UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman EDWARD D. DEES
United States Air Force

ACM 34841

13 December 2002

Sentence adjudged 8 June 2001 by GCM convened at Incirlik Air Base, Turkey. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Patrick J. Dolan.

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

Before

VAN ORSDOL, BRESLIN, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of one specification of violating a lawful general regulation by displaying and storing sexually explicit materials on a government computer, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and two specifications of possessing computer discs containing images of child pornography on divers occasions contrary to 18 U.S.C. § 2252A(a)(5)(A), in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting alone sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant now asserts his guilty pleas were improvident. We find error but no prejudice, and affirm.

Providence of the Plea–Possession of Child Pornography

After the appellant submitted his assignment of errors in this case, the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002), concerning the constitutionality of portions of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260. This Court then granted the appellant's request to file a supplemental assignment of error to assess the impact of the Supreme Court's ruling upon this case. Citing *Free Speech Coalition*, the appellant now argues that his guilty pleas to the specifications of Charge II were improvident, because they were based upon a definition of child pornography invalidated by the Supreme Court. We do not agree.

As previously noted, the appellant pled guilty to two specifications of possessing computer discs containing images of child pornography. One specification concerned the government computer the appellant used at work; the other specification involved two computers and several portable discs the appellant kept in his dormitory room on base.

As required by Rule for Courts-Martial (R.C.M.) 910(e), the military judge questioned the appellant at length about his understanding of the offenses to which he was pleading guilty, and the factual basis for the 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 of computer or computer generated image or picture whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
>
> 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 engaged 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 repeatedly advised the military judge that the images in question met this definition of child pornography.

The appellant agreed to a detailed stipulation of fact, explaining how he committed the charged offenses. According to the stipulation of fact, the appellant told agents of the Air Force Office of Special Investigations (AFOSI) that "he had gone to child pornography web sites on his government computer," and that "the sites contained pictures of girls that were approximately 15 years of age and older." The parties stipulated that the appellant downloaded on his government computer between five and ten images that constituted child pornography, and that some of these images were included, along with sexually explicit photographs involving adults, in Prosecution Exhibit 7. The parties also stipulated that Prosecution Exhibits 8 through 15, inclusive, contained a representative sample of the images of child pornography found on computer discs the appellant possessed at his home.

In *Ashcroft v. Free Speech Coalition*, decided after the trial in this case, 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. 122 S. Ct. at 1405-06. Nonetheless, the Supreme Court reiterated that the government could constitutionally prohibit pornography involving actual children. *Id.* at 1396. *See generally New York v. Ferber*, 458 U.S. 747 (1982); 18 U.S.C. § 2256(8)(A) and (C).

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).

This was a guilty plea. In order to determine whether there is a "substantial basis in law and fact for questioning the guilty plea," *Milton*, 46 M.J. at 318, we must decide whether the guilty plea was based, in whole or it part, upon the portions of the definition of child pornography later struck down in *Free Speech Coalition*.

We turn first to 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. Some of the websites had names suggestive of child pornography, containing such terms as "lolita" and "daughters," but the appellant did not indicate he believed that this was child pornography because of these advertisements or descriptions. To the contrary, in the stipulation of fact that is Prosecution Exhibit 1, the parties agreed that the appellant told the AFOSI agents he thought he was in "regular" pornography sites, and then either strayed into sites involving child pornography, or hit them "by accident." 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 turn next to 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*, 122 S. Ct. at 1397. 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 1396. 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.

The parties agreed to the introduction of some of the images in question, and representative samples of the images were included in the record in Prosecution Exhibits 7 through 15. 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) ("We have examined the images shown to the jury. The children depicted in those images were real; of that we have no doubt whatsoever."); *James*, 55 M.J. at 300-01. Reviewing these images, we note that one image in Prosecution Exhibit 10 is a

cartoon drawing, which cannot meet the definition of child pornography set out in *Free Speech Coalition*. However, the remaining pictures support the appellant's admissions that the images in question involve actual children engaged in sexually explicit conduct.

The appellate defense counsel argues simply that the appellant "never admitted that the images he possessed actually contained minors." 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 muster under *Free Speech Coalition*, does not use either word to modify the term "minor." Contrary to the appellant's argument, 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 stipulated that he "knew or believed the images that he possessed were of individuals under 18 years of age," 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.

Of course, "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).

Providence of the Plea–Divers Occasions

The appellant maintains his guilty plea to Specification 1 of Charge II was improvident, in part, because the facts adduced at trial show the possession was on a single occasion, rather than on "divers occasions" as alleged. We agree.

In the stipulation of fact the parties agreed that,

> [B]etween 28 October 2000 and 29 October 2000, the Accused knowingly possessed between five and ten images of minors engaged in sexually explicit conduct. These images were stored on the hard drive of his government computer at the Law Enforcement Desk in Building 558. . . . The Accused exercised control over the hard drive which contained these images of child pornography. During his 28 October–29 October 2000

shift, the Accused exercised exclusive control over the computer on which these images were found.

From the stipulation of fact, and the factual matters presented to the military judge during the plea inquiry, it is clear there was only one continuous and exclusive possession of the disc in question, although the appellant downloaded and stored multiple images of child pornography during his shift. The gravamen of the offense was the possession of the computer disc containing images of child pornography, not receiving, downloading, or storing the images. Thus we conclude the factual circumstances adduced at trial only support the appellant's plea to possession of the disc on the single occasion alleged, and not on "divers occasions." We affirm the findings of Specification 1 of Charge II, excepting the words, "on divers occasions."

Having taken corrective action on the findings, we must assess the impact, if any, on the sentence. The appellant concedes the error had no impact on the sentence, and we agree. The allegation of "divers occasions" appears to have been inadvertent, perhaps from copying the other specifications. It did not increase the maximum punishment, or change in any way the substantive evidence that formed the basis for the findings of guilt or the sentence. The extensive stipulation of fact and the military judge's inquiry established the operative facts clearly, and did not include evidence of more than the single possession of the one computer drive during the appellant's shift. Thus, we are convinced the error had no impact on the sentence imposed below.

The approved findings, as modified, and the 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. 27, 31 (2000). Accordingly, the findings, as modified, and the sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator