UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SEAN M. MAHONEY
United States Air Force

ACM 35330

10 June 2004

Sentence adjudged 21 August 2002 by GCM convened at Beale Air Force Base, California. Military Judge: R. Scott Howard (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MALLOY Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of one specification of possessing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge accepted the appellant's pleas and sentenced him to a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to airman basic. Relying on *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, (2002), the appellant asserts that his pleas were improvident because the military judge failed to explain to him the difference between possession of pornographic images of real and imaginary children. We disagree.

The Supreme Court issued *Free Speech Coalition* on 16 April 2002, which was more than four months before the appellant's trial. Despite this, the appellant did not raise a *Free Speech Coalition* issue prior to entering guilty pleas. And he declined to do so for good reason. The appellant was not charged with possessing child pornography in violation of 18 U.S.C. § 2252A. Instead, he was charged with possessing visual depictions of children less than 18 years of age under circumstances that were prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, in violation of Clauses 1 and 2 of Article 134, UCMJ.

During the providence inquiry he acknowledged that: 1) He knew that these were pictures of children under 18 years of age and that it was wrongful for him to possess them, 2) His conduct was prejudicial to good order and discipline because it could inspire others to do the same thing, and 3) His conduct could bring discredit upon the armed forces because "[c]hild pornographers are some of the most reviled individuals in society."

The appellant also entered into a stipulation of fact with the government. This stipulation included the stipulated testimony of Lieutenant Colonel (Doctor) Susan A. Brown, Chief, Adolescent Medicine, Department of Pediatrics, Wright-Patterson Medical Center, Wright-Patterson Air Force Base, Ohio. Doctor Brown is an expert in pediatric and adolescent gynecological medicine and forensic pediatrics. She examined the sexually-explicit pictures in issue in this case. Based on her assessment of breast and genital development of the children in these pictures, she opined to a high degree of medical certainty that the children in the pictures were under 18 years of age and that at least three of the girls were under 13 years of age. There is not the slightest indication that she was offering a medical opinion concerning the development of virtual children.

The possession of these images clearly could be charged under Clause 1 or 2 of Article 134, UCMJ, as conduct prejudicial to good order and discipline or as conduct of a nature to bring discredit upon the armed forces. *See United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000); *United States v. Sollmann*, 59 MJ 831 (A.F. Ct. Crim. App. 2004); *United States v. Anderson*, ACM 34980 (A.F. Ct. Crim. App. 7 Jun 2004). The only question is whether the record contains a factual basis for us to conclude that the appellant providently admitted his guilt after being advised of the elements of the offense with which he was charged. *See United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). The record of trial must "make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *Id.* "The military judge must elicit facts from the accused that 'objectively' support the plea." *United States v. Horton*, 55 M.J. 585, 586 (A.F. Ct. Crim. App. 2001) (citing *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996)).

Since he was not charged with violating 18 U.S.C. § 2252A, there was no reason for the military judge to use the definitions from 18 U.S.C. § 2256 to define the charged offense for the appellant. Further, this is not a case where we need to be concerned by the possibility that the appellant was misled by the use of one of the definitions found unconstitutional by the Supreme Court in *Free Speech Coalition*. Those unconstitutional definitions simply played no part in the providence inquiry.

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact" for questioning the plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea." *Id.* at 238 (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 (C.A.A.F. 1996).

In this case, there is no such basis. The appellant's testimony during the providence inquiry, the stipulation of fact, and the stipulated testimony of Doctor Brown objectively support the appellant's acknowledgement that his misconduct violated Article 134, UCMJ. Under the circumstances, we see no requirement for the military judge to have discussed with the appellant the distinction between virtual and real children prior to accepting his guilty pleas. Having examined the photographs, we are as convinced, as the appellant was at trial, that possessing them was unlawful.

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

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator