UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
L.T. BOOKER, J.A. MAKSYM, E.G. SMITH
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILLIAM T. JONES III
AVIATION MACHINIST'S MATE AIRMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 200602320
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 April 2006.
Military Judge: CAPT Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Naval Air Force, U.S. Atlantic Fleet, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR C.D. Jung, JAGC, USN.
For Appellant: LT Richard McWilliams, JAGC, USN; LT Brian Korn, JAGC, USN.
For Appellee: Maj Wilbur Lee, USMC; Maj Elizabeth Harvey, USMC.

27 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SMITH, Judge:

Pursuant to his pleas, the appellant was found guilty by a military judge sitting as a general court-martial of violating a lawful general regulation on divers occasions by wrongfully using Government computer equipment and communication systems to view pornography, and knowingly receiving child pornography that had been transported in interstate commerce, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C.

§§ 892 and 934. The military judge sentenced the appellant to confinement for two years and a bad-conduct discharge. The convening authority approved the sentence adjudged; however, in accordance with the terms of the appellant's pretrial agreement, all confinement in excess of eighteen months was suspended for a period of twelve months from the date of his action.

On 12 December 2007, after review pursuant to Article 66(c), UCMJ, this court affirmed the conviction. *See United States v. Jones*, No. 200602320, unpublished op. (N.M.Ct.Crim.App. 12 Dec 2007)(per curiam). In our decision, we specifically addressed appellant's two assignments of error.[1] On 4 September 2008, the Court of Appeals for the Armed Forces (CAAF), granted the appellant's petition for grant of review on the following modified issue:

> WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT THE OPPORTUNITY TO REVIEW THE EVIDENCE BEFORE HE PLED GUILTY AND WHETHER, IN LIGHT OF THAT DENIAL, APPELLANT'S PLEA WAS PROVIDENT.

Without comment, CAAF set aside our decision and returned the record of trial to the Judge Advocate General of the Navy for remand to this court for a new review and consideration of the modified issue under Article 66(c), UCMJ.

We have carefully re-examined the record of trial in light of the modified issue and considered the appellant's additional brief and assignment of error, as well as the Government's answer. We again 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Background

[1] The appellant's assigned errors were:

I. WHETHER THE MILITARY JUDGE VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT AND RULE FOR COURTS-MARTIAL 701 BY DENYING APPELLANT THE OPPORTUNITY TO REVIEW THE EVIDENCE AGAINST HIM BEFORE HE PLED GUILTY.

II. WHETHER APPELLANT PLED GUILTY PROVIDENTLY TO RECEIVING CHILD PORNOGRAPHY WHERE, UNABLE TO REMEMBER THE NATURE OF [THE] PICTURES [HE DOWNLOADED] AND PROHIBITED FROM REVIEWING THE PICTURES, HE RECITED DESCRIPTIONS OF THE PICTURES PROVIDED BY HIS DEFENSE COUNSEL.

Charges were preferred against the appellant on 26 January 2006. He waived his Article 32 hearing on 7 February 2006. The charges were referred to a general court-martial on 14 March 2006. The appellant signed a pretrial agreement on 6 April 2006, agreeing to enter unconditional pleas of guilty, and he signed a stipulation of fact on 10 April 2006, the day before trial. Counsel met with the military judge on 10 April 2006 for an unrecorded conference pursuant to RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). During the R.C.M. 802 conference, counsel advised the military judge that they had arranged for the appellant to review the subject child pornography prior to commencement of trial the following day. At that time, the military judge directed that the appellant not be permitted to review the images as had been arranged by counsel. *See* Record at 10, 65.

Trial commenced on 11 April 2006. After an appropriate rights advisement, the appellant entered pleas of guilty in accordance with the pretrial agreement. The military judge then explained to the appellant the elements of the offenses and related definitions, and began to question him regarding the offenses. As the providence inquiry progressed, the appellant had difficulty in providing specific details of the child pornography taken from his computer. The appellant never denied his attempts or success at obtaining and viewing child pornography. Prior to recessing for the day, the military judge noted that "[t]he accused has had, and this is probably not on the record so, let me put it on the record, has had a difficult time this afternoon maintaining composure and perhaps is losing his focus over the duration of the last several hours in court." *Id*. at 60.

Prior to reconvening the following morning, the court held another unrecorded R.C.M. 802 conference at which time defense counsel asked for leave of court to permit the appellant the opportunity to review the images of child pornography to assist him in answering the military judge's questions; the military judge denied the request. When the court reconvened, defense counsel provided the following basis for his request:

> That the accused has the right to view the evidence against him in this case, specifically the images of pornographic material. In order—the accused is willing to plead here, has plead guilty, is tempting [sic] to go through providency to the time delay between the investigation and where his crimes were

committed and today's date. The accused is unable to give exact specific details as requested by the court. And again, it is our position of the defense and accused—his right to review the evidence against him.

Id. at 63-64.

In denying the request, the military judge responded as follows:

> Well that issue isn't really raised at this stage of the proceedings, whether or not he has a right to review evidence against him. The issue is do we stop in the middle of this providency inquiry in the face of guilty pleas in [sic] the stipulation of fact to adjourn the court and allow him to go back and review these materials. It's my view having proceeded as far as we had through providency that it's clear to me that reviewing these images is not going to resolve the issues that your client was having yesterday. He broke down repeatedly, was reluctant to use specific language in describing what he clearly knows about these offenses and those kinds of reluctances and even – well those kinds of issues are not going to be resolved by going back and looking at these images. They are going to be resolved by doing what I did and that is taking a break, allowing him to recover his composure, review with you the requirements of a provident plea . . . . So your request is denied.

Id. at 64.

Defense counsel then stated for the record that the issue of the appellant reviewing the images had been discussed during the pretrial R.C.M. 802 conference on 10 April 2006. *Id*. at 65. The military judge responded on the record:

> Yes, Yes it was and my inclination was the same then. That it was not necessary for these proceedings at the point at which the proceedings were. That I think that issue is off the mark procedurally in terms of the timeliness with which it was raised and context in which it was raised. That's not to say under other circumstances that might not be a proper exercise of an accused's right, but as it's been raised in this case, it is untimely and improper.

Id. at 65.

The appellant then indicated he was ready to proceed and the providence inquiry continued. The appellant was able to provide answers to the military judge's questions sufficient to convince the military judge that there was an adequate factual basis for the plea and that the appellant was in fact guilty.

Discussion

As indicated above, there are two issues before the court: (1) whether the military judge erred in denying the appellant's request to review the evidence – the photographs and video containing child pornography – before pleading guilty; and (2) whether, in light of this denial, the appellant's plea was provident. With regard to the first issue, the appellant essentially argues that even on the eve of trial, he had an absolute and continuing personal right to view the subject child pornography pursuant to the Sixth Amendment and R.C.M. 701 and, thus, the military judge erred in denying him the opportunity to review the evidence. Concerning the second issue, the appellant claims that because he had trouble during the providence inquiry remembering specific details of the images without reviewing the evidence, his plea was improvident. We disagree.

I. Whether the Military Judge Erred in Denying the Request to Review the Evidence

The appellant contends that he had an absolute right to review the subject child pornography pursuant to the Sixth Amendment and R.C.M. 701. This argument is without merit.

Regarding the Sixth Amendment, the appellant argues that "[t]he military judge denied [him] his Sixth Amendment rights to participate in the preparation of his own defense and to equal access to the evidence." Appellant's Brief and Assignment of Error of 6 Oct 2008 at 10. We recognize that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . ." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). The Sixth Amendment provides that "[i]n all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend VI; *see United States v. Kreutzer*, 61 M.J. 293, 295

(C.A.A.F. 2005)("Compulsory process, equal access to evidence and witnesses, and the right to necessary expert assistance in presenting a defense are guaranteed to military accuseds through the Sixth Amendment . . . ."). In addition, the Sixth Amendment provides the accused with a right to defend, described as follows:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation-to make one's own defense personally-is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Faretta v. California, 422 U.S. 806, 819-20 (1975). Moreover, the right of an accused in a criminal trial to due process is, in essence, the right to defend against the Government's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

In this case, the appellant claims that the military judge violated his Sixth Amendment rights to "make a defense" and have equal access to the evidence by refusing to allow his personal inspection of the evidence of child pornography. Although the appellant refers to his right to make a defense, the appellant never referenced his ability to defend himself as part of his request to review the evidence. Instead, the only reasons the appellant advanced were to assist him in completing the providence inquiry and because it was "his right to review evidence against him." Record at 63-64. More particularly, the appellant was attempting to remember the specific details of each of the charged images to facilitate the providence inquiry.

