UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ZACHARY R. LYNCH
United States Air Force

ACM 38094

14 May 2013

Sentence adjudged 20 December 2011 by GCM convened at Joint Base Elmendorf-Richardson, Alaska. Military Judge: W. Shane Cohen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, a reduction to E-1, and a reprimand.

Appellate Counsel for the appellant: Captain Zaven T. Saroyan.

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

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Before a general court-martial composed of military judge alone, the appellant was charged with and pled guilty to (1) one specification of knowingly and wrongfully possessing one or more video files "*of minors* engaging in sexually explicit conduct" and (2) one specification of knowingly and wrongfully possessing one or more images "*of minors* engaging in sexually explicit conduct," in violation of Article 134, UCMJ, 10 U.S.C. § 934 (emphasis added).[*] The military judge merged the two specifications for

[*] The specifications alleged, in the disjunctive, both Clauses 1 and 2 of the terminal element of Article 134, UCMJ, 10 U.S.C. § 934.

sentencing and determined the maximum punishment by referencing 18 U.S.C. § 2252A(b)(2), which sets maximum confinement at 10 years for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5). The court adjudged a bad-conduct discharge, confinement for 22 months, reduction to the lowest enlisted grade, and a reprimand. The convening authority approved confinement for 18 months and otherwise approved the sentence as adjudged.

The appellant relies on *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), to argue that the punishment under 18 U.S.C. § 2252A does not apply because the specifications fail to allege the aggravating circumstance that the children in the images were actual minors. We disagree. Unlike the specification in *Beaty*, the specifications here did not allege that the images and videos were of only "what appears to be" minors. Moreover, *Beaty* expressly found no abuse of discretion in using the analogous United States Code maximum for a specification alleging possession of "visual depictions of minors engaging in sexually explicit activity." *Id*. at 42.

Consistent with *Beaty*, the crime charged here is punishable as authorized by the United States Code section referenced by the military judge which criminalizes possession of child pornography. 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) and (B) (emphasis added). Consistent with the United States Code definition, the specifications here allege the wrongful and knowing possession of images and videos of *minors* engaging in sexually explicit conduct. Therefore, the military judge correctly used the punishment authorized for possession of child pornography under 18 U.S.C. § 2252A(a)(5) for purposes of determining the maximum punishment. *See* Rule for Courts-Martial 1003(c)(1)(B)(ii) (providing that an offense not listed in or closely related to one listed in the *Manual for Courts-Martial* is punishable as authorized by the United States Code).

Alternatively, the appellant argues that the plea inquiry was improvident because the military judge failed to establish that the appellant possessed images of actual children. 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 and look for 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; *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).

Here, we find nothing that would raise a substantial question regarding the appellant's guilty plea. The military judge correctly explained the elements and definitions of the offenses to include defining "minor" as "any person under the age of 18 years." After acknowledging his understanding of the elements and definitions, the appellant admitted to possessing videos and still images *of minors* engaged in sexually explicit conduct. He told the judge that the age range of the persons in the videos was "[b]etween the ages of 12 and 17. The judge pointedly asked, "[D]o you have any doubt in your mind as you sit here today, that you possessed approximately 10 videos of minors between the ages of 12 to 17 years of age who were engaged in sexually explicit conduct as I have defined that term for you?' The appellant replied, "No, sir." The judge conducted a similar inquiry regarding the ages of the persons in the still images. The appellant told the judge that the persons in the images were "[b]etween the ages of 9 and 17" and that he had no doubt they were under the age of 18. In consideration of the entire inquiry, we find no substantial basis to question the appellant's guilty plea.

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