descriptions. Rather, it was the visual depictions themselves that led the appellant to conclude that minor children were involved. 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 that any error of law in providing that definition did not create a substantial basis for challenging the plea.

We next consider 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. At no time did the appellant indicate that the pictures in question were child pornography only because they "appeared to be" actual children. Nothing in the record indicates the images in question are "computer-generated" or "virtual" photographs. To the contrary, the appellant stipulated to the assessment of an expert pediatrician that the children were prepubertal or "going through puberty," a fact that would logically apply to actual children.

The images in question were included in the record in Prosecution Exhibit 4. This also provides a 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), *cert. denied*, 123 S.Ct. 930 (2003) ("We have examined the images shown to the jury. The children depicted in those images were real; [o]f that we have no doubt whatsoever."). "[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 *United States v. Shearer*, 44 M.J. 330, 334 (1996)). Reviewing these images, we find that the images in question include depictions of actual children engaged in sexually explicit conduct.

During the providence inquiry, the appellant agreed that the images showed minor children but he did not explicitly state that they were "actual" or "real" children. However, 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 scutiny under *Free Speech Coalition*, does not use either word to modify the term "minor." Normal usage and common-sense suggest that describing a person as a minor or a child indicates the subject is a real person, unless there is some limiting language such as "appears to be," "virtual," or "computer-generated." Where, as here, the appellant indicated that the images were of minors, and that minors are children under the age of 18, we find a sufficient basis to conclude that the appellant believed they were images of real children. To do otherwise would require speculation on our part, and we will not "speculate post-trial as to the existence of facts which might invalidate" a guilty-plea. *Johnson*, 42 M.J. at 445. We hold that any error of law in including the "appears to be" language from 18 U.S.C. § 2256(8)(B) in the definition of child pornography in this case 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, 10 U.S.C. § 859(b). However, considering our disposition above, 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).

Sentence Appropriateness

The appellant asserts that his sentence to a bad-conduct discharge is inappropriately severe. We considered carefully all the facts and circumstances of this case, including all matters submitted in sentencing and clemency. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We find this assignment of error to be without merit.

Conclusion

The approved findings 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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner