UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WAYNE A. ELLIS
United States Air Force

ACM 38176

19 November 2013

Sentence adjudged 30 May 2012 by GCM convened at Joint Base Charleston, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James; Major Anthony D. Ortiz; and Major Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

HELGET, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, in accordance with his pleas, of one specification of willful dereliction of duty; one specification of aggravated sexual assault of a child who had attained the age of 12, but not 16; one specification of abusive sexual contact with a child who had attained the age of 12, but not 16; one specification of indecent acts; and one specification of wrongfully and knowingly possessing one or more visual depictions of minors engaged in

sexually explicit conduct, in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. The court sentenced the appellant to a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

Before this Court, the appellant raises three assignments of error: (1) His plea of guilty to dereliction of duty for failure to refrain from providing alcohol was improvident under *United States v. Hayes*, 71 M.J. 112 (C.A.A.F. 2012); (2) The military judge erred in finding the appellant guilty of possessing three images of child pornography where only one image constituted child pornography; and (3) The Staff Judge Advocate presented new matters to the convening authority in his addendum without giving the appellant an opportunity to respond. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

On 18 March 2009, the appellant met HS, a 14-year-old at the time. HS had traveled with her mother, BA, from Missouri to Charleston, South Carolina (SC), to visit her brother, Airman (Amn) JS. At the time, the appellant and Amn JS were friends assigned to the 437th Aerial Port Squadron, Joint Base Charleston, SC. While visiting, BA rented a beach house on Folley Beach, near Charleston, SC.

On 19 March 2009, the appellant went with Amn JS and another Airman to the beach house for dinner. Later in the evening, the appellant and HS sat on the couch together watching a movie. Eventually, they started kissing and the appellant digitally penetrated HS's genital opening. Soon thereafter, they decided to go to the garage, where they ultimately engaged in sexual intercourse. HS returned home to Missouri the following day.

In late April 2009, HS and BA returned to Charleston. Prior to this visit, the appellant had arranged for a room at a hotel adjacent to the hotel where HS was staying with BA. At approximately 0100 on the first night, HS snuck out of her room and met the appellant who was waiting outside in his car. They then proceeded to the hotel room the appellant had reserved. At HS's request, the appellant had purchased some Smirnoff Ice, an alcoholic beverage. Once in the room, they both drank some of the Smirnoff Ice and engaged in sexual intercourse. Additionally, the appellant digitally penetrated HS's genital opening, they performed oral sex on each other, and engaged in mutual masturbation. The following night, HS again snuck out of her hotel room and met the appellant. Consistent with the previous night, they went to the appellant's hotel room where they again engaged in sexual relations to include sexual intercourse.

The appellant and HS had no further physical contact following the April 2009 encounters. They did, however, communicate via electronic means to include electronic

mail, texting, and Internet video conferencing. These communications continued until approximately 30 March 2011. On multiple occasions, they shared pictures and videos of each other's exposed genitalia.

On 5 August 2011, the appellant was interviewed by the Air Force Office of Special Investigations (AFOSI). After the interview, the appellant consented to a search of his computers and electronic equipment in his home. The computers were sent to the Defense Computer Forensics Laboratory (DCFL) for analysis. DCFL identified 33 images of suspected child pornography. During the providency inquiry, the appellant admitted to possessing two images of child pornography and the military judge determined that he also possessed a third image of child pornography.

Guilty Plea Providency

"[W]e review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322. "In reviewing the providence of [the a]ppellant's guilty pleas, we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it." *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)). This is an area for which the military judge is entitled to much deference. *Inabinette*, 66 M.J. at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). A military judge abuses his discretion when accepting a plea if he does not ensure the accused provides an adequate factual basis to support the plea during the providency inquiry. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

At trial, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, and the judge must be satisfied that the accused understands the law applicable to his acts (why he is guilty) and that he is actually guilty. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 40 C.M.R. at 250-51); *Jordan*, 57 M.J. at 238.

1. Dereliction of Duty

In his first assigned error, the appellant claims that his guilty plea to the dereliction of duty charge and specification was improvident because the military judge found that he violated South Carolina law without any evidence presented as to that law.

In the Specification of Charge I, the appellant was charged with willful dereliction of duty, in violation of Article 92, UCMJ. During the appellant's plea inquiry, the military judge explained the elements of the offense, as follows:

> (1) That you had a certain prescribed duty, that is, to refrain from providing alcohol to an individual under the legal age of 21 years old;
>
> (2) That you actually knew of this assigned duty; and
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> (3) That . . . you were derelict in the performance of that duty by willfully failing to refrain from providing alcohol to [HS], an individual under the legal age of 21 years old.

The military judge informed the appellant that, "A duty may be imposed by regulation, lawful order or custom of the service," and the appellant said he understood. The appellant also stated that as a military member he had a duty to follow the law of the state in which he resided and in South Carolina it is unlawful to provide alcohol to someone under the age of 21. He was aware of this duty and admitted that he willfully failed to refrain from providing alcohol to a person under the age of 21 by intentionally providing alcohol to HS, who he knew was only 14 years old.

