UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JASON M. BRINKLEY
United States Air Force

ACM 34629

31 October 2003

Sentence adjudged 7 May 2001 by GCM convened at Rhein-Main Air Base, Germany. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-2.

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

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Mitchel Neurock.

Before

VAN ORSDOL, PRATT, and MALLOY
Appellate Military Judges

MALLOY, Judge:

This appeal involves a pre-*Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), prosecution for violation of the Child Pornography Prevention Act of 1996, (CPPA), 18 U.S.C. § 2251, *et. seq*. After unsuccessfully seeking dismissal of the case on jurisdictional grounds, the appellant pleaded guilty at a general court-martial to a single charge and specification of knowingly receiving, on divers occasions, child pornography that had been transported in foreign commerce, in violation of 18 U.S.C § 2252A(a)(2)(A). The charge was brought under Clause 3 of Article 134, UCMJ, 10 U.S.C § 834, as an offense, not capital, under federal law. All of the criminal conduct occurred while the appellant was assigned to Rhein-Main Air Base, Germany.

Under the terms of a pretrial agreement, the appellant elected to be sentenced by a military judge sitting alone. After conducting an extensive providence inquiry, the military judge accepted the appellant's guilty plea and sentenced him to a bad-conduct discharge, confinement for 5 months and reduction to the grade of E-2. The adjudged sentence was less than that provided for in the pretrial agreement. The convening authority waived mandatory forfeitures but otherwise approved the sentence as adjudged on 20 July 2001. The case is now before this Court for mandatory review under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

The appellant has filed two assignments of error to which the government has responded. As he did at trial, he argues the court-martial lacked subject-matter jurisdiction over the offense because Congress did not affirmatively express an intent for 18 U.S.C § 2252A(a)(2)(A) to apply extraterritorially. The appellant reasons that since his violations occurred exclusively in Germany, his conviction cannot stand.

In his second assigned error, he argues that his plea to receiving child pornography in "foreign commerce" was improvident because "[he] did not receive the pornography from a location within the United States, it did not pass through the United States and [he] was outside of the United States when he received it." Although not a separate assignment of error, the appellant further challenges his guilty plea in light of the Supreme Court's decision in *Free Speech Coalition.* He asserts the plea also cannot stand because the military judge used a now constitutionally infirm definition of child pornography in advising him of the elements of the offense.

After careful consideration of the briefs and the record of trial, we affirm the appellant's conviction and sentence.

I. Background

The stipulation of fact provided that, in September 2000, German law enforcement authorities notified the Air Force Office of Special Investigations (OSI) that the appellant had accessed a website site containing child pornography. The appellant accessed the website on his home computer using an Internet service provider based in Bitburg, Germany, to which he subscribed. The website was operated by a German national who was then under investigation for dissemination of child pornography in violation of German criminal law. As a result of this information, the appellant became the subject of an OSI investigation.

The appellant further stipulated that, among other things, he "viewed images of adult males sodomizing children and elementary aged females performing various sexual acts on adult males, and determined the site [he visited] contained child pornography." He located these images by using "links on Internet pornography message boards" and search terms such as "lolita" and "teen." A consensual search of his computer hard drive

revealed more than 5000 images, graphic and video files of all types, of which approximately 325 were suspected child pornography. Twenty-two of the latter are included in the record and form the basis of the charged offense.

During the providence inquiry, the military judge used the following definition to advise the appellant of the meaning of child pornography:

> "Child pornography" means any visual depiction, including any photograph, film, video picture, or a computer, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means of sexually explicit conduct when: a. the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct, b. such visual depiction is or appears to be of a minor engaging in sexually explicit conduct, c. such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct, 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 specifically stipulated, and thereafter affirmed on the record, that his acts "victimized the children depicted in the pornographic images and were wrongful" and that his "wrongfully receiving child pornography was prejudicial to good order and discipline." In addition to stipulating that he "victimized the children depicted" in the images, the record contains the following exchanges between the military judge and the appellant during the plea colloquy:

> MJ: So it had either images of people under the age of 18 engaging in sexually explicit conduct or displaying their genitals in a lewd and lascivious manner?
>
> ACC: Yes, Ma'am, that's correct.
>
> . . . .
>
> MJ: Now the site that you actually came across the specific images of children engaging in sexually explicit conduct or child pornography images was described in the stipulation of fact as an Internet site that was under investigation by German authorities, involving a German national, correct?
>
> ACC: Yes, Ma'am.
>
> . . . .

MJ: And did you know that the images that you were viewing at the time that you viewed them, constituted child pornography, as I've defined the term for you?

ACC: [No response.]

MJ: That is, that they were children -- in lewd and lascivious acts?

ACC: Yes, Ma'am.

MJ: Bailiff let me have you come and retrieve--

[Defense counsel] DC: Your honor?

MJ: Yes?

DC: I don't know if this helps -- I don't think the confusion was in respect to the actual images. I think his confusion was whether or not that he knew that there was a statute with respect to that?

ACC: Right.

MJ: Okay.

DC: I don't know if that helps that or not.

MJ: All right thank you.
And I can hold off for a second then.

MJ: When you looked at these images, did you know that at least one individual, in each of these images that are charged as child pornography, were minors under the age of 18?

ACC: Yes, Ma'am.

The appellant further stipulated that the images he "knowingly received on his home computer using his Internet account . . . were transported by computer over the world wide web in interstate and foreign commerce, and in violation of 18 U.S.C.§ 2252A(a)(2)(A)." As the appellant correctly points out, however, the military judge did not provide him with the statutory definition of "in foreign commerce" found within Title 18 of the United States Code when prefacing her discussion of the offense with

him. Instead, she simply relied on her and counsel's understanding of the term. In this regard, the record reveals the following exchange between the military judge and the appellant on the subject of the meaning of "in foreign commerce:"

> MJ: Now, this offense requires that you be satisfied in your mind, and that the court be satisfied, that these images had been transported to you in foreign commerce. Do you agree that these images, coming in from a German Internet site provider were, in fact, in foreign commerce?
>
> ACC: Yes, Ma'am.
>
> MJ: In other words, this German national who was operating this site was able to access citizens of the United States by using the commerce mechanism known as the Internet. Do you agree with that?
>
> ACC: Yes, Ma'am, I do.
>
> . . . .
>
> MJ: In other words, a German merchant was reaching out and getting money from an American citizen by using the Internet.
>
> ACC: Yes, I understand, Ma'am.
>
> MJ: And you agree that that's foreign commerce?
>
> ACC: Yes, Ma'am.
>
> MJ: And here it indicates that he made approximately .01 Deutsche Mark per hit or visit to his web site, so you agree that he was engaged in commerce, right?
>
> ACC: Yes, Ma'am.
>
> MJ: He was doing it for a profit?
>
> ACC: Yes.
>
> MJ: And you don't have any idea where he got these images from, whether they may have been imported to him from outside of Germany, for example?
>
> ACC: I do not know, Ma'am.

MJ: Okay, so it's possible that, in addition to the fact that he, a German merchant, was reaching out in international commerce to you, an American citizen, he also could have been using images that he accessed from other national sites?

ACC: Yes, Ma'am.

MJ: And you accept that as possibly true?

ACC: Yes, Ma'am.

II. Discussion

A. Extraterritorial Application of § 2252A(a)(2)(A)

Notwithstanding the appellant's guilty plea and concession under oath that his conduct violated § 2252A(a)(2)(A) of the CPPA, the issue of extraterritorial application is not waived for appeal. A guilty plea does not waive a challenge to the jurisdiction of the court-martial that tried the appellant. *See United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999) (guilty plea did not waive issue of whether state offense had been properly assimilated under Article 134, UCMJ). We review the military judge's findings of fact under a clearly erroneous standard and her conclusions of law on the jurisdictional issue de novo. *See generally*, S. Childress & M. Davis, 2 Federal Standards of Review §§ 7.01, 7.05 (2d ed. 1992).

Suffice it to say here, we agree with the military judge's ultimate conclusion that a military member may be charged under Article 134, UCMJ, Clause 3, with a violation of Section 2252A(a)(2)(A), regardless of the situs of the offense. Indeed, both this Court and the Navy-Marine Corps Court of Criminal Appeals have recently reached this conclusion after examining arguments similar to the one the appellant now advances. *United States v. Martens*, 59 M.J. 501 (A.F. Ct. Crim. App 2003); *United States v. Cream*, 58 M.J. 750 (N.M. Ct. Crim. App. 2003). As the court noted in *Cream*, a contrary "reading of the CPPA somewhat disregards the extended reach of the UCMJ's status-based jurisdictional scheme, directly conflicts with the jurisdictional parameters set forth in the Federal criminal code, and fails to adequately appreciate the intent of Congress in passing the subject statute." *Cream*, 58 M.J. at 752.

We add a final note to the discussion of the extraterritorial application of the statute. The appellant suggests, as the appellant did in *Martens*, that the Supreme Court's decision in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), casts into doubt an earlier and separate line of decisions of the Supreme Court finding extraterritorial application of criminal statutes. While this could possibly be the case--though we doubt

it for the reasons set forth in *Martens* and other federal decisions cited therein--the short answer to this claim is that it is simply not our prerogative to speculate as to whether the Supreme Court has overruled its prior case law by implication. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). Accordingly, we reject the appellant's argument concerning the effect of *Arabian Am. Oil* and, consistent with *Martens* and *Cream,* hold that 18 U.S.C. § 2252A(a)(2)(A) applies extraterritorially.

B. The Providence of the Plea

As noted above, the appellant now challenges the providence of his guilty plea for two reasons. First, he alleges that the plea was improvident because he did not "receive the pornography from a location within the United States, it did not pass through the United States, and the appellant was outside of the United States when he accessed it." Second, he asserts the plea cannot stand after the Supreme Court's decision in *Free Speech Coalition.* Both issues merit discussion. Ultimately, however, we conclude that the plea was provident and the appellant's conviction is unaffected by the unconstitutional definitions of the CPPA.

A guilty plea will be set aside when the record reveals "a 'substantial basis' in law and fact" for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Post-trial speculation as to the existence of a possible or theoretical defense is not sufficient to disturb a guilty plea. *Id.* The appellant's guilty plea relieved the government of its burden of proving each element beyond a reasonable doubt and, therefore, it is not particularly surprising that the record has not been fully developed on the cyberspace[1] travels of the appellant's child pornography. *Id.*

Even so, we are not here to determine whether the appellant may have had a possible defense based on the possibility that the pornography he knowingly received via the World Wide Web was somehow not transmitted "in foreign commerce." He waived this opportunity when he elected to plead guilty. Instead, as noted above, we look for a "substantial basis" for questioning the plea, and we find none.

We must determine whether there are factual circumstances in the record, when viewed in its entirety, to support the conclusion that the appellant knowingly and voluntarily pleaded guilty. *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002). Our superior court has made clear that a necessary predicate for such a finding is a determination that the military judge adequately and correctly advised and discussed all

[1] Cyberspace has no particular geographic location. Instead, it encompasses the various tools available to communicate and retrieve documents on the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). The Internet is the international network of computers that allows information in cyberspace to be available anywhere in the world. *Id.*

elements of the offense with an accused before accepting a guilty plea. *Id*. If the military judge has failed in this task, we must find reversible error, "unless 'it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty.'" *United States v. Redlinski*, 58 M.J.117, 119 (C.A.A.F. 2003) (quoting *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)). Although we agree with the appellant that the military judge did not fully explain the meaning of the statutory phrase "in interstate or foreign commerce," we believe the record, when viewed in its entirety, adequately establishes that he understood the elements of the offense, admitted them freely, and pleaded guilty because he was guilty and wanted the benefit of the pretrial agreement.

Section 2252A(a)(2)(A) provides: "Any person who--knowingly receives or distributes--any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; shall be punished as provided in subsection (b)." The definition of "foreign commerce" is found in 18 U.S.C. § 10 and is exceedingly brief: "The term 'foreign commerce', as used in this title includes commerce with a foreign country," meaning commerce between the United States and a foreign country. *Martens*, 59 M.J. at 505. Here, the military judge failed to completely and correctly advise the appellant of this element before accepting his plea. Thus, we are left with the task of determining whether this failure is fatal to the providence of the plea to the charged offense.

