UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHASE A. DIEBEL
United States Air Force

ACM 35824

31 May 2006

Sentence adjudged 18 November 2003 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Philip D. Cave, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major C. Taylor Smith.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of four specifications of failure to go, one specification of willfully disobeying a lawful order, three specifications of dereliction of duty, one specification of wrongful use of cocaine, one specification of wrongful use of marijuana, one specification of larceny, and one specification of forgery, all in violation of Articles 86, 90, 92, 112a, 121, and 123, UCMJ, 10 U.S.C. §§ 886, 890, 892, 912a, 921, 923. Contrary to his pleas, he was also convicted of one specification of conspiracy to commit forgery

and one specification of consensual sodomy, in violation of Articles 81 and 125, UCMJ, 10 U.S.C. §§ 881, 925. The appellant was found not guilty of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. Finally, one charge and specification of obstruction of justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934, was dismissed after arraignment, pursuant to a defense motion.

The military judge sentenced the appellant to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence, except he reduced the period of confinement from 18 months to 15 months.

The appellant raises one issue before this Court: Whether his conviction for violating Article 125, UCMJ, by engaging in consensual sodomy, must be set aside in light of *Lawrence v. Texas*, 539 U.S. 558 (2003). Finding no error, we affirm.

Background

On 16 February 2003, when the appellant was 19 years old, he brought AS, a 16-year-old female civilian, onto Malmstrom Air Force Base (AFB), without obtaining a visitor's pass. Malmstrom AFB Instruction 31-202, ¶ 1.1.1, requires persons sponsoring visitors onto Malmstrom AFB to obtain a visitor's pass for the visitor. Instead of obtaining a visitor's pass for AS, as he was required to do, the appellant brought AS onto the base by hiding her in the trunk of his car because she did not have any form of identification, such as a driver's license, with her.

Once on base, the appellant brought AS to his dormitory. On 13 January 2003, the appellant had signed a Dormitory Resident Responsibilities Memorandum. The memorandum prohibits residents of the Malmstrom AFB dormitories from having guests under the age of 18 in the dormitory. The appellant knew he was not supposed to have guests in the dormitory under 18-years-old.

After arriving at the dormitory, the appellant and AS, as well as two other friends, went back to the car and retrieved a case of beer from the trunk of the appellant's car and brought it back to the dormitory.[1]

Later that evening, the appellant and AS went to his dormitory room and engaged in consensual sexual intercourse. In addition, AS performed oral sodomy upon the appellant by placing his penis into her mouth. At trial, the parties stipulated that the age of consent for consensual sodomy in Montana and under the UCMJ is 16. AS testified it was her idea to perform oral sodomy on the appellant. Subsequent to the appellant's

[1] AS observed the appellant consume approximately four beers that evening. The appellant pled guilty, and was subsequently convicted of dereliction of duty for consuming alcoholic beverages while under the age of 21.

sexual encounter with AS, he discussed what happened with a friend, Airman (Amn) K.[2] The appellant also told Amn K AS's father had telephoned him, that her father was upset, and he told the appellant he had contacted, or was going to contact, the appellant's commander.

Constitutionality of the Sodomy Conviction

The appellant relies on the Supreme Court decision in *Lawrence,* 539 U.S. at 558, to defend the legality of his private, consensual, heterosexual sodomy with AS. Our superior court in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), provided guidance on how to apply the principles of *Lawrence* to the military.

We conduct a de novo review in determining whether Article 125, UCMJ, as applied in the appellant's case, is constitutional. *Marcum*, 60 M.J. at 202-03 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)). Challenges to a conviction under Article 125, UCMJ, are reviewed on a case-by-case basis, and in doing so, we must answer three questions. "First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?" *Id*. at 206. Namely, did the conduct involve "private, consensual sexual activity between adults?" *Id.* at 207 "Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?" *Id.* at 206-07. For example, did it involve public conduct, minors, prostitutes, or persons who may be injured or coerced or who are situated in relationships where consent might not be easily refused? *Id*. at 207. "Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?" *Id.*

As noted above, the parties stipulated at trial that the age of consent for consensual sodomy under the UCMJ is 16.[3] Because of the parties' stipulation, we answer the first question in the affirmative and the second question in the negative. As to the third, we note that it is appropriate to consider the "military interests of discipline and order" in evaluating the appellant's claim. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

The appellant violated several rules in order to facilitate his sexual encounter with AS. First, he brought her onto Malmstrom AFB, in the trunk of his car, in violation of a local instruction which required the appellant to obtain a visitor's pass for such visitors. Second, he willfully brought AS into his dormitory, knowing that she was not 18 years of age, violating the dormitory rules that he had earlier agreed to obey. Third, he involved AS in his unlawful consumption of alcoholic beverages by having her assist him in bringing beer into the dormitory. The appellant was charged with, and pled guilty to,

[2] Amn K testified the appellant said, "[H]e had f***ed the s*** out of a girl that was there."
[3] Because the parties so stipulated, we leave for another day whether a person under 18 is a "minor" under the analysis of *Lawrence.*

dereliction of duty, for wrongfully consuming alcoholic beverages; bringing a civilian visitor onto Malmstrom AFB without a visitor's pass; and having a visitor under the age of 18 in his dormitory.

After balancing the appellant's "autonomy and liberty interest" against "the clear military interests of discipline and order," we answer the third question in the affirmative. *Stirewalt*, 60 M.J. at 304. We conclude that the appellant's willful violations of military law, as a precursor to sodomy with AS, took his actions "outside any protected liberty interest recognized in *Lawrence*," and, thus, Article 125, UCMJ, is constitutional as applied to the appellant. *Id*.

Sentencing Argument by the Trial Defense Counsel

Although not raised by the appellant, we note the trial defense counsel said the following during sentencing argument:

> Now, the government has argued that a bad-conduct discharge should be imposed. I'm conceding that a punitive discharge is necessary, however, if the court does feel that a punitive discharge is appropriate . . . it should be a bad-conduct discharge and not a dishonorable discharge.
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> . . . .
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> And at some point in time after that, again because he goes on appellate leave, or because you've not imposed a punitive discharge, there is administrative separation, or not, even a return to duty. Stranger things have happened. Those are our thoughts for you, Your Honor, as to why you can legitimately sit there and announce a sentence to confinement of no more that six months.

At trial, the military judge did not ask the appellant or his counsel whether the appellant's counsel was arguing for a bad-conduct discharge with the approval of the appellant. *See United States v. Dresen*, 40 M.J. 462, 465 (C.M.A. 1994); *United States v. Lyons*, 36 M.J. 425, 427 (C.M.A. 1993); *United States v. McNally*, 16 M.J. 32, 33 (C.M.A. 1983). After reviewing the entire record, as well as the offenses the appellant was convicted of, we conclude there was no risk of prejudice with respect to the award of a punitive discharge. *See United States v. Robinson*, 25 M.J. 43, 44 (C.M.A. 1987).[4]

Conclusion

[4] We also conclude that all parties at trial understood that the language first quoted above by the appellant's trial defense counsel, was a misstatement, and that he was in no way arguing for the appellant to receive a punitive discharge.

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 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge FINCHER participated in this opinion prior to his reassignment.

OFFICIAL

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator