UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID J. VON BERGEN
United States Air Force

ACM 34817

16 June 2003

Sentence adjudged 20 September 2001 by GCM at RAF Mildenhall, United Kingdom. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 28 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, Major Jeffrey A. Vires, and Major Patrick J. Dolan.

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

Before

BURD, ORR, W.E., and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

ORR, W.E., Judge:

The appellant was convicted, in accordance with his pleas, of one specification of knowingly possessing a computer disk containing images of child pornography on divers occasions, contrary to 18 U.S.C. § 2252A(a)(5)(A), in violation of Article 134, UCMJ, 10 U.S.C. § 934, and one specification of knowingly and wrongfully distributing child pornography in interstate or foreign commerce by means of a computer in violation of Art. 134, UCMJ. A military judge sitting alone sentenced the appellant to a dishonorable discharge, confinement for 28 months, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant now asserts his guilty plea to

possessing child pornography was improvident. Specifically, the appellant asks this court to set aside the finding of guilty to Specification 1 (possession of child pornography) of the Charge because of the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which held that the definitions of child pornography in 18 U.S.C. §§ 2256(8)(B), (D) are overbroad and unconstitutional. We find error but no prejudice, and affirm.

Providence of the Plea–Possession of Child Pornography

After the appellant's trial, the Supreme Court issued its opinion in *Free Speech Coalition* concerning the constitutionality of portions of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251-2260. As a result, the appellant now argues that his guilty plea to Specification 1 of the Charge was improvident because it was based upon a definition of child pornography invalidated by the Supreme Court. We do not agree.

As previously noted, the appellant pled guilty to both specifications of the Charge. As required by Rule for Courts-Martial (R.C.M.) 910(e), the military judge questioned the appellant at length about his understanding of the offenses to which he pled guilty and the factual basis for the plea. The military judge advised the appellant of the definition of child pornography contained in 18 U.S.C. § 2256(8), specifically:

> "Child pornography" means any visual depiction including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
>
> a) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
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> b) Such visual depiction is or appears to be of a minor engaging in sexually explicit conduct;
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> c) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct; or
>
> d) Such visual depiction is 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.

The appellant repeatedly advised the military judge that the images in question met this definition of child pornography.

The appellant agreed to a detailed stipulation of fact, explaining how he committed the charged offenses. Both specifications concerned a computer the appellant kept in his dormitory room on base that was used as a file server accessible by several other airmen on the base. According to the stipulation of fact, the appellant told agents of the Air Force Office of Special Investigations (AFOSI) that he knew child pornography was illegal and he had made child pornography available to others using his computer. Additionally, the appellant stipulated that many of the 930 image files were pictures of pre-teenage children that were in various stages of undress and sexual situations with men, women, and other children. The parties also stipulated that the appellant's government computer also contained over 100 movie files that constituted child pornography, and that some of these images were included, along with sexually-explicit photographs involving adults, in Prosecution Exhibit 4. While the appellant stated that he did not know the age of all of the children, he did stipulate that two of the girls in one picture looked approximately four or six years old. He also accepted as fact a report prepared by a pediatrician stating that 12 of the images depicted children engaged in sexually-explicit acts or in a sexually-suggestive manner.

In *Free Speech Coalition*, decided after the trial in this case, the Supreme Court found that some language within 18 U.S.C. § 2256 defining child pornography unconstitutionally infringed upon free speech. 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 depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Id.* at 256-58. Nonetheless, the Supreme Court reiterated that the government could constitutionally prohibit pornography involving actual children. *Id.* at 240. *See generally New York v. Ferber*, 458 U.S. 747 (1982); 18 U.S.C. §§ 2256(8)(A), (C).

In determining whether a guilty plea is provident, the standard of review 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 (1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. James*, 55 M.J. 297, 298 (2001); *United States v. Bickley*, 50 M.J. 93, 94 (1999). 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 (1996) (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 (1996). "We will not overturn a military judge's acceptance of a guilty plea based on a 'mere possibility' of a defense." *Faircloth*, 45 M.J. at 174 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). This Court will not "speculate post-trial as to the existence of facts

which might invalidate an appellant's guilty pleas." *United States v. Johnson*, 42 M.J. 443, 445 (1995). Of course, a guilty plea does not preclude a constitutional challenge to the underlying conviction. *Menna v. New York*, 423 U.S. 61 (1975).

In the case *sub judice*, the appellant pled guilty. In order to determine whether there is a "substantial basis in law and fact for questioning the guilty plea," *Milton*, 46 M.J. at 318, we must decide whether the guilty plea was based, in whole or in part, upon the portions of the definition of child pornography later struck down in *Free Speech Coalition*.

We turn first to the definition contained in 18 U.S.C. § 2256(8)(D) concerning images that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the material was child pornography. Reviewing the factual matters discussed in support of the plea, it does not appear that the appellant thought the images were child pornography because of the way they were advertised, promoted, or presented. Some of the websites had names suggestive of child pornography, containing such terms as "14year01" and "all-pics-for-ynglvrs," but the appellant did not indicate he believed that this was child pornography because of these advertisements or descriptions. To the contrary, in the stipulation of fact, the parties agreed that the appellant told the AFOSI agents that he intentionally went into chat rooms for the specific reason of downloading or obtaining child pornography. We are convinced that the definition in 18 U.S.C. § 2256(8)(D) did not play a material part in this case. *See also United States v. Appeldorn*, 57 M.J. 548 (A.F. Ct. Crim. App. 2002). We conclude that any error of law in providing that definition did not create a substantial basis for challenging the plea.

We turn next to the definition of child pornography contained in 18 U.S.C. § 2256(8)(B), relating to an image that "appears to be" a minor engaging in sexually explicit conduct. The Supreme Court found the language of 18 U.S.C. § 2256(8)(B) overly broad because it would include "computer-generated images," "a Renaissance painting depicting a scene from classical mythology," or scenes from Hollywood movies which did not involve any children in the production process. *Free Speech Coalition*, 535 U.S. at 241. The Supreme Court also took note of the Congressional findings following 18 U.S.C. § 2251 that new technology makes it possible to create realistic images of children who do not exist. *Id.* at 240. Here, the images in question were not Renaissance paintings or scenes from Hollywood movies involving actresses over 18 years old. While it is clear that the military judge did not ask the appellant whether the pictures were actual children, we are confident that the appellant believed they were. At no time did the appellant indicate that the pictures in question were child pornography only because they "appeared to be" actual children. Nothing in the record indicates the images in question were "computer-generated" or "virtual" photographs. Given the number of images found on the appellant's computer and his willingness to share these

images with others, it is not difficult to conclude that the appellant believed that the images were of actual children.

The parties agreed to the introduction of some of the images in question, and representative samples of the images were included in the record in Prosecution Exhibit 4. This also provides a basis for this Court to determine whether the appellant's pleas are provident. *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) cert. denied 123 S. Ct 930 (2003) ("We have examined the images shown to the jury. The children depicted in those images were real; of that we have no doubt whatsoever."); *James*, 55 M.J. at 300-01. "[I]n the guilty-plea context, the Government does not have to introduce evidence to prove the elements of the charged offense beyond a reasonable doubt; instead, there need only be 'factual circumstances' on the record 'which "objectively" support' the guilty pleas, i.e. that actual minors were in appellant's pictures." *Id.* at 300 (citing *United States v. Shearer*, 44 M.J. 330, 334 (1996)). After reviewing these images, we believe the pictures support the appellant's admissions that the images in question involve actual children engaged in sexually-explicit conduct.

The appellate defense counsel argues simply that the appellant "never admitted that the images he downloaded contained actual minors." We are not convinced that employment of the adjectives "actual" or "real" in describing the minors is determinative. Indeed, 18 U.S.C. § 2256(8)(A), which passed constitutional muster under *Free Speech Coalition*, does not use either word to modify the term "minor." Contrary to the appellant's argument, normal usage and common sense suggest that describing a person as a minor or a child indicates the subject is a real person, unless there is some limiting language such as "appears to be," "virtual," or "computer-generated."

In this case, the appellant was not a casual viewer of pornography. The AFOSI agents found hundreds of image files on the appellant's computer and many of them depicted children in sexual situations. Additionally, the appellant stipulated that he "knew or believed the images that he possessed were of individuals under 18 years of age." Given the number of computer images coupled with the appellant's stipulation, we find a sufficient basis to conclude that the appellant was convinced that they were images of real children. To do otherwise would require speculation on our part, and we will not "speculate post-trial as to the existence of facts which might invalidate" a guilty-plea. *Johnson*, 42 M.J. at 445. We hold that any error of law in including the "appears to be" language from 18 U.S.C. § 2256(8)(B) in the definition of child pornography in this case did not create a substantial basis for challenging the plea.

The approved findings and sentence 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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court