UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant LAURENCE H. FINCH
United States Air Force

ACM 38081
(Misc. Dkt. No. 2012-13)

25 January 2013

Sentence adjudged 9 November 2011 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 7 years, and reduction to E-1.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire (argued); Major Daniel E. Schoeni; and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Captain Brian C. Mason (argued); Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of possession and distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court adjudged a dishonorable discharge, confinement for seven years, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. The appellant assigns as error that the military judge applied the wrong maximum punishment and that the staff judge advocate misadvised the convening authority on consideration of clemency matters.

The Maximum Punishment

An offense not specifically listed in, included within, or closely related to an offense listed in the *Manual for Courts-Martial* (hereinafter *Manual*) is punishable as authorized by the United States Code (hereinafter the Code). Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii). Because the charged child pornography offenses were not specifically listed in the *Manual* at the time of trial, the parties agreed that the maximum punishment included confinement for 30 years based on the analogous offenses under 18 U.S.C. § 2252A. The appellant concedes that this maximum would be correct if the individuals in the images were actual minors, but he argues (1) that the specifications did not allege that the images involved "actual" minors and (2) that the plea inquiry failed to establish that the images were of actual minors.

The specifications allege that the appellant possessed and distributed images of a minor: Specification 1 alleges that the appellant knowingly received and possessed "visual depictions of *a minor* engaging in sexually explicit conduct" and Specification 2 alleges that he knowingly distributed "visual depictions of *a minor* engaging in sexually explicit conduct." (Emphasis added.). In *United States v. Beaty*, 70 M.J. 39, 42 (C.A.A.F. 2011), our superior court held that a specification which alleged possession of images of "*what appears to be* a minor engaging in sexually explicit activity" was insufficient to invoke the Code's maximum for possession of child pornography, but found no abuse of discretion in using the higher maximum of the analogous Code offense for a specification alleging "possession of visual depictions *of minors* engaging in sexually explicit activity." *Id*. at 42-43 (emphasis added).

In a supplemental brief, the appellant argues that the term "minor," as used in the specifications, is insufficient to invoke the punishment under 18 U.S.C. § 2252A because the statute distinguishes minors and actual minors. He cites 18 U.S.C. § 2252A(a)(3)(B), which subjects to criminal liability anyone who "advertises, promotes, presents, distributes, or solicits" material that is "an obscene visual depiction *of a minor* engaging in sexually explicit conduct" or "a visual depiction *of an actual minor* engaging in sexually explicit conduct." (Emphasis added.). Based on this provision, he argues that the specification should have alleged—and the military judge should have confirmed—that the images involved "actual minors" rather than just "minors."

But the appellant's crimes are not analogous to this subsection; rather, the appellant's crimes are analogous to other subsections which criminalize the possession and distribution of "child pornography." *See* 18 U.S.C. § 2252A(a)(2), (5). The term "child pornography" includes any visual depiction of sexually explicit conduct where (1) the "visual depiction involves the use of *a minor* engaging in sexually explicit conduct," or (2) the visual depiction is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of *a minor* engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A), (B) (emphasis added). Therefore, the

specifications at issue here are sufficient to allege the analogous offenses of knowing receipt and possession as well as knowing distribution of child pornography, under 18 U.S.C. § 2252A(a)(2), (5), for purposes of determining the maximum punishment.

The appellant next argues that, despite the language of the specifications, the military judge conducted a plea inquiry for images that only "appeared to be" minors. We 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. *See also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (A plea of guilty should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea.). "An accused must know to what offenses he is pleading guilty," *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008), and a military judge's failure to explain the elements of the charged offense is error. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Accordingly, "a military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)).

