UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant PHILLIP L. STORDAHL
United States Air Force

ACM 36187

22 August 2006

Sentence adjudged 2 December 2004 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: William M. Burd.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major Maria A. Fried, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Kimani R. Eason.

Before

BROWN, MOODY, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

The appellant pled guilty to one specification of violating a lawful general regulation "by wrongfully accessing unofficial internet sites" on a government computer, in violation of Article 92, UCMJ, 10 U.S.C. §892, and to one specification of wrongfully possessing sexually explicit images of minors, in violation of Article 134, UCMJ, 10 U.S.C. §934. A panel of officers and enlisted members sentenced the appellant to a bad-

conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the adjudged sentence.

The appellant has submitted four assignments of error: (1) that his plea to the regulatory violation cited in Charge I is improvident; (2) that the military judge improperly admitted evidence on sentencing in violation of Military Rule of Evidence 403; (3) that there is no documentation that either trial counsel or trial defense counsel reviewed the record; and (4) that the sentence is inappropriately severe. This last assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding error as to the first issue, we order corrective action.

Providence of the Guilty Plea

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). 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).

"A court shall not accept a plea of guilty where 'an accused . . . sets up matter inconsistent with the plea . . . .'" *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (quoting Article 45(a), UCMJ, 10 U.S.C. § 845(a)). "[I]n deciding a providence issue, the sole question is whether appellant made a statement during the trial which was in conflict with his guilty plea. It is unnecessary that his statement be credible; instead, it only need be inconsistent." *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).

Charge 1 and its Specification allege a violation of Air Force Instruction (AFI) 33-129, *Transmission of Information Via the Internet* (4 Apr 2001). The appellant asserts that his plea of guilty to this charge is improvident in that he raised a matter inconsistent with his plea when he told the military judge that he did not know that the computers in question belonged to the government.

AFI 33-129, paragraph 6.1.3, forbids "[s]toring, processing, displaying, sending, or otherwise transmitting offensive or obscene language or material" by means of a government computer or network. During the providence inquiry, the appellant stated to the military judge that he had used computers at the base library to check his personal e-mail account and, by clicking on attachments to e-mail he had received, he accessed sexually explicit web sites. The military judge had the following colloquy with the appellant:

MJ: So, did you know that what you were doing was criminal at the time that you did it?

[The accused consulted with his defense counsel]

ACC: At the time frame, sir, I would just click through the opening screens and would not read them. So, I wasn't aware at that time that the base library computers were actually government owned computers. Since that time, I've seen and read the opening screens on there and I do realize that they are government owned computers.

MJ: Well, that doesn't specifically answer my question . . . the implication from your response is . . . that you didn't know at the time that you used the computers that you were actually committing a criminal act?

ACC: Yes, sir. At the actual time that I was using the computers I did not realize that they were considered to be government computers because I didn't read the opening screens.

. . . .

MJ: What's important for me to know now is not necessarily what you understand today . . . but . . . what was going through your mind at the time that you did these acts that you are now admitting constitute a violation of this regulation? So, did you think you were entitled to go to a base library . . . use [sic] the computers at the library to access pornographic websites?

ACC: No, sir, I did not. I wasn't going to the library with the express intention of accessing pornographic sites. I was there for the intention of checking my personal e-mail.

After examining the appellant on other matters pertinent to his plea, the military judge returned to the issue of the appellant's knowledge of whether he was using a government computer.

MJ: Defense counsel, can you tell me why I should find the accused's plea provident based on what he said about his knowledge of the nature of the computers at the time he was accessing these unofficial Internet sites?

DC: Your Honor, if you could clarify what do you believe we haven't answered or haven't adequately responded to?

MJ: Whether he knew he was using a government computer, at the time that he went to the sites?

DC: I don't see, sir, how that is an element of the offense . . . [w]hether he knew he was using a government computer.

The military judge engaged in a further colloquy with the trial defense counsel over the significance of the appellant's knowledge of the ownership of the computer. Eventually, the judge attempted to resolve the problem by discussing the issue of deliberate avoidance.

MJ: Do you think it was reasonable for you to believe that what you were doing was not using a government computer?

ACC: [No response]

MJ: I'm asking you what you think now, not what you thought then.

[The accused consulted with his defense counsel.]

ACC: Sir, now I believe that if I had actually read the pop-up banners on the computers, I would have realized that they were . . . actually government computers. So, I do not believe I have a defense against this, sir.

[The accused consulted with his defense counsel]

ACC: Sir, I also had to sign in at that front desk of the base library for permission to actually use the computers, and there were rules that were next to the sign-in log also.

MJ: Did you read those rules?

ACC: No, sir, I did not. If I would have read those rules, at that time I would not have gone to those types of websites.

. . . .

MJ: There is a concept that is used in some offenses called "deliberate avoidance," and it almost sounds like you were deliberately avoiding knowing the proscriptions that applied to the use of the system by not reading the notice when you signed in and then all the notices given in the pop-ups as you were logging into this. Do you agree with that?

[The accused consulted with his defense counsel.]

ACC: Yes, sir, that was deliberate.

MJ: Counsel, do you feel any further inquiry is required?

CTC: No, your honor.

MJ: Defense counsel?

DC: No, your honor.

Following this, the military judge went on to examine the appellant as to the providence of his plea to possessing child pornography. Ultimately, he found the appellant guilty of both charges.

We sense the military judge's frustration in this case, with the appellant obviously wanting to plead guilty to the regulatory violation, but unable or unwilling to admit that he knew, at the time of the offense, that the computers belonged to the government. Although the trial defense counsel did not believe the issue to be relevant, based upon a review of the record, an honest and reasonable mistake of fact can pose a defense to a regulatory violation. *See United States v. Brown*, 22 M.J. 448, 451 (C.M.A. 1986). The military judge broached the subject when he asked the appellant about the reasonableness of his belief as to the ownership of the computers, but he never discussed the mistake of fact defense in sufficient detail to ensure that the appellant understood it's meaning. As it stands, the judge's colloquy with the appellant included a discussion of deliberate avoidance, which, in our view is not really suggested by the appellant's factual description of the offense. Deliberate avoidance involves purposeful ignorance. The appellant's answers to the judge's questions -- with the exception of one conclusory response -- suggest it was his haste, rather than some conscious design of avoidance, that lead him to skip the various posted warnings about proper use of the computers. *See United States v. Brown*, 50 M.J. 262, 266 (C.A.A.F. 1999).

Had the judge fully explained the defense of mistake of fact, the appellant would probably have been able to admit that his belief that the computers belonged to someone other than the government was unreasonable; however, that did not happen. We sympathize with the military judge who had no reason to foresee that a Master Sergeant with more than 20 years experience in the Air Force would claim not to know this proposition. As it stands, however, we conclude that the appellant's responses concerning his knowledge of the ownership of the library computers, raises a "'substantial' basis in law and fact" for questioning the plea. *Milton*, 46 M.J. at 318. We hold that the military judge abused his discretion by accepting the plea. Charge I and its

Specification are dismissed. We examined the remaining issues and resolve them adversely to the appellant.

Having dismissed a specification, we must now determine if we can reassess the sentence or whether we must return the case to the convening authority for a rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

Applying this criterion, we conclude that we can reassess the sentence. The remaining conviction, Charge II and its Specification, concern the appellant's possession of child pornography on his personal computer, and is by far the more serious of the two charges. According to the stipulation of fact, "30 images recovered from the hard drive [of the appellant's computer] are of known real children engaged in sexually explicit conduct. Such conduct includes oral sex, anal sex, vaginal sex, masturbation, and the lascivious display of genitals. The accused possessed thousands of images of a similar nature." Our review of the other evidence submitted by the prosecution and placed under seal by the military judge confirms this statement. By comparison, the pornographic material underlying the dismissed Charge I and its Specification was less egregious, depicting subjects who, though young, could not be positively identified as minors. Additionally, the evidence underlying the regulatory violation is much less voluminous than that of Charge II. Accordingly, we conclude that absent the error, the members would have sentenced the appellant to no less than a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1. We reassess the sentence to that quantum of punishment.

Conclusion

The approved findings, as modified, and sentence, as reassessed, 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, as modified, and sentence, as reassessed, are

AFFIRMED.

Senior Judge MOODY participated in this decision prior to his retirement.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator