UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARK R. HUSCHAK
United States Air Force

ACM 35382

28 June 2004

Sentence adjudged 23 September 2002 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Ann D. Shane (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major James K. Floyd.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

ORR, Judge:

The appellant pled guilty to carnal knowledge, sodomy with a child under the age of 16 on divers occasions, sodomy on divers occasions, committing indecent acts upon the body of a child under the age of 16, two specifications of committing indecent acts with another, communicating indecent language, furnishing tobacco products to a minor on divers occasions, furnishing intoxicating liquors to a minor and possessing child pornography, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. A military judge sitting alone as a general court-martial accepted the appellant's pleas and sentenced him to a dishonorable discharge, confinement for 10 years, and reduction to E-1. The convening authority reduced the period of confinement to 8 years and approved the remainder of the adjudged sentence.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant alleges that his conviction for possessing child pornography should be set aside because his guilty plea was improvident. The appellant requests that this Court reassess the sentence. We disagree and affirm.

I. Background

In October 1997, the appellant began engaging in sexual activity with the victim. The victim was the daughter of the appellant's wife's sister, and was 13 years old at the time. The sexual activity began as kissing and over time progressed from heavy petting, to oral sex and ultimately sexual intercourse on at least 30 occasions. On one occasion, the appellant asked the victim to watch while he had sexual intercourse with his wife. On another occasion, the appellant shaved the victim's vagina prior to having sexual intercourse with her. The offenses continued for several years until the victim turned 17 years old.

In early 2000, the victim became extremely moody and argumentative with her parents and sister. The victim's parents noticed that she had several horizontal cuts across her hand and forearm and placed her in therapy. The victim started performing progressively worse in school and refused to cooperate with her therapist. Her parents decided to send her to live with the appellant and his wife in Tucson, Arizona, for three months. While she was there, the appellant gave the victim alcohol to drink and cigarettes to smoke. He also showed the victim pornographic images on his home computer. When the victim told her mother that the appellant possessed pornography and had given her alcohol and cigarettes, her mother made arrangements for the victim to come back home early.

The appellant visited the victim's family in Maryland over the 2000 Christmas holiday season. During the visit, the victim's mother told the appellant to discontinue the inappropriate relationship with her daughter. Even though the victim's parents were still angry about the inappropriate behavior in Tucson, Arizona, they allowed the appellant to spend one night at their home. Once the victim's parents went to sleep, the appellant and the victim had sexual intercourse. In May 2001, the victim told her mother that the appellant had sexually abused her since she was 12 years old. One week later, the victim told her father about the sexual abuse. The victim told her parents that she did not want to get her uncle in any trouble by making a report to the police authorities. Initially, the victim's parents honored her wishes and decided that they would not inform the authorities if the appellant gave them $25,000 as compensation for the victim's misery. When the appellant stated that he did not have the money, the victim's father called the police. When the authorities searched the appellant's home computer, they found over 2,100 images of nude children in sexually explicit poses.

II. Possession of Child Pornography

The specification charging the wrongful possession of child pornography alleged that the appellant did "wrongfully and knowingly possess visual depictions of a minor engaging in sexually explicit conduct, which conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces." The charge was brought under Article 134, UCMJ, and the specification alleged grounds under clauses 1 and 2 of that article. *See generally Manual for Courts-Martial, United States*, Part IV, ¶¶ 60(c)(2)-(3) (2000 ed.).

As noted above, the appellant pled guilty to this specification. As part of the providence inquiry required under Article 45, UCMJ, 10 U.S.C. § 845 and Rule for Courts-Martial 910(e), the military judge questioned the appellant about his understanding of the charged offense. The military judge advised the appellant of the elements of the charged offense as follows:

> That, on divers occasions, between about 1 June '97 and about 26 September 2001, in the continental United States, you wrongfully and knowingly possessed visual depictions of a minor engaging in sexually explicit conduct.
>
> And that, under the circumstances, your conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.

The military judge focused upon clause 1 of Article 134, UCMJ, which sanctions "disorders and neglects to the prejudice of good order and discipline in the armed forces." The military judge also discussed clause 2 of Article 134, UCMJ, which sanctions "all conduct of a nature to bring discredit upon the armed forces." The military judge defined the term "child pornography" using definitions similar to those found in 18 U.S.C. § 2256, including the definitions of child pornography contained in § 2256(8), subsections A through D, but she did not specifically refer to the statute.

The military judge explored the factual basis for the plea by inquiring about how the appellant obtained the images and his lack of legal justification or excuse for possessing them. The military judge also discussed at length with the appellant whether the images constituted child pornography:

> MJ: Okay. Then, at this time, I want you to tell me why it is you believe you are guilty of Specification 4 of Charge IV.
>
> ACC: Between May 1997 and September 2001, I possessed visual depictions of minors engaging in sexually explicit conduct. I possessed

these images on a computer media such as my hard drive or on compact discs. I knew the children and images were minors and that such images were illegal. I had no excuse or authorization to possess such images.

