UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SCOTT J. VEENSTRA
United States Air Force

ACM 35160

25 February 2004

Sentence adjudged 26 March 2002 by GCM convened at Langley Air Force Base, Virginia. Military Judge: John J. Powers (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Maria A. Fried, Major Karen L. Hecker, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

PRATT, Chief Judge:

Pursuant to a pretrial agreement, the appellant pled guilty to wrongfully possessing images of child pornography, in violation of 18 U.S.C. § 2252A[1], the Child Pornography Prevention Act of 1996 (CPPA) and Article 134, UCMJ, 10 U.S.C. § 934. The military judge, sitting alone as a general court-martial, accepted the appellant's plea and sentenced him to a bad-conduct discharge, confinement for 10 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

[1] Specifically, the appellant was charged with violating § 2252A(a)(5)(A) by possessing child pornography in a building owned by and under the control of the United States.

On appeal, the appellant argues that his conviction is "void" in the wake of the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), wherein a portion of the federal statute defining child pornography was held unconstitutional. Under the facts of this case, we agree and set aside the conviction.

I. Background

The appellant was assigned to an intelligence squadron at Langley Air Force Base, Virginia. He lived in a dormitory on base where, beginning in December 2000 and using his personal computer, he began searching the Internet for nudity. By his own account, his curiosity soon led him to "kid sites," and things just "spiraled down from there." Over the next five or six months, he was "trapped in an abominable addiction." Ultimately, he reportedly became concerned with his behavior and befriended a couple in his Bible study group who helped him eventually renounce pornography. He put essentially all of his pornography collection away in a briefcase and was reportedly saving to purchase a shredder with which he planned to destroy the entire collection.

Unfortunately for him, a month later but before he was able to afford a shredder, there was a health & welfare dormitory inspection during which a military drug dog alerted on his briefcase.[2] The appellant consented to a search of the briefcase and of his entire room. In the briefcase, inspectors found a well-organized binder containing various images of apparent child pornography, 10 compact disks, and 44 floppy disks. An investigation by the Air Force Office of Special Investigations ensued. All of the compact disks, 17 of the floppy disks, and the hard drive from the appellant's personal computer, combined to contain over 2000 images of which "at least 500" images were believed to represent child pornography.

The appellant waived his right to an Article 32, UCMJ,[3] investigation and entered into a pretrial agreement whereby he agreed to plead guilty to possession of child pornography in exchange for the convening authority's promise not to approve confinement in excess of 18 months.

II. Providence of Guilty Plea

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact" for questioning the 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

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[2] The record does not address what may have caused the dog to alert on the briefcase. There was no indication that it contained drugs or drug residue of any kind.

[3] 10 U.S.C. § 832.

(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 (C.A.A.F. 1996).

In this case, the military judge properly accepted the appellant's guilty plea under the law as it existed at the time of trial. However, just three weeks after the appellant's court-martial, the Supreme Court released its opinion in *Free Speech Coalition*, wherein the Court found that some language in 18 U.S.C. § 2256, containing definitions of child pornography applicable to the offenses in § 2252A, unconstitutionally infringed upon free speech. Specifically, the Court found that the language of § 2256(8)(B), proscribing an image or picture that "appears to be" of a minor engaging in sexually explicit conduct, and the language of § 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 256-58. In effect, then, while the Supreme Court reiterated that the government could constitutionally prohibit pornography involving actual children, *Id.* at 240, it may not seek to proscribe images of "virtual" children.

This case seems to be "on all fours" with our superior court's holding in *United States v. O'Connor,* 58 M.J. 450, 453 (C.A.A.F. 2003), a guilty plea case in which the Court explained:

> It is no longer enough, however, to knowingly possess, receive or distribute visual depictions that "appear to be" of a minor engaging in sexually explicit conduct. In the wake of *Free Speech Coalition*, the relevant provisions of 18 U.S.C. § 2256(8) require that the visual depiction be of an actual minor engaging in sexually explicit conduct.

