UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant GERARDO B. GAMEZ
United States Air Force

ACM 35576

30 March 2005

Sentence adjudged 13 March 2003 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Dismissal and confinement for 45 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

PRATT, STONE, and GENT
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of disobeying a superior commissioned officer, failing to obey a lawful general regulation, sodomy, and adultery. Articles 90, 92, 125, and 134, UCMJ, 10 U.S.C. §§ 890, 892, 925, 934. Contrary to his pleas, the military judge convicted the appellant of conduct unbecoming an officer and gentleman. Article 133, UCMJ, 10 U.S.C. § 933. The convening authority approved the adjudged sentence of a dismissal and confinement for 45 days.

The appellant raises three issues before this Court: (1) 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); (2) Whether his conviction for violating an Air Force regulation prohibiting "sexual relations" with enlisted servicemembers should be dismissed because it is multiplicious with his convictions for sodomy and adultery; and (3) Whether his sentence is inappropriately severe.[1]

Background

The appellant was a 27-year-old married officer assigned to Francis E. Warren Air Force Base, Wyoming. Initially, he served as a section commander in a missile squadron and then as a section chief in the Military Personnel Flight (MPF). In his short Air Force career, he won numerous accolades for his job performance and volunteer efforts. Notwithstanding this outstanding record, the appellant engaged in a pattern of sexual improprieties that led to the demise of an otherwise promising career.

An investigation into the appellant's misconduct began when his commander learned he was involved in an adulterous relationship with Airman (Amn) SMM, an unmarried female who worked in the same section of the MPF as the appellant. The appellant's relationship with Amn SMM led to his conviction on four specifications: (1) violating his commander's order that he have no contact with Amn SMM; (2) engaging in sodomy with Amn SMM; (3) committing adultery with Amn SMM; and (4) violating Air Force Instruction (AFI) 36-2909, *Professional and Unprofessional Relationships*, ¶ 5.1.3 (1 May 1999), a lawful general regulation that prohibits unprofessional relationships between officers and enlisted members (more commonly referred to as fraternization). This provision specifically prohibits officers from engaging in "sexual relationships" with enlisted members.

The investigation revealed further improprieties, including a one-time adulterous encounter with a female lieutenant. Additionally, the appellant engaged in conduct unbecoming an officer and a gentleman by soliciting the wives of two enlisted airmen to engage in sex with him, and by grabbing them by the back of their necks and pushing their heads together while asking them to kiss each other.

Constitutionality of the Sodomy Conviction

Relying on the decision of the United States Supreme Court in *Lawrence v. Texas*, the appellant attacks his conviction for private, consensual, heterosexual sodomy with Amn SMM. Since that decision, and after briefs were filed in this case, our superior court issued its decision in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). The

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have considered it and find it to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Marcum case provides guidance on how to apply the principles of *Lawrence v. Texas* to the military environment.

We conduct a de novo review in determining whether Article 125, UCMJ, as applied to the appellant's conduct in this 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? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence* [e.g., involving public conduct, minors, prostitutes, or persons who might be injured/coerced or who are situated in relationships where consent might not easily be refused]? 539 U.S. at 578, 123 S.Ct. 2472. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07.

We answer the first question in the affirmative and the second question in the negative.[2] As to the third question, 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), *cert. denied*, 73 U.S.L.W. 3555 (U.S. 21 Mar 2005) (No. 04-1083). The appellant's relationship with Amn SMM violated AFI 36-2909, ¶ 5.1.3, the provision that forms the basis of the fraternization conviction. This provision specifically prohibits officers from engaging in "sexual relations" with enlisted members. The appellant was Amn SMM's superior officer and obligated, as such, to place military interests above his sexual interests. 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. *See Stirewalt*, 60 M.J. at 304. Military interests are even more substantial in a case such as this where Amn SMM worked in the same section of the MPF as the appellant. We thus conclude Article 125, UCMJ, is constitutional as applied to the appellant.