The crux of the appellant's argument is that there was no evidence presented to the military judge that established his duty to obey South Carolina law. The appellant relies on our superior court's decision in *United States v. Hayes*, 71 M.J. 112 (C.A.A.F. 2012). Hayes pled not guilty to a charge of dereliction of duty by consuming alcoholic beverages while under the age of 21. The issue in his case was the sufficiency of the evidence presented by the Government at trial and used to support the finding of guilty. The Court stated:

> Article 92(3), UCMJ, requires the existence of a duty. The [*Manual for Courts-Martial, United States* (*MCM*) (2008 e.d.)] states that the duty "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." [*MCM*, Part. IV, ¶ 16.c.(3)(a)]. It is uncontested that consuming alcohol in any saloon, resort, or place where alcohol is sold while under the age of twenty-one is a violation of Nevada state law. However, even viewed in the light most favorable to the prosecution, there is insufficient evidence in the record for any rational trier of fact to conclude, for the purposes of Article 92(3), UCMJ, that Appellant had a military duty to obey Nevada state law generally.

Id. at 114 (footnotes omitted). The *Hayes* Court found the proof to be insufficient:

> There is no evidence in the record, and the Government points to none on appeal, to support the proposition that [Hayes] was bound by a military duty . . . and subject to sanction under Article 92(3), UCMJ, to obey Nevada's alcohol law, or in the alternative, all state laws in Nevada—an obligation imposed on all citizens within the state. In short, Article 92(3), UCMJ, requires proof of certain military duties, it does not assume such duties. We, thus, conclude the evidence is insufficient as a matter of law.

Id. at 114-15 (internal citations and footnote omitted).

Unlike in *Hayes*, a litigated trial, the present case involved a guilty plea where the appellant freely admitted under oath that he had a military duty to follow South Carolina law. The legal standards applicable to the Government in *Hayes* to sufficiently prove every element of the offense were vastly different than a judge's obligation to ensure an accused understands the law and facts during a guilty plea. In fact, the appellant was advised by the military judge that by pleading guilty, the court could find him guilty of the offenses without receiving any evidence. Specifically, the military judge advised the appellant that he gives up "the right to a trial of the facts; that is, your right to have this court-martial decide whether or not you are guilty based upon the evidence the prosecution would present and on any evidence you may introduce." Accordingly, because the appellant pled guilty, the Government had no obligation to present any evidence concerning the elements of the offense. The requirement was for the military judge to ensure the appellant understood the facts that supported his guilty plea and the law applicable to his acts. During the military judge's colloquy with the appellant, he admitted that through custom of the service, he had a duty to follow the laws of the state he resided in. He further acknowledged that under South Carolina law, it was unlawful to provide alcohol to someone under the age of 21. Upon our review of the record of trial, we find no "substantial basis" in law or fact for questioning the appellant's guilty plea.

Even if we were to find the dereliction of duty charge and specification to be improvident, considering the entire record of trial and applying the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), we are confident the appellant would have received no less than the sentence adjudged at his trial.

2. Child Pornography

In his second assigned error, the appellant argues that the military judge erred in finding him guilty of possessing three images of child pornography claiming that only one image constituted child pornography. The appellant frames the issue as the evidence being factually and legally insufficient to support his conviction. However, as the appellant pled guilty to the charged offense, we will instead address this issue as to whether or not the appellant's plea was provident.

The appellant was charged with wrongfully and knowingly possessing one or more visual depictions of minors engaged in sexually explicit conduct (child pornography), in violation of Article 134, UCMJ. During the providency inquiry, the military judge advised the appellant of the elements of the offense along with any pertinent definitions. In particular, she advised the appellant of the following definitions:

> Sexually explicit conduct means actual or simulated sexual intercourse, including genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex. Sexually explicit conduct also means bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.
>
> Lascivious means the indecent exposure of the genitals or pubic area usually to incite lust. Not every exposure of genitals or pubic area constitutes a lascivious exhibition. Consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition. In determining whether a visual depiction is a lascivious exhibition of the genitals or pubic area of any person you should consider whether the focal point of the visual depiction is on the minor's genitalia or pubic area, whether the setting of the visual depiction appears to be sexually inviting or suggestive. For example, in a location or in a pose generally associated with sexual activity, whether the minor appears to be displayed in an unnatural pose or in inappropriate attire, whether the minor is fully or partially clothed or nude, whether the visual depictions appear to suggest sexual coyness or an apparent willingness to engage in sexual activity, whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

After acknowledging that he understood the elements and definitions, the appellant specifically pled guilty to possessing two images of child pornography, which were identified in the Stipulation of Fact as images 00249954 and 00253233. The appellant stated that he intentionally downloaded these images from a website called 4chan. He indicated that image 00249954 depicted a young teen nude female on all fours with a nude male apparently penetrating her from behind, and image 000253233 depicted a nude prepubescent female facing the camera in a squatting position with her genitalia clearly visible. The appellant admitted that he accessed this website with the specific intent of finding images of children engaged in sexually explicit conduct. The appellant further indicated that, in light of the undeveloped and immature bodies and faces of the persons depicted in the images, those persons were under the age of 18.

In addition to the two images the appellant specifically pled guilty to, the Stipulation of Fact, which included the DCFL report, identified 31 other images of

purported child pornography. At various times throughout the providency inquiry, the military judge discussed with the appellant the extent to which his guilty plea applied to these images. Initially, the trial defense counsel indicated that the appellant was admitting that these images were found on his computer, but not that he knowingly possessed them or that the images met the definition of sexually explicit. However, the appellant subsequently admitted that he recalled using various terms such as "bitlord" and "underage softcore" to search for child pornography. He also agreed that all of the additional images were on his computer due to his own actions and he recalled downloading approximately 30 images of child pornography. Finally, the appellant admitted that all of the 33 images listed in the DCFL report and attached as Prosecution Exhibit 2 were the images he downloaded. After considering the appellant's inquiry and reviewing the Stipulation of Fact and attached documents, the military judge found the appellant's plea of guilty was provident and entered findings of guilty. Additionally, the military judge entered special findings concerning the 33 images of purported child pornography finding that only the two images mentioned above, 00249954 and 00253233, plus one additional image, 00249805, met the definition of minors engaging in sexually explicit conduct. Concerning the other 30 images, the military judge could not determine beyond a reasonable doubt that the images were of minors under the age of 18.

On appeal, the appellant claims that only image 00253233 qualifies as child pornography as there is no evidence in the record of trial to prove that the people in the other two images are under 18 years of age. We disagree.

Our superior court has held that a guilty plea should only be overturned on appeal if the record fails to objectively support the plea or there is evidence in substantial conflict with the plea of guilty. *United States v. Bullman*, 56 M.J. 377, 381 (C.A.A.F. 2002). We are convinced the three images are of minors and the appellant's plea was provident considering that: the appellant specifically admitted and described why images 00249954 and 00253233 constituted child pornography; the appellant's admission that these images were found after using specific search terms for downloading child pornography; the military judge specifically found upon her review that image 00249805 constituted child pornography; and our independent review of the said three images. Accordingly, based upon our review of this case, we find that the record fully supports the appellant's guilty plea and there is no evidence in substantial conflict with his plea of guilty.[1]

Post-Trial Processing

On 3 July 2012, the Staff Judge Advocate (SJA) signed the Staff Judge Advocate's Recommendation (SJAR). On 20 July 2012, the appellant submitted his request for

[1] During the providence inquiry, the appellant also admitted to receiving and possessing nude pictures and movies of HS that focused on her genitalia.

clemency to the convening authority. On 25 July 2012, the SJA submitted an Addendum to his initial SJAR. In paragraph 3 of the Addendum, the SJA said:

> Please look carefully, paragraph by paragraph, at [the appellant's] choice of words in his request. These are hardly the words of a man who recognizes his crimes for what they were or a man who has accepted responsibility for his actions.
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> It seems clear that [the appellant] has only paid lip-service to the idea of taking responsibility for his actions. While not overt, the tone and word-choice of [the appellant's] request speaks volumes.

On appeal, the appellant claims that the SJA's comment constitute new matter for which he was not given an opportunity to respond. He requests that we order a new action which would allow him an opportunity to respond. We disagree.

"Whether matters contained in an addendum to [SJAR] constitute 'new matter' that must be served upon an accused is a question of law that is reviewed de novo." *United States v. Scott*, 66 M.J. 1, 3 (C.A.A.F. 2008) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). In all cases alleging "new matter," the appellant must demonstrate prejudice by stating what, if anything, would have been submitted to "deny, counter, or explain" the new matter. *Chatman*, 49 M.J. at 323.

In determining what constitutes new matter, we look to the discussion of Rule for Courts-Martial 1106(f)(7), which provides:

> New matter includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

"While recognizing that the Discussion is non-binding, [our superior court] has nonetheless cited with approval its illustrations of what is and is not "new matter." *Scott*, 66 M.J. at 3 (citation omitted). In this case, the alleged "new matter" does not comment about new court decisions, evidence from outside the record, or an issue not previously discussed by the parties. The SJA only highlighted that the appellant had failed to take full responsibility for his actions and did not completely appreciate the consequences of his misconduct in his clemency request to the convening authority. In his clemency submission, the appellant asserted, "She began to flirt with me and before I knew it, I really liked the attention. I let my guard down and saw her as an equal. Although I knew her age, she acted extremely mature." Further, the appellant commented, "By the time I serve my 3 years, everyone will have moved on from this incident. Everyone will have

forgotten about me, and my case." We find that under these circumstances, the SJA's response to the appellant's comments do not constitute "new matter."[2] However, even assuming the SJA's comments constituted "new matter," we find that the appellant has not shown prejudice by demonstrating what he would have said in rebuttal that would have produced a different result. *United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000). A pretrial agreement in this case capped confinement at 40 months. Considering the adjudged sentence imposed only three years of confinement, it is unlikely the convening authority would have granted the appellant's clemency request to reduce his period of confinement by an additional two months.

Conclusion

The approved findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence, are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

[2] In the future, we recommend staff judge advocates refrain from making similar comments in their Staff Judge Advocate Recommendations as they add little value to the proceedings and tend to create unnecessary appellate issues.