MJ: Okay. At the time, then, that you – where did you have these images?

ACC: In Biloxi, Mississippi, Your Honor.

MJ: No. I mean, were they in a binder, folder, desk drawer, or did you have them actually on the hard drive of your computer? Where did you actually have them maintained?

ACC: On CDs, Your Honor.

MJ: Okay. Were they CDs that you copied the pictures onto or did you buy the CDs with the pictures already on them?

ACC: These were images from the Internet, Your Honor.

MJ: Okay. So you had downloaded them and copied them to the CD?

ACC: Yes, Your Honor.

MJ: Okay. At the time that you copied the images to the CD, did you know that they were of minors engaged in sexually explicit conduct?

ACC: Yes, Your Honor.

The military judge explained at length that the appellant's possession of the images had to be wrongful. The military judge also explained that, "It is not necessary that the actual identity of the identifiable minor be proven. It is only required that it actually be a child. In other words, if it was an animated picture or drawing, not involving the likeness of an actual child, the elements would not be satisfied." The military judge asked:

MJ: Is there any question in your mind as to whether these are actual children in the pictures?

ACC: They appear to be, Your Honor.

MJ: Okay. Do you believe them to be?

ACC: Yes, Your Honor.

MJ: Okay. Do they appear to be under the age of eighteen to you?

ACC: Yes, Your Honor.

MJ: At the time that you obtained the pictures, was it your intention to have pictures of children, underage minors, engaging in sexually explicit conduct? Is that what you were attempting to possess?

ACC: Yes, Your Honor.

The military judge also determined that the appellant understood and agreed that his possession of the images in question was service discrediting under clauses 1 and 2 of Article 134, UCMJ. The military judge asked the appellant to explain why his possession of the visual depictions was service discrediting or prejudicial to good order and discipline:

MJ: Okay. And as indicated also here in the specification, one of the elements is either that your conduct was service discrediting or prejudicial to good order and discipline. Which was it, was it both, and in what manner was it?

ACC: Okay. I'm sorry, Your Honor.

MJ: No, that's fine.

ACC: I believe it was prejudicial to good order and discipline in the armed forces because I was in the Air Force at the time of possession and it's illegal to possess such items, and it brings discredit upon the armed forces because . . .[the victim] knew that I had possession of this and she could tell others, Your Honor.

MJ: Okay. So you would agree, then, that others finding out that a member of the military keeps and possesses such material would reflect poorly on the military as a whole.

ACC: Yes, Your Honor.

The military judge accepted the appellant's plea and imposed the sentence indicated above. On 2 November 2002, the convening authority approved the findings and reduced the confinement portion of the sentence to 8 years and forwarded the record of trial for appellate review under Article 66, UCMJ.

The appellant argues that in accordance with the decision of the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) portions of 18 U.S.C. § 2256 are unconstitutional. He contends, therefore, that his conviction for possessing child pornography must be set aside because the appellant and the stipulation of fact used the "appears to be" language that the Supreme Court found unconstitutional. We disagree. We reemphasize that the offense at issue is a violation of the general article, Article 134, UCMJ, clauses 1 or 2, not 18 U.S.C. § 2252A.

III. Discussion

We must determine whether the appellant's guilty plea to possessing child pornography was provident. The test 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)). *See United States v. James*, 55 M.J. 297, 298 (C.A.A.F. 2001); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 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 (C.A.A.F. 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 (C.A.A.F. 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 (C.A.A.F. 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).

In *Free Speech Coalition*, 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 visual depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Free Speech Coalition*, 535 U.S. 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).

The precise issue before us is whether, in the wake of the decision in *Free Speech Coalition*, there is a substantial basis in law or fact to question the providence of the appellant's guilty plea to violating Article 134, UCMJ, clauses 1 or 2, for possessing child pornography. Of course, "military courts . . . have the same responsibilities as do

the federal courts to protect a person from a violation of his constitutional rights." *Burns v. Wilson*, 346 U.S. 137, 142 (1953). However, the Supreme Court recognized that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Id.* at 140. Certain conduct might enjoy First Amendment protection for persons in the United States but still be a prosecutable offense under the UCMJ if committed by a service member. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy*, 417 U.S. 733, 758 (1974).

In *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000), decided before the decision in *Free Speech Coalition*, our superior court considered whether acts which did not constitute a violation of 18 U.S.C. § 2252 were punishable as a violation of Article 134, UCMJ, under clauses 1 or 2:

> It is clear from reading Article 134 that conduct which violates no specific statute may still be an offense thereunder if it is found to be prejudicial to good order and discipline or if it is of a nature to bring discredit upon the armed forces. *See United States v. Williams*, 17 MJ 207, 215-16 (CMA 1984); *United States v. Mayo*, 12 MJ 286, 289 (CMA 1982); *United States v. Long*, 2 USCMA 60, 6 CMR 60 (1952). We have no doubt that the knowing possession of images depicting sexually explicit conduct by minors, when determined to be service-discrediting conduct, is a violation of Article 134.