Since we conclude that it was not, we do not decide whether the plea supports the lesser included or closely related offenses under Article 134, UCMJ. *See United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000) (Article 134's three clauses do not create separate offenses but reflect alternative ways of charging criminal conduct).[2] We do pause to note, however, that the appellant stipulated that his conduct was wrongful, prejudicial to good order and discipline, and service discrediting.

The appellant was charged with knowingly receiving, by means of a computer, child pornography transported "in foreign commerce." He actually stipulated that this pornography had been "transported by computer over the World Wide Web in interstate and foreign commerce." His admission and stipulation that he received the pornography from the Internet was sufficient to establish that it was transmitted in interstate commerce. *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce"). It is a small step in logic to conclude that information admittedly receive from the World Wide Web has also been transported in foreign commerce.

[2] Prior to arraignment and during argument on the appellant's motion to dismiss, trial counsel suggested that Clause 1 or 2 violations of Article 134, UCMJ, were lesser included offenses, and defense counsel suggested that possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(A) was a closely related offense.

We begin our discussion by observing that the appellant misperceives the nature of the proof required under the statute. The appellant asserts that his plea is improvident because the statute requires a showing that he personally received the child pornography in interstate or foreign commerce; in other words, that he, located in Germany at the time, received the material from somewhere in the United States. The military judge, moreover, made the same error in her discussion of the meaning of foreign commerce with the appellant when she stated: "Now this offense requires that you be satisfied in your own mind, and that the court be satisfied, that these images had been transmitted to *you* in foreign commerce." (emphasis added). In our view, this is not the law.

The statute requires not that the child pornography have been transported in interstate or foreign commerce to the individual charged with its violation (here the appellant), but, rather, that it "has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer."[3] This requirement is simply the jurisdictional element or jurisdictional "hook" that allows federal prosecution consistent with the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8, cl. 3. *See United States v. McCoy*, 323 F.3d 1114, 1124 (9th Cir. 2003); *United States v. Rodia*, 194 F.3d 465, 471 (3d Cir. 1999) (A jurisdictional hook is a "provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute"). *See also United States v. Pabon-Cruz*, 255 F.Supp. 2d 200, 205 (S.D.N.Y. 2003) ("What makes the conduct punished by § 2252(a)(1)(A) blameworthy is that it involves trafficking in depictions of the sexual abuse of children; the 'interstate [or foreign] commerce element' is merely what brings the blameworthy conduct under federal jurisdiction."). *Accord*, *United States v Murray*, 52 M.J. 423 (2000) (evidence that the appellant downloaded child pornography from the Internet was sufficient to prove that it had passed through interstate commerce*).*

What, then, is required to satisfy this jurisdictional "hook" in a case involving images seized from a computer is some nexus between the images and the Internet. *See United States v. Runyan*, 290 F.3d 223, 242 (5th Cir. 2002) ("[T]he Government must make a specific connection between the images introduced at trial and the Internet to provide the requisite jurisdictional nexus."), *cert. denied*, 537 U.S. 888 (2002). There is no requirement, however, that the accused actually knows of this nexus. In *Murray*, 52 M.J. at 426, the Court rejected the "appellant's contention that the Government was required to prove that he knew the pictures passed through interstate commerce, i.e., that the interstate commerce element is more than jurisdictional."

[3] This distinction can be illustrated by a simple hypothetical. A. receives proscribed child pornography on his home computer and then gives hard copies of the images to his friend and neighbor B. While the images were not transported to B. in interstate or foreign commerce, he has nonetheless received child pornography that has been, and is thus subject to prosecution under the statute.

Against this backdrop, we turn to the question of whether the appellant understood that in a litigated case the government would have to prove his pornography was transported in interstate or foreign commerce and whether he freely admitted to this fact, despite the military judge's incorrect statement of the law. As we have quoted above, although the appellant did not know from where the child pornography came, he stipulated that the images "were transported by computer over the world wide web" and he understood they could have come from any site in the world, including the United States. And this, of course, is consistent with the way information travels in cyberspace on the World Wide Web. "The Internet is a 'unique and wholly new medium of worldwide human communication,'" and information placed on the World Wide Web, such as the pornography in issue here, has "no particular geographical location but [is] available to anyone, anywhere in the world, with access to the Internet." *Reno v. American Civil Liberties Union*, 521 U.S. at 850-51 (footnote omitted).

