UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ROBERT J. POLFLIET JR.
United States Air Force

ACM 34652

10 January 2003

Sentence adjudged 19 May 2001 by GCM convened at Yokota Air Base, Japan. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 18 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Major Marc A. Jones.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo and Lieutenant Colonel Lance B. Sigmon.

Before

BURD, PECINOVSKY, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

PECINOVSKY, Judge:

In a general court-martial before a military judge sitting alone, the appellant was found guilty, contrary to his pleas, of wrongful introduction of hallucinogenic mushrooms onto Yokota Air Base, Japan, wrongful use of hallucinogenic mushrooms, larceny of three packages of mushrooms of a value exceeding $100, unlawful entry, and knowing possession of computer files containing child pornography[1], in violation of

[1] This specification was charged as a violation of 18 U.S.C. § 2252A, made applicable to courts-martial through Article 134, UCMJ, 10 U.S.C. § 934.

Articles 112a, 121, 130, and 134, UCMJ, 10 U.S.C. §§ 912a, 921, 930, 934. His adjudged and approved sentence consisted of a bad-conduct discharge and confinement for 18 months.

The appellant alleges that 18 U.S.C. § 2252A is unconstitutionally vague and overbroad because it proscribes depictions of legal conduct. He further alleges, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the government violated his rights under Article 31, UCMJ, 10 U.S.C. § 831. We conclude that that the government did not violate the appellant's Article 31 rights and that any error of law in providing the definition of child pornography, held unconstitutional in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), was harmless beyond a reasonable doubt. We affirm.

Facts

On 9 June 2000, Japanese law enforcement officials interrogated the appellant concerning his involvement in a burglary of a Japanese business. The appellant confessed to breaking into a Japanese store, named Ero, and stealing hallucinogenic mushrooms. After the Japanese completed their interrogation, they informed the Air Force Office of Special Investigations (AFOSI) of the appellant's admissions. Later on 9 June 2000, an AFOSI agent interrogated the appellant after advising him of his rights under Article 31, UCMJ, 10 U.S.C. § 831 rights and obtaining appellant's waiver of those rights. Although the AFOSI agent knew that the appellant admitted to Japanese authorities that he committed housebreaking and larceny, the agent only told the appellant that AFOSI suspected him of wrongful use and possession of a controlled substance. The agent directed the appellant to write down everything he told the Japanese authorities. The appellant's written statement included admissions concerning the housebreaking and larceny, as well as the possession and wrongful use of hallucinogenic mushrooms.

Previously, on 20 May 2000, the appellant and Airman (Amn) Marone viewed several pornographic pictures that were on computer disks possessed by the appellant. Amn Marone testified that some of the pictures were "questionable" because the females in them looked like they were under the age of 18. He testified that in the first questionable picture the girl posing looked like she could have been 15 or 16. In viewing additional photos, Amn Marone testified that he saw some young children "between the ages of 8 and 10." Upon seeing these photos, Amn Marone exclaimed, "What the f*** is that?" The appellant did not show any surprise and said that he did not know it was there when he downloaded it from the Internet, but that "there is some child pornography on there", referring to the discs they were viewing. The appellant told Amn Marone that there was more child pornography on his computer. Amn Marone testified he viewed approximately 100 pictures from the appellant's computer and that 8 to 10 of those pictures were of child pornography.

AFOSI agents testified that they seized over one thousand pornographic images from the appellant's computer and computer disks. Dr. La Shell, a pediatrician, testified that the pictures in question depicted images of females who were under the age of 18 "to a reasonable degree of medical certainty." In the appellant's statement to AFOSI, he admitted to finding pictures on his computer that he had earlier downloaded that "were not appropriate because of the girls' age group." He stated the reason he knew "the age of the girls wasn't appropriate was due to their height, facial features, and the fact that they looked as if they hadn't reached puberty."

Article 31

We hold the AFOSI agents sufficiently notified the appellant of the nature of the accusations against him. *United States v. Simpson*, 54 M.J. 281 (2000). An accused or suspect "must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." *Id.* at 284. Relying upon *Simpson*, the military judge found that when the appellant was told to write down everything he told the Japanese authorities, he was sufficiently oriented to the offenses suspected. The military judge found that the appellant admitted to taking three packages of mushrooms from the Ero store and hiding them in his room. The military judge also found that this information provided by the appellant "was part of a continuous sequence of events related to the use of mushrooms on that evening." With those facts, the military judge properly denied the appellant's motion to suppress.

Child Pornography

Subsequent to the filing of briefs in this case, on 16 April 2002, the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), concerning the constitutionality of portions of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260. In *Free Speech Coalition*, the Supreme Court found that some of the language in 18 U.S.C. § 2256 defining child pornography unconstitutionally infringed upon free speech. In *United States v. Lee*, 57 M.J. 659 (A.F. Ct. Crim. App. 2002), this court analyzed a military judge's acknowledgement of the definition of child pornography in § 2256 and concluded that any error of law in considering that definition of child pornography was harmless beyond a reasonable doubt.

Here, as in *Lee*, the appellant and the witnesses described the images in question as photographs of young girls. Amn Marone testified that some of the pictures were "questionable" because the females in them looked like they were under the age of 18. He testified that in the first questionable picture the girl she looked like she could have been 15 or 16 years of age. In viewing additional photos, Amn Marone testified that he saw some young kids "between the ages of 8 and 10."

Dr. La Shell, a pediatrician, testified that the pictures depicted images of females who "are" under the age of 18 "to a reasonable degree of medical certainty." In the appellant's statement to AFOSI, he admitted to finding pictures on his computer that he had earlier downloaded that "were not appropriate because of the girls' age group." He stated the reason he knew "the age of the girls wasn't appropriate was due to their height, facial features, and the fact that they looked as if they hadn't reached puberty." The military judge, as the trier of fact, could have arrived at only one rational conclusion: the images were of actual children. In addition, viewing the images ourselves, we are convinced, beyond a reasonable doubt, that the images are of actual children well under the age of 18.

Moreover, the appellant challenged, at trial, the constitutionality of the statute, 18 U.S.C. § 2252A, in its definition of child pornography to include the words "or appears to be." In denying the motion to suppress, the military judge found that the government presented evidence from the doctor that the visual depictions were of minors. The military judge found that she need not reach the issue of whether or not "or appears to be" is constitutionally vague. In addition to the testimony by Dr. La Shell that the images "are" of children under the age of 18, the appellant's admissions and the testimony by Amn Marone further supports the conviction for possession of child pornography, notwithstanding the unconstitutionality of the "or appears to be" language in the statute. We conclude that any error of law in considering the definition, if the military judge considered it at all, which was held unconstitutional in *Free Speech Coalition*, was harmless beyond a reasonable doubt. *Lee*, 57 M.J. 659, 663.[2]

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the accused occurred. Article 66 (c), UCMJ, 10 U.S.C. § 866(c), *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator

made applicable to courts-martial through Article 134, UCMJ, 10 U.S.C. § 934.

[2] We are mindful of the Supreme Court's decision in *Griffin v. United States*, 502 U.S. 46, 53 (1991), in which the Supreme Court held that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." The Court held that when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think, that their own intelligence and expertise will save them from that error." *Id.* at 59. Unlike in *Griffin*, in this case the appellant was tried before a military judge sitting alone. The evidence before the military judge did not even suggest that the images were not of actual children under the age of 18. To the contrary, all of the evidence clearly demonstrated that the images were of actual under-age children.