UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2009-11**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
CHARLES L. WALTON,	)	
USAF,	)	
Appellee	)	**Panel 1**
	)	

GREGORY, Judge

The appellee was arraigned before a general court-martial at McChord Air Force Base, Washington, on various charges of sexual misconduct under Articles 93, 120, 125, and 134, UCMJ, 10 U.S.C. §§ 893, 920, 925, 934. Specification 2 of Charge I alleges a violation of Article 120(k), UCMJ, Indecent Act. The military judge granted a defense motion at trial to dismiss this specification, and the counsel for the United States appeals that ruling under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure.

The subject specification alleges that the appellee committed indecent conduct by sending a photo of his genitalia from his cell phone to Ms. BH in violation of Article 120(k), UCMJ. The trial counsel argued that this conduct was indecent in light of all the surrounding circumstances, including that Ms. BH did not want the photo. Agreeing with the parties that consent was an important factor in determining whether this conduct was indecent, the military judge found that Article 120(r), UCMJ, prohibited such evidence of consent and, therefore, deprived the appellee of his due process right to present a defense and created a strict liability offense that criminalizes consensual sexual behavior in violation of the First Amendment.[1] Based on these dual constitutional violations the military judge dismissed the specification.

Standard of Review

We review de novo matters of law in an appeal under Article 62, UCMJ. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008), *review denied*, 66 M.J. 380 (C.A.A.F. 2008). "We are bound by the factual determinations of the military judge,

[1] U.S. CONST. amend. I.

except where they are unsupported by the record or are clearly erroneous." *Id.* "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is *correct*." *Id*. (quoting *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)) (alterations in original). Interpretations of statutes and legislative history are matters of law. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005). Here, we accept the military judge's finding that consent would be relevant to whether the conduct is indecent, but disagree with his statutory interpretation that Article 120(r), UCMJ, prohibits consideration of such evidence of consent.

The Doctrine of Constitutional Avoidance

The statutory construction principle of constitutional avoidance rests on the presumption that the legislative branch does not intend an interpretation that raises constitutional doubt, and, where plausible alternative interpretations exist, courts should choose the interpretation that does not raise such doubt. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). For the reasons stated by the military judge, the statute would be unconstitutional if it prohibited evidence of consent in determining whether conduct is indecent under Article 120, UCMJ. However, in applying the principle of constitutional avoidance, we must consider any plausible alternative interpretation of the apparent conflict between Articles 120(k) and 120(r), UCMJ, that comports with the Constitution.

A Constitutional Interpretation

Congress clearly intended to incorporate prior military law on indecency into the new Article 120, UCMJ. Article 120(t)(12), UCMJ, first defines indecent conduct in terms virtually identical to earlier versions of the offense:

> The term "indecent conduct" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

Article 120(t)(12), UCMJ; *see also Manual for Courts-Martial, United States*, Part IV, ¶ 90.c. (2005 ed.). The new statute adds to this definition conduct that includes observing or making visual depictions of nudity or sex acts "without another person's consent." Article 120(t)(12), UCMJ. Both the language of the statute and the legislative history show that the term "indecent" in the new Article 120, UCMJ, defined "the same conduct that has been held to be indecent by military appellate courts." *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice (JSC Report)*, 261 (2005).[2] The military appellate decisions referenced by the *JSC Report* adopt a totality of the circumstances approach in determining indecency, an approach which includes

[2] The report is available at http://www.dod.gov/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc.

consent as well as many other factors. *See United States v. Baker*, 57 M.J. 330, 335-36 (C.A.A.F. 2002); *United States v. Rollins*, 61 M.J. 338, 344-45 (C.A.A.F. 2005).

Against this clear intent to include consent as a factor in determining whether conduct charged under Article 120(k), UCMJ, is indecent, Article 120(r), UCMJ, excludes consent and mistake of fact as to consent as either "an issue" or "affirmative defense" in prosecutions for indecent conduct under Article 120(k), UCMJ, and other offenses. Acknowledging an apparent but not actual contradiction in these two provisions, the government argues that Article 120(r), UCMJ, does not prohibit evidence of consent in determining whether conduct is indecent; rather, it only excludes consent as a mandatory element of the offense and prohibits a defense of mistake of fact as to consent. The appellee concedes that if existing military precedent still applies, consent remains a factual consideration in determining indecency and that this interpretation does not conflict with the exclusion of consent as an element in Article 120(k), UCMJ, as outlined in Article 120(r), UCMJ.

The Elements of Indecent Act

Conviction under Article 120(k), UCMJ, requires proof beyond a reasonable doubt of two elements: (1) that the accused engaged in certain conduct and (2) that such conduct was indecent. Existing military precedent takes a totality of the circumstances approach to determine whether charged conduct is indecent within the definition provided by Article 120(t)(12), UCMJ, which, as stated in the *JSC Report*, defines indecent as "the same conduct that has been held to be indecent by military appellate courts." *JSC Report*, at 261. This totality of the circumstances approach recognizes that the definition of indecency requires consideration of both the circumstances of the act itself and the "societal standards of common propriety." *United States v. Woodard*, 23 M.J. 514, 516 (A.F.C.M.R. 1986), *set aside and remanded for further review*, 23 M.J. 400 (C.M.A. 1987). Consent or lack thereof is one of many possible factors to consider in determining indecency depending on the circumstances of the case. *Baker*, 57 M.J. at 336. Article 120(k), UCMJ, and the definition referenced therein clearly incorporate consent as a permissible factor in determining indecency, and, consistent with this, Article 120(r), UCMJ, removes consent as a mandatory element and affirmative defense.