Sapp, 53 M.J. at 92. *See also United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000).

Considering the precedent established by this solid body of law, we have no difficulty affirming the appellant's knowing, voluntary guilty plea to conduct prejudicial to good order and discipline. In *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), our superior court examined the viability of a charge of possession of child pornography under clauses 1 and 2, of Article 134, UCMJ. The Court considered, in light of the decision in *Free Speech Coalition*, whether "the possession of such visual depictions can be viewed as service discrediting." The Court indicated a willingness to uphold a guilty plea as long as the providence inquiry demonstrated that the appellant "clearly understood the nature of the prohibited conduct." *O'Connor*, 58 M.J. at 454. In essence, the providence inquiry must include a discussion of whether the visual images contain actual children and that the appellant's conduct was service discrediting. In the instant case, the providence inquiry included both.

In *United States v. Irvin*, No. 03-0224/AF (10 Jun 2004), our superior court held that if the offense of possession of child pornography is charged under either clause 1 or

2 of Article 134, we need not focus on whether there was a violation of the Child Pornography Prevention Act (CPPA). "[T]he providence of his guilty plea must be assessed against the elements of that offense, not the elements of the CPPA offense at issue in *O'Connor* and *Free Speech Coalition*." *Irvin*, slip op. at 6.

We now turn to the specific conduct charged in this case as a violation of clauses 1 and 2 of Article 134, UCMJ: the possession of child pornography. The appellant told the military judge that he illegally "possessed visual depictions of minors engaging in sexually explicit conduct." The appellant also explained why his conduct was service discrediting and prejudicial to good order and discipline. Therefore the requirements specified in the *Irvin* case have been met. *Id.* at *7*.

Nevertheless, the appellant argues that the plea is improvident because the appellant stated during the providence inquiry that the pictures "appeared to be" of children. In *O'Connor*, 58 M.J. at 453, the Court ruled that, in order to find a guilty plea provident, "his plea inquiry and the balance of the record must objectively support the existence of this factual predicate," i.e., that the images involved actual minors. The factual predicate includes the appellant's responses to the military judge's questions. While the appellant originally used the "appeared to be" language, he later told the military judge that he believed that there were actual children in the pictures. The appellant also agreed with the military judge when she asked whether the children in the pictures "appeared to be" under the age of eighteen. Although the appellant did not state that he believed that the children were under eighteen years of age, he stated that "I knew the children and images were minors and that such images were illegal."

The factual predicate may also include the images in question. This Court may review the images to determine whether they are consistent with the appellant's plea. *See James*, 55 M.J. at 301; *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002), *cert. denied*, 538 U.S. 954 (2003); *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) ("We have examined the images shown to the jury. The children depicted in those images were real; Of that we have no doubt whatsoever."), *cert. denied*, 537 U.S. 1138 (2003); *United States v. Tynes*, 58 M.J. 704 (Army Ct. Crim. App. 2003); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003) (*Free Speech Coalition* does not require either direct evidence of the identity of the children in the images or expert testimony that the images are of real children rather than computer-generated "virtual" images), *cert. denied*, 124 S. Ct. 945 (2003). *See also United States v. Sanchez*, 59 M.J. 566 (A.F. Ct. Crim. App. 2003). The images in question were not "computer-generated images," "a Renaissance painting depicting a scene from classical mythology," or scenes from Hollywood movies involving actresses over 18 years old. *Free Speech Coalition*, 535 U.S. at 241. Having reviewed the images in Prosecution Exhibit 3, we find that most, if not all of the children depicted in those images are under the age of 18. We also find that the appellant's discussion with the military judge established a sufficient basis to conclude that the appellant understood that his conduct was service discrediting and

prejudicial to good order and discipline. Therefore, we find nothing inconsistent with the appellant's plea.

Even if the "appears to be" language is later determined to be error, we are constrained from reversing a finding on the ground of an error, even constitutional error, unless that error "materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998). "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

When the military judge used the "appears to be" language she was referring to the ages of the children in the images. The "appears to be" phrase found unconstitutionally overbroad under *Free Speech Coalition* was in the context of whether there were actual or computer-generated children in the images. The Supreme Court did not hold that the "appears to be" language is unconstitutional in every context. But if it is determined that the "appears to be" language is unconstitutional when referring to the ages of the children, we find a sufficient basis to conclude that the appellant's plea was provident. We are satisfied that any error of law in using the "appears to be language" was harmless beyond a reasonable doubt. *See generally United States v. Mason*, No. 02-0849/AF (10 Jun 2004). The appellant's responses to the military judge's inquiries and the images in the record objectively support the guilty plea. *O'Connor*, 58 M.J. at 453; *James*, 55 M.J. at 300. We find nothing in the plea inquiry or the balance of the record to suggest that accepting the appellant's guilty plea to a violation of Article 134, UCMJ, clauses 1 and 2, violated his First Amendment rights.

IV. Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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Chief Court Administrator