Thus, in order to sustain the appellant's guilty plea as provident, we must find "factual circumstances as revealed by the accused himself" that support a conclusion that he was pleading to the possession of pornographic images of *actual* children. *Davenport*, 9 M.J. at 367. In other words, we must be certain that the appellant did not rely upon the "appears to be" language as part of the definition of child pornography. As in *O'Connor*, since this case was tried before *Free Speech Coalition* established the critical significance between "actual" versus "virtual" children, there was no effort by the military judge to address this distinction during the appellant's providence inquiry. However, normal usage and common sense suggest that describing a person as a "minor" or a "child" indicates reference to a real person, unless there is some limiting language such as "appears to be," "virtual," or "computer-generated." *See United States v. James*, 55 M.J. 297, 300-01 (C.A.A.F. 2001) (the appellant's admissions that the images "depicted young females under the age of eighteen" and "minors" reasonably suggested depiction of actual minors). Thus, in some cases, where the colloquy between the military judge and the accused contains clear acknowledgement that the images are of "minors" and "children

under the age of 18," where a stipulation of fact contains similar admissions lending themselves to no explanation other than the fact that the accused is admitting to the involvement of real children in the charged depictions, and where our review of the pictures themselves clearly reinforces our conclusion that actual children are indeed the subjects of the images, we can find the requisite factual predicate and determine that the "appears to be" definition did not play a role in the appellant's guilty plea. Article 59(a), UCMJ, 10 U.S.C. § 859(a). In the case sub judice, however, we cannot.

During the providence inquiry, in describing the elements of the offense and in defining certain terms to the appellant, the military judge did not read or otherwise refer specifically to the definitions contained in 18 U.S.C. § 2256(8). In pertinent part, he used the following language to advise the appellant:

> MJ: This offense requires that you have knowingly possessed material containing an image of child pornography. . . . However, it is not required that you actually---know the actual ages of the persons in the visual depictions but you must have known or believed the persons to be minors. Now, child pornography means visual depictions including any photograph, film, video, picture, or computer---or computer generated image or pictures, whether made or produced by electronic, mechanical or other means of sexually explicit conduct . . . . Now, for the purpose of this statute, the words child and minor mean any person under the age of 18 years.

The appellant acknowledged that those definitions, together with the elements described by the military judge, correctly described his conduct. When asked to describe in his own words why he felt he was guilty of the offense, the appellant admitted that he looked at and downloaded pictures of child pornography on his computer. "I do believe the pictures to be of people under the ages [sic] of 18." As the military judge continued a colloquy with the appellant to ascertain his understanding of the offense and to establish a factual basis therefor, there were a number of exchanges—either answers by the appellant or questions framed by the judge—which simply referred to "minors."

In this setting, as stated earlier, normal usage and common sense might imply that such unqualified references were necessarily to actual children. However, at one point, the military judge framed one of his questions in terms of "a minor or what appeared to be a minor." And later, in reviewing a stipulation of fact entered into in conjunction with the pretrial agreement, the military judge quoted from the stipulation of fact, "at least 500 of the images if not more, appeared to be minors engaging in 'sexually explicit conduct' as defined in 18 USC 2256." The appellant agreed that this was true. In the context of this case, this use of "appears to be" language and reference to 18 U.S.C. § 2256 taints both prior and subsequent unqualified references to "minors," making it impossible to conclude with a sufficient degree of certainty that the appellant was not relying on the

constitutionally stricken definition contained in 18 U.S.C. § 2256(8)(B). Therefore, we must hold that his plea was improvident.

III. Lesser Included Offense

In their appellate brief, the government asserts that, if we find we cannot uphold the appellant's guilty plea as provident for a violation of 18 U.S.C. § 2252A as charged, then we should nevertheless find his plea provident as to a lesser included offense under Article 134, Clause 1 or 2, as conduct prejudicial to good order and discipline or conduct of a nature to bring discredit upon the armed forces. Article 134, UCMJ; *Manual For Courts-Martial, United States* (MCM), Part IV, ¶ 60c(2) & (3) (2002 ed.). *See United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000); *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000).

Again, we are bound by the decision of our superior court in *O'Connor* wherein, despite a stipulation of fact that his conduct was service-discrediting, the court found that the lack of discussion of this element by the military judge or by the appellant during the providence inquiry precluded finding his plea provident to the lesser-included offense under Clause 2 of Article 134, UCMJ. *O'Connor*, 58 M.J. at 455. In the case sub judice, this element is not addressed in any way, either in the stipulation of fact or during the providence inquiry. Under these circumstances, we cannot find the appellant's plea provident to a lesser included offense under Clause 1 or 2 of Article 134, UCMJ.

IV. Conclusion

The appellant's pleas of guilty to the Charge and Specification being improvident, the findings of guilt and the sentence are set aside. The record is returned to The Judge Advocate General. A rehearing is authorized.

OFFICIAL

HEATHER D. LABE
Clerk of Court