We find that Article 120(r), UCMJ, does not prohibit evidence of consent in determining whether conduct is indecent under Article 120(k), UCMJ; rather, it only excludes consent as a mandatory element of the offense and prohibits a defense of mistake of fact as to consent. First, this interpretation is consistent with the context of Article 120(r), UCMJ, as revealed in its opening sentence: "Lack of permission is *an element* of the offense in subsection (m) (wrongful sexual contact)." (Emphasis added). The Article's exclusion of consent as "an issue" in other offenses is, as the government brief states, an "un-artful" way of excluding consent as a mandatory element. Second, removing lack of consent as a mandatory element of indecent acts follows existing precedent which holds that indecent conduct includes both consensual and nonconsensual

acts and must be evaluated within the totality of the circumstances. *See Woodard*, 23 M.J. at 516. Third, this interpretation applies the principle of constitutional avoidance to harmonize the two clauses in a way that does not render the statute unconstitutional.

Mistake of Fact

Whether mistake of fact exists as a defense depends on whether the fact in issue is either (1) a required mental state or *mens rea* of the charged offense or (2) expressly provided as a defense by the legislature or executive. *United States v. Wilson*, 66 M.J. 39, 40-41 (C.A.A.F. 2008), *cert. denied*, 128 S. Ct. 2978 (2008). Both are matters of statutory interpretation. *Id*. Here, an affirmative defense of mistake of fact as to consent would exist if (1) the elements of the new Article 120, UCMJ, indecent act charge required knowledge as to consent or (2) the statute expressly provided a mistake of fact defense. Neither condition applies.

First, while consent is one of several facts to consider in determining whether charged conduct is indecent, consent is not a required element. The statutory definition of indecent conduct as well as existing military precedent discussed above show that an act may be indecent regardless of consent depending on the totality of the circumstances, with open and notorious sexual conduct the most common example. *See, e.g.*, *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999). Second, the statute expressly excludes mistake of fact as to consent as an affirmative defense to an indecent act charge. Article 120(r), UCMJ. Under these circumstances, mistake of fact as to consent is clearly not an affirmative defense to an indecent act charge.

Precluding the affirmative defense of mistake of fact as to consent does not, however, preclude consent as a factor in determining indecency. In an analogous charge, the former Article 134, UCMJ, offense of indecent acts with a child expressly excluded consent as a defense, but this did not make consent irrelevant to determining whether certain conduct is indecent: notwithstanding this express exclusion of consent as a defense, "all the facts and circumstances of a case including the alleged victim's consent, must be considered on the indecency question." *Baker*, 57 M.J. at 336. Likewise, under the new indecent act offense consent remains relevant to determining indecency under existing military precedent despite the exclusion of mistake of fact as to consent as an affirmative defense.

A Limited Interpretation

An interpretation which excludes consent as a required element and mistake of fact as to consent as an affirmative defense does not equate to expanding indecency to constitutionally protected private consensual conduct; indecency still depends on the totality of the circumstances which may or may not include consent. The example cited by the military judge of sharing a pornographic magazine among consenting persons is instructive. In *Rollins*, the appellant shared a pornographic magazine with a person under

the age of sixteen in a public parking lot as a prelude to a request for sexual activity. *Rollins*, 61 M.J. at 343-44. Rejecting the appellant's First Amendment attack on his conviction of indecent acts, the Court emphasized the totality of the circumstances approach: "The determination of whether an act is indecent requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of the intended act." *Id*. at 344. Evidence that would be offered to support an honest and reasonable mistake defense if available would generally be admissible in determining whether the charged act is indecent under this totality of the circumstances approach. Such objective evidence goes toward raising a reasonable doubt as to the charged element of indecency rather than admitting indecency and claiming mistake as an affirmative defense.

Further, an interpretation which permits consideration of consent in an indecent act charge does not, as the appellee argues, open the door to consent in every crime enumerated in Article 120, UCMJ. The definition of indecent conduct in Article 120(t)(12), UCMJ, as well as the legislative history, clearly show congressional intent to include consent as a factor, not a mandatory element, in determining whether charged conduct is indecent. For consent to apply in other enumerated offenses under Article 120, UCMJ, the same clarity of legislative intent must be shown.

Finally, permitting evidence of consent does not allow the government *discretion* to "voluntarily assume" lack of consent as an element as argued by the appellant. The elements remain the same; the government must prove beyond a reasonable doubt that: (1) the accused committed the conduct alleged and (2) such conduct is indecent. The determination of indecency depends on the totality of the circumstances in the particular case which may or may not include consent. Military judges should tailor instructions to ensure consideration by the court members of all relevant facts and circumstances bearing on whether charged conduct is, in fact, indecent.[3]

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 25th day of January, 2010,

[3] *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002), provides a helpful example. The Court stated that the military judge should have tailored an instruction to the facts of the case which included: (1) the relative ages of the accused and alleged victim, (2) the relative youth of the accused, (3) the prior relationship between the two, and (4) the alleged victim's factual consent. *Baker*, 57 M.J. at 336.

ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.

(BRAND, Chief Judge and HELGET, Senior Judge participating)

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court