UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class THOMAS N. PATTERSON
United States Air Force

ACM 38031 (recon)

18 July 2013

Sentence adjudged 22 September 2011 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: J. Wesley Moore (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1.

Appellate Counsel for the appellant: Lieutenant Colonel Maria A. Fried; Major Matthew T. King; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL[1]
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 knowingly and wrongfully possessing video and photographic "visual depictions of minor children" engaged in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[2] The military judge determined the

[1] Upon our own motion, this Court vacated the previous decision in this case for reconsideration before a properly constituted panel. Our decision today reaffirms our earlier decision.
[2] The sole Specification of the single Charge alleged, in the disjunctive, both Clauses 1 and 2 of the terminal element of Article 134, UCMJ, 10 U.S.C. § 934.

maximum punishment by reference to 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 20 months, and reduction to the lowest enlisted grade. The convening authority approved the sentence 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 Specification fails to allege the aggravating circumstance that the children in the images were "actual" minors. We disagree. Unlike the specification in *Beaty*, the Specification here did not allege that the images 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 charged crime 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 this definition of child pornography, the Specification alleges the wrongful and knowing possession of video and photographic visual depictions of minor children 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 as to "actual minors" because the military judge failed to establish that the appellant possessed images of actual 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 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 defined minor as "any person under the age of 18 years" and told the appellant that to be guilty of the charged offense he must have knowingly possessed "sexually explicit images of minor children." After acknowledging his understanding of the elements and definitions, the appellant told the judge that he found the images by searching the Internet for files that contained images of "minors engaged in some sort of sexual activity." Specifically as to the age, he told the judge that the persons in the images were "[a]nywhere from 17, all the way down to – I think there may have been two infants." The judge asked the appellant if he had any doubt that he knowingly possessed images of children engaged in sexually explicit conduct. The appellant replied, "No, sir, no doubt." In consideration of the entire inquiry we find no substantial basis to question the appellant's guilty plea.

The appellant raises four additional issues. He complains that the record is not substantially verbatim because the audio in his videotaped confession is missing, but, as the Government answers, the audio is present and simply requires adjusting the volume. We have considered the three remaining assignments of error submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

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