Given the appellant's admissions on the record that he retrieved the child pornography from the World Wide Web and his understanding that it could have been transported from anywhere in the world, his present position that his plea was deficient because the military judge failed to inform him of a one line statutory definition is untenable. He admitted that the pornography he knowingly received was not only transported in foreign commerce but that it was also transported in global commerce and it was available anywhere in the world, without regard to geography. In sum, there is no statutory requirement, as appellant now suggests, that he had to know and admit that the child pornography came to him personally from the United States. Under the circumstances, we find there is not a substantial basis in fact and law to question his guilty plea. The admission that the information traveled in global commerce on the information super highway created by the Internet is sufficient to satisfy this jurisdictional element.

We next turn to the question whether the appellant's conviction can be affirmed in light of the Supreme Court's decision in *Free Speech Coalition* and the Court of Appeals for the Armed Forces' recent decision in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). As our superior court noted in *O'Connor*:

> In *Free Speech Coalition*, the Supreme Court determined that certain portions of the § 2256(8) definition are unconstitutional, specifically the "or appears to be" language of § 2256(8)(B), and the entirety of 2256 (8)(D). 535 U.S. at 256, 258. In striking the former, the Court specifically discussed the distinction between "virtual" child pornography and "actual" pornography and concluded that the rationales for restricting pornographic materials involving actual children do not extend to computer generated simulations or images. *Id.* at 249-56.

Id. at 452 (footnote omitted).

The military judge used a definition of child pornography that included the language that has now been determined to be unconstitutional. *See Free Speech Coalition*. This was error under the law as it exists at this time. Accordingly, following our superior court's reasoning in *O'Connor*, we must determine whether the appellant pleaded guilty to receiving pornographic pictures of "actual" children and whether those children were, in fact, minors and not adults posing as minors. We believe that we can answer both of these questions in the affirmative based on: (1) the stipulation of fact, (2) the appellant's responses during the providence inquiry, and (3) our independent review of the pictures included in the record under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See 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). *See also United States v. Sanchez*, ACM 34940 (A.F. Ct. Crim. App. 29 Sep 2003).

The appellant stipulated that the pornography he received contained "the images of adult males sodomizing children and elementary aged females performing various sexual acts on adult males, and determined the site contained child pornography." Moreover, he admitted on the record to the following: (1) The pictures contained "either the images of people under the age of 18 engaging in sexually explicit conduct or displaying their genitals in a lewd and lascivious manner;" (2) He knew "that they were children," and (3) "When he looked at the images [he knew] that at least one individual, in each of the images that are charged as child pornography, were minors under the age of 18." Consistent with the appellant's view, there is no doubt in our minds that these pictures depicted graphic images of prepubescent children being sexually abused.

We are satisfied that the appellant admitted to receiving images of "actual," and not "virtual," children. *See Free Speech Coalition*. Again, we return to the stipulation of fact and the appellant's admissions on the record. The appellant stipulated that his conduct "victimized the children depicted in the pornographic images" and then affirmed this position on the record. This admission makes sense only if the appellant understood and believed that the images were of "actual" children. While "virtual" images might be just as graphic as those received by the appellant, and their production might harm society in a general sense, they do not victimize "actual" children because those images exist only in cyberspace. On the other hand, "actual" children depicted in pornography really exist and continue to be victimized by actions such as the appellant described. *See United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) ("[T]he children depicted in the pornography suffer a direct and primary emotional harm when another person possesses, receives or distributes the material"), *cert. denied*, 536 U.S. 963 (2002).

The appellant's admission is only consistent with his belief that he, in fact, received pictures of "actual" children being victimized in a most cruel manner and his

receipt of these pictures further victimized them. Accordingly, we conclude that his case is not like the situation in *O'Connor* because there is no doubt as to the appellant's understanding of what he received.

III. 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

HEATHER D. LABE
Clerk of Court