UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant RORY L. PIERMATTEI
United States Air Force

ACM 35997

27 October 2005

Sentence adjudged 5 May 2004 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Mark R. Strickland, Major Andrew S. Williams, Major Sandra K. Whittington, Major James M. Winner, and Captain John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Major Lane A. Thurgood, and Major Michelle M. McCluer.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The appellant was tried at McGuire Air Force Base, New Jersey, by a military judge sitting as a general court-martial. In accordance with his pleas, the appellant was convicted of one specification of violating a lawful general regulation and one specification of possessing visual depictions of a minor engaging in sexually explicit conduct, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. § 892, 934.[1] The

[1] The government withdrew two other Article 134, UCMJ, specifications after arraignment.

convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 24 months, and reduction to E-1.

The appellant asserts his plea to the Article 134, UCMJ, offense was improvident because there was no factual basis to support the finding that he knowingly possessed child pornography.[2] Appellate government counsel concur. We find the challenged plea improvident and set aside his conviction for that offense.

Background

The appellant's daughter discovered what she described as pictures of "little girls in sexual positions with their clothes off" on the appellant's government-issued laptop computer. She told her mother, who then reported the discovery to the Air Force Office of Special Investigations (AFOSI). AFOSI investigators seized the laptop computer and the appellant's two personal computers. A computer forensic examiner found images on each computer that appeared to be of children under the age of 18 engaging in sexually explicit acts or in sexual poses. The appellant was charged with wrongfully storing or displaying sexually explicit images on the government laptop computer and possessing child pornography.

Discussion

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "Pleas of guilty should not be set aside on appeal unless there is 'a "substantial basis" in law and fact for questioning the guilty plea.'" *Id.* at 375 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

When the military judge discussed the elements of the Article 134, UCMJ, offense with the appellant during the providence inquiry,[3] she explained that "[t]his offense requires you to have knowingly possessed certain material and to have known that the material you possess[ed] contained a visual depiction of minors engaging in sexually explicit conduct. An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason."

To support his plea, the appellant admitted that images of child pornography were on the hard drives of the seized computers. But, as to some of the images, the appellant explained that he received them unintentionally from a Yahoo chat group he subscribed to named "Soft Teen Girls." While it seems incongruous to suggest a subscriber to such

[2] The appellant also contends his plea to the Article 134, UCMJ, offense was improvident because "the record does not support a finding of conduct prejudicial to good order and discipline or service discrediting conduct." We need not address this issue in light of our disposition of the assigned error discussed above.
[3] *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

a chat group might receive unwanted pornographic images of minors, that was the gist of the appellant's explanation:

> MJ: At this time I'd like you to tell me why you're guilty of Specification 1 of Charge II.
>
> . . . .
>
> ACC: [R]eally what happened was I'd be searching the net for legal pornography and I'd come across a site, a web site, that maybe contained images that appeared to be of young females. I didn't save these images to my computer. This happened on a number of occasions over the years. On one occasion I went to a Yahoo group entitled Soft Teen Girls. This group stated that it had a content of 16 to 20 year old females, but that child pornography was not permitted. *I subscribed to this group assuming that it would not contain child pornography* and received e-mails from the group moderator. Most of the pictures that were sent to me were of an adult nature, however, on a few occasions I received an e-mail that contained images of females that I thought to be under the age of 18. *And once I saw the contents of these emails, I deleted them*.[4]

(Emphasis added.) In response to the military judge's questions, the appellant repeatedly explained that he would delete these images once he identified the nature of them, implicitly blaming the occasional member of the "Soft Teen Girls" group who sent images "off topic" and outside the group's guidelines.[5]

The providency of a plea rests on what the appellant actually admits on the record. *United States v. Eddy*, 41 M.J. 786, 791 (A.F. Ct. Crim. App. 1995). In this case, the appellant raised matters inconsistent with his plea when he described the occasional images of child pornography as unsolicited and unwanted email attachments, instead of the adult images he desired and expected. At one point, the military judge focused on the apparent inconsistency: "Now, this 'Soft Teen Girls Group,' when you subscribed to that program, you stated that you thought you would receive images of 16 to 20 year old females?" The appellant started to answer, but then conferred with his trial defense counsel. A short recess followed, and when the court was called back to order, the

[4] It appears the appellant's theory of criminal responsibility was that he possessed the images because they were retrievable from the computer hard drives, even though he deleted the images when he identified them as possible child pornography. We resolve this case on the basis of unresolved inconsistencies in the appellant's guilty plea, and need not reach the issue of whether the mere existence of retrievable images on a computer hard drive amounts to wrongful possession for Uniform Code of Military Justice purposes.

[5] The incongruity of the appellant's explanation is highlighted by the email he received as a prospective "Soft Teen Girls" subscriber regarding the exchange of images: "The subjet [sic] of the group is Teenager girls (preferably nude and softcore). No child porn is allowed. The girls should be between 14 and 20 years old."

military judge pursued a different line of questioning. The inconsistencies remained, and, as characterized by appellate government counsel, it is not clear that the "Appellant's inquiry left a 'mere possibility' that he even committed a crime."

We find there is a substantial basis in law and fact to question the appellant's guilty plea, and conclude the military judge abused her discretion in accepting the appellant's plea to Specification 1 of Charge II.

Conclusion

The appellant's conviction of Charge I and the Specification, alleging a violation of Article 92, UCMJ, is affirmed. The appellant's plea to Specification 1 of Charge II, alleging a violation of Article 134, UCMJ, was improvident. Accordingly, his conviction of Specification 1 of Charge II and the sentence are set aside. The record is returned to The Judge Advocate General for remand to the convening authority who may order a rehearing on Charge II and the sentence. If the convening authority finds that a rehearing on Charge II is impracticable, he or she shall dismiss Charge II and order a rehearing on the sentence in light of the appellant's provident guilty plea to Charge I. *See United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000). Upon completion of the convening authority's subsequent action, the case shall be returned to this Court for further review. *United States v. Johnson*, 45 M.J. 88, 89 (C.A.A.F. 1996).

OFFICIAL

ANGELA M. BRICE
Clerk of Court