Indeed, the procedural posture of the case at the time the military judge denied the appellant's request negates any inference that the decision to deny review of the evidence interfered with the appellant's ability to prepare a defense. The appellant had already agreed to enter pleas of guilty pursuant to a pretrial agreement, and he had entered into a confessional stipulation of fact, which included samples of

three of the pictures of child pornography, and described in detail why he believed the images constituted child pornography.[2] *See* Prosecution Exhibit 1, at 1-12 and attachments A and B thereto. Also, before receiving the pleas, the appellant's defense counsel indicated to the military judge that they did not have any motions to dismiss any of the charges or to seek any other relief, which could have included any references to an inability to proceed without the appellant's review of the evidence of child pornography at issue. Record at 13. Furthermore, the record demonstrates that the appellant's defense counsel had full access to the evidence, including the images of child pornography. At no time prior to or during trial did defense counsel suggest that a lack of discovery impaired his ability to effectively represent his client. Accordingly, the appellant's rights under the Sixth Amendment were not violated by the military judge's refusal to permit him to personally view the evidence of child pornography in the middle of the providency inquiry.

The appellant also argues that the military judge violated his rights under R.C.M. 701 regarding defense inspections of evidence. We note that one of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution, *see, e.g. Brady v. Maryland*, 373 U.S. 83 (1963), or otherwise available to federal defendants in civilian trials, *see United States. v. Williams,* 50 M.J. 436, 439 (C.A.A.F. 1999). *See also United States v. Santos,* 59 M.J. 317, 321 (C.A.A.F. 2004); R.C.M. 701, Analysis.

The primary foundation for this broad right of discovery in the military is Article 46, UCMJ, which provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." 10 U.S.C. § 846.[3] The President has implemented

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[2] The record shows that the stipulation of fact contained two sealed portions containing pages 5, 6, and 7. Record at 20. Upon questioning by the military judge, the appellant admitted that he read the stipulation of fact, discussed it with his counsel, understood everything contained in the stipulation, and provided the information used to construct the stipulation of fact. *Id.* Moreover, he admitted that everything set forth in the stipulation was true and correct. *Id.*

[3] More specific to child pornography, 18 U.S.C. § 3509(m) provides as follows:

> (m) Prohibition on reproduction of child pornography. (1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title)

Article 46 in R.C.M. 701. R.C.M. 701(a)(2)(A) provides that the Government shall, upon request of the defense, permit the defense to inspect:

> Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused . . . .

Further, R.C.M. 701(e) provides:

> *Access to witnesses and evidence*. Each party shall have adequate opportunity to . . . interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

Id. As shown above, these military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. *United States. v. Roberts,* 59 M.J. 323, 325 (C.A.A.F. 2004).

We also note the Rules for Courts-Martial provide for the regulation of discovery by the military judge. R.C.M. 701(g).

> shall remain in the care, custody, and control of either the Government or the court.
>
> (2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.
>
> (B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

Id.

The "military judge may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as appropriate." R.C.M. 701(g)(2); *see United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). A military judge's ruling on a discovery request is reviewed under an abuse of discretion standard. *United States. v. Walker,* 66 M.J. 721, 742 (N.M.Ct.Crim.App. 2008).