Multiplicity and Unreasonable Multiplication of Charges

The appellant argues that his conviction for fraternizing with Amn SMM should be dismissed because it is multiplicious with his sodomy and adultery convictions. He

[2] We note there may be situations involving a superior-subordinate relationship that could involve coercion or where consent might not be easily refused, but we do not find either of these factors in the present case.

claims that the sexual conduct supporting the sodomy and adultery offenses are clearly included within the term "sexual relations" found in the fraternization charge. Alternatively, if we determine the offenses are not multiplicious, the appellant asks that we find they constitute an unreasonable multiplication of charges. The appellant failed to lodge objections based on either ground at trial and pled guilty unconditionally to the three offenses he now challenges. Consequently, we review for plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (citing *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)).

Our superior court recently summarized the rules and standards for assessing multiplicity claims where the appellant first raises the issue on appeal as follows:

> Appellant may show plain error and overcome [waiver] by showing that the specifications are *facially duplicative*, that is, factually the same. The test to determine whether an offense is factually the same as another offense, and therefore lesser-included to that offense, is the "elements" test. Under this test, the court considers whether each provision requires proof of a fact which the other does not. Rather than adopting a literal application of the elements test, this Court [has] stated that resolution of lesser-included claims can only be resolved by lining up elements realistically and determining whether each element of the supposed lesser offense is rationally derivative of one or more elements of the other offense—and vice versa. Whether an offense is a lesser-included offense is a matter of law that this Court will consider de novo. To determine whether the offenses are factually the same, we review the factual conduct alleged in each specification, as well as the providence inquiry conducted by the military judge at trial.

United States v. Hudson, 59 M.J. 357, 359 (C.A.A.F. 2004) (internal punctuation and citations omitted) (emphasis added). We begin our analysis by reviewing the three specifications, their elements, and the appellant's explanation of his guilt on the record.

The Specification for the violation of a lawful general regulation reads as follows:

> In that [the appellant] . . . did, at or near Cheyenne, Wyoming, on divers occasions, between on or about 21 September 2001 and on or about 13 April 2002, fail to obey a lawful general regulation, to wit: paragraph 5.1.3., Air Force Instruction 36-2909, dated 1 May 1999, by wrongfully engaging in *sexual relations* with Airman [SMM], *an enlisted person not his wife*.

During the providency inquiry, the military judge described the elements of the offense as follows:

> First, there was in existence a certain lawful general regulation in the following terms, paragraph 5.1.3, Air Force Instruction 36-2909, dated 1 May 1999, which prohibits officers from wrongfully engaging in *sexual relations with enlisted personnel.*
>
> Second, that you had a duty to obey such regulation.
>
> And, third, that on diverse [sic] occasions, between on or about 21 September 2001 and 13 April 2002, at or near Cheyenne, Wyoming, you failed to obey this lawful general regulation by wrongfully engaging in *sexual relations* with Airman [SMM], *an enlisted person not your wife.*

In his own words, the appellant described why he believed he was guilty of this offense:

> Sir, I knew of the existence of AFI 36-2909, paragraph 5.1.3, which prohibits dating and *sexual relationships* between an officer and enlisted members. I knew of this regulation because I was trained on it when I went through the Air Force ROTC program. I have also been briefed on it since I've been on active duty. I knew that as an officer it was my duty to follow this lawful regulation by not having *sexual relations* with any enlisted troop. I further knew that this was a lawful punitive regulation which officers could be punished under the UCMJ for violating. On more than one occasion between 21 September 2001 and 13 April 2002, I violated this order by having *sexual intercourse* with [SMM], here in Wyoming -- Cheyenne, Wyoming. Excuse me, Sir. During part of this time, Airman [SMM] was working directly in my section in the Military Personnel Flight. So, I knew that she was an enlisted troop. *At no time have I ever been married to Airman [SMM].*

The Specification for the offense of sodomy reads as follows: "In that [the appellant] . . . did, at or near Cheyenne, Wyoming, on divers occasions, between on or about 21 September 2001 and on or about 13 April 2002, commit sodomy with Airman [SMM]."

