

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**James A. MICHAEL
Aviation Machinist's Mate Second Class (E-5), U. S. Navy**

NMCCA 200600193

Decided 30 January 2007

Sentence adjudged 4 October 2005. Military Judge: K.J. Allred. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Fleet Logistics Support Squadron THREE ZERO, NAS, North Island, San Diego, CA.

LT A.M. SOUDERS, JAGC, USNR, Appellate Defense Counsel
LCDR REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of possessing child pornography, soliciting obscene material on divers occasions, and receiving child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, and 18 U.S.C. § 2252A(a)(5)(B), 2252(a)(3)(B) and 2252(a)(2)(A). The appellant was sentenced to reduction in rate to E-1, confinement for six months, forfeiture of two-thirds pay per month for ten months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, and the sentence limitation portion of the pretrial agreement had no effect on the sentence.

We have examined the record of trial, the appellant's assignments of error,¹ and the Government's response. We

¹ I. [APPELLANT'S] PLEA OF GUILTY TO CHARGE II, SPECIFICATION 2 IS IMPROVIDENT AS TO THE CHARGE OF SOLICITING OBSCENE MATERIAL BECAUSE THE

conclude that Specification 2 under Charge II must be modified to remove the obscenity portion of the specification and the sentence must be modified to restate forfeitures in absolute terms. Following our corrective action, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Although not assigned as error, we note that in taking action, the CA did not order any portion of the sentence executed as authorized by Article 71(c), UCMJ, and RULE FOR COURTS-MARTIAL 1113, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).² Execution of the sentence may be ordered following completion of appellate review, when final action is taken on this case.³

Improvident Plea

In his first assignment of error, the appellant contends that his plea of guilty to soliciting obscene visual depictions of a minor engaging in sexually explicit conduct in Specification 2 of Charge II is improvident because the military judge used an improper definition of obscenity during the providence inquiry. Appellant's Brief and Assignment of Errors of 30 May 2006 at 3-4. We agree and will take corrective action to remove that portion of the specification pertaining to obscene visual depictions of minor children in our decretal paragraph. However, we conclude that the appellant's guilty plea to the remaining portion of Charge II pertaining to soliciting material containing a visual depiction of an actual minor engaging in sexually explicit conduct remains provident because the military judge elicited sufficient facts to establish that the images qualified as visual depictions of actual minors engaging in sexually explicit conduct.

Before accepting a guilty plea, a military judge must accurately inform the appellant of the nature of his offense and elicit from him a factual basis to support his plea. *United*

MILITARY JUDGE USED AN IMPROPER DEFINITION OF OBSCENITY DURING THE PROVIDENCE INQUIRY.

II. THE ADJUDGED SENTENCE TO FORFEIT TWO-THIRDS PAY PER MONTH FOR TEN MONTHS IS IMPROPER BECAUSE THE MILITARY JUDGE DID NOT STATE IT IN WHOLE DOLLARS AS REQUIRED BY R.C.M. 1003(b)(2).

² In taking action, the convening authority merely stated that "the sentence provides for reduction to the grade of pay grade E-1, confinement for 6 months, forfeiture of two-thirds pay per month for 10 months, and a bad-conduct discharge is approved." CA's Action of 6 Feb 2006. Missing from the end of this sentence are the words "and will be executed." See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), App. 16 at A16-1.

³ Moreover, the initial action designates a brig as the place of confinement, even though it does not specifically order confinement executed. In the context of this action, implicit in that designation is the order to execute the approved confinement. See R.C.M. 1113(d)(2)(c).

States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004)(citing *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969)). An essential aspect of informing the appellant of the nature of the offense is a correct definition of legal concepts. The judge's failure to do so may render the plea improvident. *Id.* (citing *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)(holding plea improvident due to erroneous definition of child pornography); *United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982)(holding plea improvident where a military judge failed to define the substantive elements of conspiracy to a complex offense)). However, such an error in advising an accused will not render the guilty plea improvident where the record contains "factual circumstances" that "objectively support" the guilty plea to a more narrowly construed statute or legal principle. *Negron*, 60 M.J. at 141 (citing *United States v. James*, 55 M.J. 297, 300 (C.A.A.F. 2001)). In evaluating whether a plea is provident, this Court considers the entire record of trial. *Id.* From that record, we must determine whether there is a substantial basis in law and fact for questioning the plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

In Specification 2 of Charge II, the appellant was convicted of violating Article 134, with the underlying misconduct being a violation of 18 U.S.C. § 2252(A)(a)(3)(B), popularly known as the Child Pornography Prevention Act. Specifically, the appellant's conduct was charged as follows:

In that Aviation Machinist Second Class James A. Michael, U.S. Navy, Fleet Logistics Support Squadron THREE ZERO, on active duty, did, at or near San Diego, California, on divers occasions between on or about 3 July 2004, and on or about 29 July 2004, knowingly solicit through interstate commerce material, in a manner that reflected the belief that the said material contained an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct as defined in 18 United States Code, Section 2256(2)(A), in violation of 18 United States Code, Section 2252A(a)(3)(B).