In this case, we find the military judge acted within his discretion in denying the appellant the opportunity to personally review the images of child pornography the day before his guilty plea and during his guilty plea. The appellant had already agreed to enter pleas of guilty pursuant to a pretrial agreement before the first occasion that he sought to review the images of child pornography. As such, the rules of discovery to permit the appellant to prepare a defense were largely inapplicable. Even if the appellant was dissatisfied with the military judge's initial determination that he would not have access to this evidence, he nonetheless entered into a confessional stipulation of fact on the same day that the military judge denied his request to review the images of child pornography. In this stipulation, he described in detail why he believed the images were, in fact, child pornography. In addition, the stipulation of fact contained three samples of the downloaded child pornography as attachments. Furthermore, the record demonstrates that the defense, through appellant's defense counsel, had full access to the evidence, including the images of child pornography. At no time prior to or during trial did defense counsel suggest that a lack of discovery impaired his ability to effectively represent his client and the appellant has not argued that his defense counsel was ineffective. Finally, there is no assertion before us that during the discovery phase of this litigation or while appellant and his counsel were preparing for trial, he was ever denied access to pertinent evidence. Therefore, the appellant's allegation that the military judge violated the discovery rules by failing to permit his personal inspection of the evidence of child pornography also lacks merit.

II. Whether the Appellant's Plea was Provident

Although we find that the military judge acted within his discretion in denying the appellant the opportunity to view the images of child pornography, we still must address whether the appellant's pleas were provident despite this denial. As described further below, we find that the appellant's pleas were

provident despite the military judge's refusal to permit him to personally view the images of child pornography.

The law is well-settled as to the requirements for the acceptance of a guilty plea. A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. 10 U.S.C. 845(a); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)(citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion. Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. R.C.M. 910(e); *see also United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993).

A military judge may not "arbitrarily reject a guilty plea." *United States v. Penister,* 25 M.J. 148, 152 (C.M.A. 1987). The standard of review to determine whether a plea is provident is whether the record reveals a *substantial* basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995). In considering the adequacy of guilty pleas, we consider the entire record to determine whether the requirements of Article 45, UCMJ, R.C.M. 910, and *Care* and its progeny have been met. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

We address first the appellant's declaration of 19 March 2008, which he uses to support his argument that his plea to receiving child pornography was not provident.[4] While the appellant avers that he "was having a difficult time remembering

[4] We hereby grant the appellant's Motion to Attach filed on 6 October 2008.

any of the pictures I had seen" and that he "was also having an extremely difficult time getting through the military judge's questions," the appellant does not deny that he did, in fact, receive child pornography, nor does he suggest that the images he viewed were "virtual" images, nor did he negate his statement at trial, Record at 38, that he "accessed the internet, Yahoo, Google" and then typed in "[p]reteen pictures, anything of that nature."

We note further from our review of the trial proceedings that the appellant described one image to the military judge of a female child between the ages of 10 and 17 performing oral sex on an adult male. Record at 57-58. We finally note that the appellant had described to the military judge a shared computer with an area dedicated to him, protected by a user name and a password, which contained a movie "from the sites that I went to when I was accessing these sites on the internet . . . ." Record at 41.

The record in this case reflects that the military judge accurately listed the elements of the offenses and defined the terms contained in the elements. *Id*. at 24-37. The military judge then proceeded to question the appellant regarding the factual basis for the plea with appropriate reference to the stipulation of fact. The appellant explained how he used three different government computers and his personal log-in through the government LAN system to access the internet, search for child pornography, and download the child pornography to the "My Pictures" folder under his profile. *Id*. at 38-40.

The appellant further admitted to downloading and saving fifteen pictures of child pornography over the period from December 2004 to September 2005, including the three pictures which were attached to the stipulation of fact. *Id*. at 44-46. The military judge then inquired at great length as to why the images met the definition of child pornography and the appellant was able to reasonably describe the nature of the images and why they met the definition of child pornography. *Id*. at 46-60. Following an overnight adjournment, the providence inquiry resumed the following morning. The military judge continued to question the appellant in great detail as to his conduct regarding the downloading of child pornography, and the appellant was able to give cogent and complete responses. *Id*. at 66-79.

In his answers to the questions by the military judge, the appellant demonstrated that he was convinced of his guilt, and

he was able to describe all the facts necessary to establish guilt, including adequate descriptions of the pornographic images at issue in this case. His responses satisfied the military judge that there was a sufficient factual basis for his pleas of guilt. Record at 100. After considering the entire record, we find no substantial basis in law or fact for questioning his plea of guilty to the two offenses.

Conclusion

Accordingly, the findings and sentence as approved by the convening authority are affirmed.

Senior Judge BOOKER and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court