UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEAN A. STARKWEATHER
United States Air Force

ACM 35165

30 September 2004

Sentence adjudged 4 April 2002 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jeffrey A. Vires, and Major Antony B. Kolenc.

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

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of distribution and possession of 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 10 months, forfeiture of all pay and allowances, and reduction to E-1. 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. Additionally, the

appellant avers that his plea to distribution of child pornography was improvident because he was "merely" aware that two individuals copied pornographic files from his computer.

In Specification 1 of the Charge, the appellant was charged with distributing 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. In Specification 2, the appellant was charged with possession of child pornography in violation of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A, under clause 3 of Article 134, UCMJ. Because the appellant's conduct was charged under different clauses of Article 134, UCMJ, we must determine the providency of his pleas based upon this distinction, even though the appellant's guilty pleas were based upon the same set of photographs. We reverse the findings in part and set aside the sentence.

Law

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty 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, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

Discussion

Specification 1

The distribution 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. *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004). *See also United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000). 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.*

During the providence inquiry for the distribution of child pornography, the appellant acknowledged that he knew that these were pictures of minors engaging in sexually explicit conduct and that it was wrongful for him to distribute them. He also acknowledged that his conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces when he agreed with the military judge that, "[S]omebody in the civilian sector might think that airmen are passing around and looking at child pornography . . . [and] that might cast the military in a bad light." The appellant also entered into a stipulation of fact with the government. The stipulation included an acknowledgement by the appellant that he knew two other airmen were accessing files on his computer that contained child pornography. The appellant also stipulated that he allowed the two airmen to download the files containing adult and child pornography from his computer. Additionally, the appellant stipulated that under the circumstances, his conduct was service discrediting and prejudicial to good order and discipline.

The Supreme Court issued its opinion in *Free Speech Coalition* two weeks after the appellant's trial. In *Free Speech Coalition*, the Supreme Court found some of the language within the CPPA unconstitutional. Specifically, the Court found that the language of 18 U.S.C. § 2256(8)(B), proscribing an image or picture that "appears to be" of a minor engaging in sexually explicit conduct, and the language of 18 U.S.C. § 2256(8)(D), sanctioning visual depictions that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Id*. at 257-58.

Because Specification 1 was not charged as a violation of 18 U.S.C. § 2252A, there was no requirement for the military judge to use the definitions from 18 U.S.C. § 2256 to define the charged offense for the appellant. In fact, the military judge distinguished the two specifications by informing the appellant that Specification 1 was not a violation of a specific federal statute like Specification 2, so the definitions would be a little bit different. As a result, as regards to the offense of distribution charged in Specification 1, we need not be concerned by the possibility that the appellant was misled by the use of one of the definitions later found unconstitutional by the Supreme Court in *Free Speech Coalition.*

The appellant's testimony during the providence inquiry and the stipulation of fact objectively support the appellant's acknowledgement that his misconduct violated clauses 1 and 2 of Article 134. 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. *See Irvin*. Having examined the photographs, we are convinced, as the appellant was at trial, that distributing them was unlawful. Furthermore, we find that the appellant's conduct in allowing two other airmen to download pornographic files from his computer, for their own use, falls within the

definition of "distribute." *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37(c)(3) (2002 ed.). When assessing the appellant's conduct in distributing the child pornography against the elements of clauses 1 and 2 of Article 134, UCMJ, we find no basis to question the providence of the appellant's plea.

Specification 2

Conversely, in Specification 2, the appellant was charged with possessing child pornography in violation of 18 U.S.C. § 2252A. Therefore, this particular conduct must be measured by a different yardstick. *United States v. Mason*, 60 M.J. 15, 19-20 (C.A.A.F. 2004). In *United States v. O'Connor*, our superior court held that, where the unconstitutional definition had been used during the *Care* inquiry and the record contained no discussion or focus on those aspects of the statute that had been upheld by the Supreme Court, the appellant's plea to violating that federal statute was improvident. 58 M.J. 450 (C.A.A.F. 2003). In this case, as in *O'Connor*, the criminal nature of the conduct at issue in Specification 2 is derived from a violation of the CPPA. Additionally, the military judge advised the appellant of the elements of this offense using definitions that the Supreme Court later found unconstitutional in *Free Speech Coalition*.

However, an improvident plea to a CPPA-based clause 3 offense under Article 134 may be upheld as a provident plea to a lesser included offense under clause 1 and/or clause 2. *Mason*, 60 M.J. at 18-19. *See also United States v. Anderson*, 60 M.J. 548, 552 (A.F. Ct. Crim. App. 2004). Here, as in *Mason*, the guilty plea to Specification 2 was entered to a violation of clause 3, specifically, a violation of the CPPA. Our superior court in *Mason* found the guilty plea to be improvident as to the clause 3 offense, in light of certain requirements under the CPPA that were not established in the record. *Id*. at 18. However, the Court concluded that a guilty plea could be provident as to the lesser included offense of engaging in conduct of a nature to bring discredit upon the armed forces under clause 1 or 2 and upheld the convictions under Article 134. *Id.* at 19-20. *See also Sapp*, 53 M.J. at 92; *United States v. Augustine*, 53 M.J. 95, 96 (C.A.A.F. 2000).

The *Mason*, *Sapp*, and *Augustine* cases involved discussions between the accused and the military judge during the providence inquiry concerning the service-discrediting character of their actions in possessing images of child pornography. In the instant case, the providence inquiry does not have such a discussion. While the stipulation of fact mentions that the appellant's distribution of child pornography was service discrediting and prejudicial to good order and discipline, it did not mention whether the possession of child pornography alone had the same service-discrediting character. *See O'Connor*, 58 M.J. at 454. Additionally, the appellant's plea inquiry was focused on the question of whether or not his conduct violated the CPPA, not the question of whether or not, under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. *Id*. Therefore, when we measure the appellant's guilty plea to possession of child

pornography in violation of the CPPA by the different yardstick of clause 3 of Article 134, we conclude that his plea to Specification 2 was improvident.

The approved findings of guilty as to Specification 1 and of the Charge are affirmed. The findings of guilty as to Specification 2 and the sentence are set aside. The record of trial is returned to The Judge Advocate General for submission to the appropriate convening authority. The convening authority may either dismiss Specification 2 and order a rehearing on the sentence as to Specification 1 and the Charge, or he may order a rehearing on Specification 2 and the sentence. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c) shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court