In complex offenses, failure to explain the elements will generally result in reversal. *See United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982). However, a guilty plea is not automatically improvident and "may meet required standards if on the basis of the whole record the showing is clear that the plea was truly voluntary, even if the trial judge has not personally addressed the accused and determined that the defendant possesses an understanding of the law in relation to the facts." *Care*, 40 C.M.R. at 251. S*ee also United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992) (finding a plea was not improvident despite the military judge's failure to read the elements). In such cases, a separate detailing of each element of the offense is not required to establish the providence of the guilty plea if the record otherwise establishes that the appellant understood the elements of the offense. *See United States v. Kilgore*, 44 C.M.R. 89, 90-91 (C.M.A. 1971) (finding the elements sufficiently "explained" throughout the military judge's dialogue with the appellant); *United States v. Nystrom*, 39 M.J. 698, 701 (N.M.C.M.R. 1993).

Here, the military judge accepted the appellant's pleas of guilty to one specification of knowingly receiving and possessing "visual depictions of a minor engaging in sexually explicit conduct" and one specification of knowingly distributing "visual depictions of a minor engaging in sexually explicit conduct." He defined minor as "any *person* under the age of 18 years." (Emphasis added.). In his explanation of the elements of the possession offense, the military judge initially stated that the specification

did not require "that the images in this case include actual images of minors" but later stated that the offense required knowing receipt of "sexually explicit images of a minor." After acknowledging his understanding of the elements, the appellant stated that he knowingly received and possessed "visual depictions of minors engaging in sexually explicit conduct."

During the ensuing colloquy with the appellant the military judge specifically asked about the age of the persons in the images:

> MJ: The depictions at issue in this case—did they show someone appearing to be under the age of 18?
>
> ACC: Yes, sir.
>
> MJ: Why did you believe they were individuals under the age of 18? What about them made you believe that?
>
> ACC: Sir, they appeared – their bodies were not developed.

At the conclusion of the inquiry, the military judge asked the appellant if he believed and admitted that he knowingly received and possessed "*visual depictions of a minor* engaging in sexually explicit conduct." (Emphasis added.). The appellant replied that he did. The military judge conducted a similar inquiry on the distribution specification and clarified with the appellant that the images were the same as those they had just discussed regarding specification one. In consideration of the entire inquiry, we find no substantial basis to question the appellant's guilty plea to knowing receipt and possession as well as knowing distribution of child pornography, as defined by 18 U.S.C. § 2256(8) and punishable as prescribed by 18 U.S.C. § 2252A. Although the military judge initially used the phrase "appearing to be" in regard to the images, the inquiry as a whole shows that both he and the appellant understood that the appellant was pleading guilty as charged to images involving a minor rather than images of only what appeared to be a minor.

The Recommendation of the Staff Judge Advocate

In an addendum to his recommendation, the staff judge advocate (SJA) responded to various matters submitted by the defense in clemency, to include the appellant's "multitude of medical issues" and lack of medical care while in initial confinement at Fort Leavenworth. The SJA stated that the appellant or his counsel should notify prison officials concerning any medical care issues and advised the convening authority that "[t]he issue of healthcare is not a basis for clemency." The appellant argues that this statement misled the convening authority concerning the scope of his clemency powers and requests that the record be returned to the convening authority for a new recommendation and action.

We review post-trial processing issues de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). In post-trial matters, "there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F. 1997)). This low threshold of possible prejudice from an erroneous post-trial recommendation "reflects the convening authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the [clemency decision]." *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005).

We find nothing that would prohibit a convening authority from granting clemency on the basis of medical issues. "The convening authority may for any or no reason disapprove a legal sentence in whole or in part." R.C.M. 1107(d). The SJA's statement that healthcare is not a basis for clemency is simply wrong. The appellant argues that, if not for the erroneous advice, the convening authority "might" have reduced his confinement. We find this insufficient to make a colorable showing of possible prejudice. Despite the erroneous advice, the convening authority states that he considered the matters submitted by the appellant before taking action. Viewed in the context of the appellant's crimes and the convening authority's express statement that he considered the matters submitted by the appellant, we see no colorable showing of possible prejudice from the single erroneous statement in the addendum.

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, 10 U.S.C. § 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

STEVEN LUCAS
Clerk of the Court

[*] The appellant petitioned this Court to order his release from confinement during the pendency of the appeal on the basis that he was unlawfully confined under an erroneous maximum punishment. For the reasons set forth herein regarding the maximum punishment for the appellant's offenses, the petition is **DENIED**.