Charge Sheet. (Emphasis added).

During the providence inquiry, the military judge advised the appellant of the elements of that offense as follows:

MJ: Okay. Let's look at Specification 2. This alleges a solicitation of child pornography in violation of a separate Section of the U.S. Code, 2256(2)(A). The elements of this offense are:

That on or about - or on various occasions between the 3rd of July 2004 and about 29 July 2004, you knowingly solicited through interstate commerce, certain material;

Second, is that you did so in a manner that reflected your belief that the material contained either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct;

Three, that you had specifically intended that the material that you solicited would be entered into interstate commerce;

Four, that your act of soliciting was wrongful;
and

Five, that at the time you solicited this material, 18 U.S. Code § 2252A(a)(3)(B) was in existence. Do you understand those elements?

ACC: Yes, sir.

MJ: Do they seem to describe correctly what happened with respect to this-

ACC: Yes, sir.

MJ: -- solicitation?

ACC: Yes, sir.

Record at 39-40. (Emphasis added).

As charged, the criminal nature of the appellant's conduct derived from his solicitation of either obscene depiction of a minor or visual depiction of an actual minor. Thus, the appellant was charged with violating both clause (i) and clause (ii) of 18 U.S.C. § 2252A(a)(3)(B). With regard to this offense, the military judge erroneously defined the term "obscene" to the appellant utilizing a definition that was not in accordance with the definition articulated by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973); *see also, United States v. Kelly*, 314 F.3d 908, 911 (7th Cir. 2003).⁴ Thus, the military judge

⁴ In *Miller*, 413 U.S. at 24, the Supreme Court held that the basic guidelines for determining whether material is obscene are: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (internal citations omitted).

failed to accurately inform the appellant of the nature of his offense under clause (i) of 18 U.S.C. §2252A(a)(3)(B). Inasmuch as the record does not otherwise establish objective support for the plea to the obscenity portion of the charge, the appellant's plea to the obscenity portion of the charge is improvident. See *Negron*, 60 M.J. at 141.

However, the finding of guilty to the remaining portion of the specification and charge alleging a violation of clause (ii) of 18 U.S.C. § 2252A(a)(3)(B) can be affirmed because the obscenity portion of the specification can be severed from the visual depiction portion of the specification, and the record contains ample evidence of the appellant's understanding and belief that the images visually depicted actual children. Record at 40, 44; Prosecution Exhibit 1 at 5.⁵ We conclude that the appellant's plea to the remaining portion of the specification is provident. We will take appropriate corrective action in our decretal paragraph to remove the obscenity portion of the specification. Our action does not alter the essential nature of the offense and there is no prejudice as to the sentence. Therefore, we do not need to reassess the sentence. See *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).⁶

Conclusion

Specification 2 under Charge II is amended to read as follows:

In that Aviation Machinist Second Class James A. Michael, U.S. Navy, Fleet Logistics Support Squadron THREE ZERO, on active duty, did, at or near San Diego, California, on divers occasions between on or about 3 July 2004 and on or about 29 July 2004, knowingly solicit through interstate commerce material, in a manner that reflected the belief that the said material

⁵ Prosecution Exhibit 1 is the appellant's Stipulation of Fact that was admitted into evidence during his providence inquiry. Record at 17. At page 5 of Prosecution Exhibit 1, the appellant stipulated that he "believed that all of the pornography" that he admitted to possessing, soliciting and receiving "depicted real children" and that his belief "that actual children were depicted in all of the pornography discussed above was corroborated by the National Center for Missing and Exploited Children." In addition, the appellant stipulated that he "was satisfied that all of the images and videos discussed above depict real children and constitute child pornography."

⁶ The appellant asserts in his second assignment of error that when the military judge announced the sentence, he failed to state the amount of adjudged forfeitures in whole dollars as was required by R.C.M. 1003(b)(2). Appellant's Brief at 6; Record at 103. The Government concedes the error. Answer on Behalf of the Government of 21 Jun 2006 at 5. We agree and, because the convening authority's action did not correct this error, will take corrective action in our decretal paragraph. *United States v. Johnson*, 32 C.M.R. 127, 128 (C.M.A. 1962); *United States v. Burkett*, 57 M.J. 618, 619-21 (C.G.Ct.Crim.App. 2002).

contained a visual depiction of an actual minor engaging in sexually explicit conduct as defined in 18 United States Code, section 2256(2)(A), in violation of 18 United States Code, Section 2252A(a)(3)(B).

We affirm the findings as amended. To correct the error of the military judge in announcing the sentence, we affirm only so much of the sentence as provides for reduction to pay grade E-1, confinement for six months, forfeiture of \$823.00 pay per month for ten months, and a bad-conduct discharge. The findings of this court do not require that the sentence be reassessed. We direct that the supplemental court-martial order reflect this court's action.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court