The military judge described the single element of sodomy as follows: "On divers occasions between on or about 21 September 2001 and 13 April 2002, at or near Cheyenne, Wyoming, you engaged in the *unnatural carnal copulation* with Airman [SMM]." The appellant then explained why he believed he was guilty of the offense of sodomy by stating: "Sir, on more than one occasion, between 21 September and 13 April

2002, I committed sodomy with Airman [SMM]. This occurred by Airman [SMM] *performing oral sex* on me. By oral sex, I mean that she placed her mouth over my penis."

The Specification for adultery reads as follows: "In that [the appellant] . . . did, at or near Cheyenne, Wyoming, on divers occasions, between on or about 22 September 2001 and on or about 13 April 2002, wrongfully have *sexual intercourse* with Airman [SMM], *a woman not his wife*."

The military judge described the three elements of adultery as follows:

> MJ: First, that on divers occasions, between on or about 20 September 2001 [sic—should be 22 September] and 13 April 2002, you wrongfully had *sexual intercourse* with Airman [SMM]. Second, that at the time you were *married to another,* and counsel, just for my edification, was Airman [SMM] married also at this time, or was she single?
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> ATC [Assistant Trial Counsel]: She was single, Your Honor.
>
> MJ: Okay. Thank you. So, basically, Lieutenant Gamez, that *you were married to another* person other than Airman [SMM], and that under the circumstances the conduct by you was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The appellant then explained why he believed he was guilty of the offense of adultery by stating:

> On more than one occasion, between 22 September 2001 and 13 April 2002, I wrongfully engaged in *sexual intercourse* with Airman [SMM] in Cheyenne, Wyoming. *At no point in time have I ever been married to Airman [SMM]*. While I was engaging in sexual intercourse, I was married to my wife, Jennifer. Under the circumstances my conduct was prejudicial to order and discipline in the service because if other people knew that I was having sex with an airman while I was married it could have caused other people to follow my bad example.

We note that each of the three specifications alleges conduct on "divers occasions" over virtually the same time period and at the same location. Based on the face of this record, particularly the language emphasized above, we conclude the fraternization and sodomy offenses are "factually distinguishable" because the appellant describes his fraternization as involving "sexual intercourse," which is distinct from the fellatio he describes in the sodomy specification. However, the fraternization and adultery offenses

are plainly multiplicious under the rationale of *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986); *United States v. Walker*, 21 M.J. 74 (C.M.A. 1985); and *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984) (finding fraternization and adultery multiplicious when charged under Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934). We conditionally dismiss Specification 1 of Charge VI involving adultery with Amn SMM, effective when direct review becomes final pursuant to Article 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1). *See Britton*, 47 M.J. at 203 (Effron, J., concurring).

We next consider whether the remaining two offenses—fraternization and sodomy—are an unreasonable multiplication of charges. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4), Discussion. We test for an unreasonable multiplication of charges by considering and balancing the five factors identified by our superior court in *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)):

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

The appellant has not established any of the *Pauling* criteria. He did not lodge an objection at trial. These offenses are aimed at distinctly separate criminal acts and do not represent or exaggerate his criminality. Nor are they continuous-course-of-conduct type of offenses. *See United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996). Charging these two offenses did not lead to an unreasonable level of punitive exposure for the appellant given the societal and military interests each addressed. And finally, nothing in the record suggests prosecutorial overreaching or abuse.

Reassessment

In light of our decision to conditionally dismiss Specification 1 of Charge VI, we have decided to reassess the sentence rather than return the case for a rehearing. When

reassessing a sentence, this Court must "assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also . . . assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We are guided in this endeavor by the principles announced in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and its progeny. This Court may reassess the sentence instead of ordering a rehearing if we are convinced the sentence "would have been at least of a certain magnitude" in the absence of the error—in this case, in the absence of Specification 1 of Charge VI. *Id*. at 307. "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997). We are confident that, in the absence of Specification 1 of Charge VI, the military judge's sentence would have been no different than that adjudged—dismissal and confinement for 45 days.

Conclusion

The approved findings, as conditionally modified, and the sentence, as reassessed, 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 conditionally approved findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court