UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JAY C. JENSEN
United States Air Force

ACM 35164

4 November 2003

Sentence adjudged 9 March 2002 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Kirk R. Granier (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 19 years, 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 Lori M. Jemison (legal intern).

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of attempted rape of a child, four specifications of indecent acts with a child, two specifications of indecent liberties with a child, two specifications of using a minor to produce visual depictions of sexually-explicit conduct, possession of child pornography, and providing alcohol to a minor, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. A general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 20 years, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for 19 years, and reduction to E-1. The appellant has submitted one assignment of error, that his plea to possession of child

pornography was improvident insofar as the military judge relied on the unconstitutionally vague and overbroad definitions contained in 18 U.S.C. §§ 2256(8)(B) and (D). Finding no errors prejudicial to the appellant's substantial rights, we affirm.

Over the course of nearly four years, the appellant engaged in a variety of criminal sexual acts with his own daughter as well as the daughters of other military personnel assigned at Grand Forks Air Force Base, North Dakota. Specifically, on one occasion, he attempted to have sexual intercourse with his 10 year-old daughter and on several others he engaged in a variety of indecent acts with her. These included fondling her genitals, exposing himself to her, masturbating in her presence, pressing his genitals against her, and having her touch his genitals. On one occasion, he gave her an entire bottle of wine to drink while she was in the bathtub. He climbed into the tub and touched her body with his genitals. He also took photographs of his daughter's exposed genitalia while she was sleeping, which he stored on his home computer.

As stated above, this activity extended to other victims outside the appellant's family including three of his daughter's young friends. He fondled their genitals and other parts of their bodies and, on more than one occasion, took sexually-suggestive photographs of one of them, storing the photographs on his computer. In addition, a military member attempting to repair the appellant's home computer discovered child pornography located therein. Subsequent investigation uncovered over 100 images of child pornography on his two home computers, on floppy disks, and on zip drives.

In charging the appellant with possessing child pornography under Article 134, UCMJ, the government alleged a violation of 18 U.S.C. § 2252A(a)(5)(B), part of the Child Pornography Prevention Act (CPPA). This specification did not include any of the pictures that appellant had made of his daughter or her friend. It is the definition of child pornography contained in the CPPA that forms the basis of the appellant's assignment of error.

The standard of review for the providence of a guilty plea 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)). 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). 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).

During the providence inquiry, the military judge advised the appellant as to the definition of child pornography contained in 18 U.S.C. § 2256(8). At that time, the statute provided that child pornography meant:

> any visual depiction including any photograph, film, video, picture, or 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 . . . .

However, after trial the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down part of the CPPA. Specifically, the Court held that the definitions of child pornography found in 18 U.S.C. §§ 2256(8)(B) and (D) were unconstitutionally vague and overbroad. According to the Court, the language found in § 2256(8)(B) would prohibit "virtual" images of child pornography, that is, images created wholly on a computer without the use of actual child victims. The Court observed, however, that it is the use of actual victims which provides the government with its rationale for prohibiting child pornography, insofar as such depictions are, in effect, records of child abuse. Such a rationale is inapplicable to images generated wholly on a computer. *Free Speech Coalition*, 535 U.S. at 250. The Court also held that § 2256(8)(B) is arguably broad enough to include such clearly protected works as the films *American Beauty* and *Traffic*, or "a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse." *Id*. at 246. In addition, § 2256(8)(D) fails to pass constitutional muster insofar as it would criminalize even legally innocent images which were, nevertheless, advertised or promoted as child pornography. *Id.* at 257. The Court's ruling did not affect the remaining portions of the child pornography definition.

Subsequently, our superior court issued its opinion in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In that case, as in the one sub judice, the accused was charged with possessing child pornography in violation of the CPPA. During the providence inquiry, the military judge asked the accused why he believed the material in question constituted child pornography, to which he replied, "the occupants in the pictures *appeared to be* under the age of 18." *O'Connor*, 58 M.J. at 453. Relying on

Free Speech Coalition, our superior court observed that "it is unclear from the providence inquiry and record here whether Appellant was pleading guilty to possession of virtual or actual child pornography." *Id*. at 453-54. Therefore, the court set aside the affected findings and sentence.

In the case *sub judice*, we acknowledge that, in advising the appellant of the legal definition of child pornography, the military judge utilized terms that the Supreme Court later found unconstitutional. As such, the advice in the providence inquiry was erroneous. However, the providence inquiry also included the following:

> MJ: Were these images of females, female children?
>
> ACC: Yes sir . . .
>
> MJ: All right. How do you know that these were of children? By that I mean somebody under the age of 18. How do you know that?
>
> ACC: I could identify them.
>
> MJ: Were you convinced that the images in these pictures were images of children, in other words, persons under 18 versus someone who was 19 years of age?
>
> ACC: Yes, sir.
>
> MJ: And you are satisfied that they were children?
>
> ACC: Yes sir. Sir, in my opinion they were children under the age of 14 . . .
>
> MJ: Do you admit . . . that at the time you possessed these materials they did contain images of actual child pornography?
>
> ACC: Yes, your honor.

The material quoted above leaves no serious question as to whether the appellant believed that he was obtaining depictions of actual children under the age of 14 years. Additionally, and, unlike *O'Connor*, the appellant did not use language drawn directly from the stricken portions of the CPPA by using the phrase "appeared to be" or the like. This is confirmed by an examination of the images themselves, appended to the record of

trial as a government exhibit, and which depict obvious minors engaging in a variety of sexual activities. *See United States v. Wolk*, 337 F.3d 997 (8th Cir. 2003); *United States v. Kimler* 335 F.3d 1132 (10th Cir. 2003). Furthermore, there is nothing in the providence inquiry to suggest that the appellant relied upon the manner in which the images were advertised, promoted, presented, etc in explaining why he believed the pictures constituted child pornography. Therefore, we conclude that the erroneous portions of the military judge's definition of child pornography used during the providence inquiry were harmless beyond a reasonable doubt and did not create a substantial basis for challenging the plea.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court