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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER P. MOFFEIT
United States Air Force

ACM 35159

29 January 2004

Sentence adjudged 7 February 2002 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Thomas G. Crossan Jr. (sitting alone), Rodger A. Drew, and Ann D. Shane.

Approved sentence: Dishonorable discharge, confinement for 45 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 Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, ~~Major Terry L. McElyea~~, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

At a general court-martial convened at Shaw Air Force Base, South Carolina, a military judge sitting alone convicted the appellant, contrary to his pleas, of three violations of Article 134, UCMJ, 10 U.S.C. § 934. He was charged with one specification each of receiving and possessing child pornography, contrary to 18 U.S.C. § 2252A, the Child Pornography Prevention Act of 1996 (CPPA). He was also convicted of an additional specification of knowingly persuading, inducing, enticing, or coercing a minor to engage in sexual activity, or attempting to do so, contrary to 18 U.S.C. §

2422(b). He was sentenced to a dishonorable discharge, confinement for 45 months, total forfeiture of pay and allowances, and reduction to the grade of E-1. He raises four issues for our consideration, only one of which merits discussion. For the reasons set forth below, we affirm.

The appellant first came to the attention of local civilian law enforcement and the Air Force Office of Special Investigations (AFOSI) when he placed a website on the Internet. The website solicited females age 13 to 20 from the Sumter, South Carolina area to engage in pagan initiation rites involving sexual activity. When questioned by AFOSI agents, he admitted to creating the website, but claimed he was not serious. Rather, he claimed, he only intended to anger people who might view the website. As part of their investigation into the website, AFOSI agents asked the appellant whether he had downloaded child pornography off of the Internet. The appellant initially denied any such activity, but ultimately admitted to AFOSI agents that he had downloaded child pornography for a one-week period. After obtaining the appellant's consent, the AFOSI obtained and examined the appellant's home computer and numerous computer diskettes found throughout his house.

The prosecution introduced into evidence 33 sample images retrieved from four of the diskettes. In addition, the prosecution successfully introduced two VHS tapes, one containing a single video clip and the other containing four video clips. Although the appellant did not assert a constitutional challenge at trial or otherwise argue the images found on the diskettes did not depict real children, he now asks this Court to set aside the finding of guilty to these specifications based on the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which determined that two of the CPPA's definitions of child pornography were unconstitutionally overbroad. The appellant argues in his appellate brief that the government did not present proof beyond a reasonable doubt that the "images were real or that real children were harmed in the creation of the images." As a result, the appellant believes the military judge had to have concluded that the visual depictions found on his computer disks simply "appeared to be" or "conveyed the impression" of being minors, the CPPA definitions found in 18 U.S.C. § 2256(8)(A) and held to be unconstitutional in *Free Speech Coalition*. We do not agree.

Lieutenant Colonel (Dr.) Susan Brown testified as an expert witness in forensic pediatrics and pediatric/adolescent gynecology. She testified that in her 15 years of clinical experience she had examined more than 10,000 images depicting child pornography. In addition, she had conducted thousands of physical examinations of children and adolescents, including more than 3,000 pelvic examinations. Using conservative estimates, she evaluated the sexual development of the individuals in each of the photographs and video clips and testified that it was her opinion--to a "very high degree of medical certainty"--that each image depicted at least one child who was under the age of 18.

Contrary to the appellant's assertions, the photographs themselves are some evidence that actual children were involved in the production of the images. *See United States v. James*, 55 M.J. 297, 301 (C.A.A.F. 2001); *United States v. Sanchez*, 59 M.J. 566, 569 (A.F. Ct. Crim. App. 2003). We are certain that had any of these images only "appeared to be" real children, an expert with the credentials and expertise of Dr. Brown would have noticed and voiced her concerns. Moreover, we have ourselves carefully examined each image to determine whether the definitions of child pornography struck down in *Free Speech Coalition* contributed to the appellant's conviction. We are convinced beyond a reasonable doubt that they did not play any part in this case. *See generally United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); *United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996). Further, we are ourselves convinced beyond a reasonable doubt that the appellant received and possessed on divers occasions one or more images depicting real children engaged in sexually explicit conduct. Article 66(c), UCMJ, 10 U.S.C. § 866(c).[1]

We have reviewed the appellant's remaining assignments of error challenging the legal and factual sufficiency of all of the specifications. Upon careful consideration of the multiple concerns he raises, we nonetheless find them to be without merit. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002).

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; *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

[1] We have considered the numerous recent summary dispositions involving child pornography allegations that were decided by our superior court, wherein the Judge Advocate Generals of the various services were directed to take action consistent with *United States v. O'Conner*, 58 M.J. 450 (C.A.A.F. 2003), a case involving the providency of a plea of guilty to receiving and possessing child pornography. *See, e.g., United States v. Harrison*, No. 02-0100/AF (21 Jan 2004). We have considered the guidance found in *O'Conner*, but are unsure of how it applies to a litigated case and believe it is distinguishable on that basis. Therefore, we have applied a harmless error analysis to the particular facts and circumstances of this case, as required by Article 59(a), UCMJ, and the precedents of our superior courts.