UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ADOLPHUS A. YOUNG III
United States Air Force

ACM 38761

24 March 2016

Sentence adjudged 17 December 2014 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Joshua E. Kastenberg (arraignment) and Ira Perkins (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances while serving confinement, and reduction to E-1.

Appellate Counsel for Appellant: Captain Michael A. Schrama (argued); and Major Isaac C. Kennen.

Appellate Counsel for the United States: Captain Tyler B. Musselman (argued); Colonel Katherine E. Oler; Major Mary Ellen Payne; and Gerald R. Bruce, Esquire.

Before

MITCHELL, DUBRISKE, and BROWN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

MITCHELL, Senior Judge:

In accordance with his pleas, Appellant was convicted of four specifications of willful dereliction of duty for failing to inform sexual partners of his human immunodeficiency virus (HIV) positive status and engaging in unprotected sexual activity, two specifications of assault consummated by a battery for having oral and anal intercourse

without disclosing his HIV-positive status, and one specification of obstruction of justice, in violation of Articles 92, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 928, 934.[1] The general court-martial, composed of a military judge sitting alone, sentenced him to a bad-conduct discharge, 8 months of confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority limited the forfeiture of all pay and allowances to the time period Appellant was serving confinement, but otherwise approved the sentence as adjudged.

On appeal, Appellant contends that his convictions for assault consummated by a battery are factually insufficient in light of our superior court's decision in *United States v. Gutierrez*, 74 M.J. 61, 68 (C.A.A.F. 2015). He also argues that his convictions for willful dereliction of duty related to his failing to follow a safe-sex order directing him to inform sexual partners of his HIV-positive status and to use barrier protection during sex should be overturned as the order is overbroad and void for vagueness. We find no substantial basis in law or fact to question his guilty plea. We also find the safe-sex order is constitutional as applied to Appellant. We affirm the findings and the sentence.

Background

Appellant's convictions stem from his failure to disclose that he had HIV prior to engaging in otherwise consensual sexual activity with multiple partners. Appellant was diagnosed with HIV on 21 May 2007. After Appellant was diagnosed, his commander issued a preventive medicine order, also referred to as a safe-sex order. The order, taken verbatim from a governing Air Force instruction, required him to: (1) disclose his HIV-positive status before having sexual relations; and (2) when having sex, use proper barrier protection to prevent the exchange of bodily fluids (i.e., condoms).[2]

From 2005 to 2013, Appellant was stationed at Nellis Air Force Base (AFB), Nevada, and then at Creech AFB, Nevada. From 1 January 2012 to 1 March 2013, Appellant frequented a local bathhouse where he engaged in unprotected oral sex and protected anal sex with other men. The bathhouse is visited by men who have sex with men (MSM)[3] in order to obtain discreet, anonymous sex. In December 2012, Appellant met another man, visited his house, and engaged in unprotected oral sex with him. During

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[1] Pursuant to a pretrial agreement, the Government withdrew and dismissed three aggravated assault specifications surrounding Appellant's unprotected sex with two other partners. Additionally, the Government declined to prove up two aggravated assault specifications in which Appellant pled guilty to the lesser included offense of assault consummated by a battery.

[2] The order derives from Air Force Instruction (AFI) 48-135, *Human Immunodeficiency Virus Program*, Attachment 14 (12 May 2004) (as modified by Change 1) (7 August 2006)). This regulation was later superseded by AFI 44-178, *Human Immunodeficiency Virus Program* (4 March 2014).

[3] "The term men who have sex with men (MSM) is used in [Centers for Disease Control and Prevention] surveillance systems. It indicates a behavior that transmits [human immunodeficiency virus (HIV)] infection, not how individuals self-identify in terms of sexuality." *HIV among Gay and Bisexual Men*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/hiv/group/msm (last updated September 29, 2015).

all of these encounters, Appellant did not disclose his HIV-positive status to his sexual partners.

When Appellant received a permanent change of station to Shaw AFB, South Carolina, in March 2013, he used a website frequented by MSM to search for sexual partners. On this website, Appellant claimed to be HIV negative. Through this website, Appellant met a sexual partner and had unprotected oral sex with him; Appellant did not disclose his HIV status to this partner. The other individual later tested positive for HIV; based on the timing, it is likely he contracted HIV prior to his sexual activity with Appellant.

As a result of his postings on the website, Appellant was also invited to and attended parties catering to MSM on two separate occasions. At the first, hosted at a local hotel during the summer of 2013, Appellant had protected anal sex with another male. At the second party, held at a motel between December 2013 and January 2014, Appellant had unprotected oral sex and protected anal sex with an unknown man; he did not inform this partner of his HIV-positive status.

At this second hotel party, appellant met Mr. LG. They began a relationship that included unprotected oral sex on multiple occasions. Appellant believed that Mr. LG was HIV positive. Appellant did not tell Mr. LG he was HIV positive; however, Mr. LG found out Appellant was HIV positive from a mutual friend.

Further facts pertinent to Appellant's assignments of error are addressed below.

Providence of Guilty Pleas

Appellant's first assignment of error alleges that his convictions for assault consummated by a battery are factually insufficient. Article 66(c), UCMJ, 10 U.S.C. § 866(c), charges us with determining the legal and factual sufficiency of the evidence presented at trial. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). However, Appellant's guilty plea waived any objection relating to factual issues of guilt. Rule for Courts-Martial 910(j). Thus, Appellant's insistence that his guilty pleas be evaluated under a sufficiency of evidence standard is misplaced. *See, e.g.*, *United States v. Smith*, 60 M.J. 985, 986–87 (N.M. Ct. Crim. App. 2004). Instead, Appellant's pleas "must be analyzed in terms of providence of his plea[s], not sufficiency of evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). In discharging this duty, we review whether the record before us contains a substantial basis in law and fact to question the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). When

reviewing a case on direct appeal, we apply the law at the time of appeal, not the time of trial. *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010).

We will not overturn a military judge's acceptance of a guilty plea based upon the "mere possibility" of a defense. *Faircloth*, 45 M.J. at 174. Similarly, we will not "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." *Id.* (quoting *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995)). Our inquiry "must establish the factual circumstances admitted by the accused which 'objectively' support his plea." *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996) (quoting *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994)).

In conducting this inquiry, we recognize that a military judge has a duty under Article 45, UCMJ, 10 U.S.C. § 845, to explain to the accused any defenses reasonably raised by a providence inquiry at trial. *United States v. Smith*, 44 M.J. 387, 392 (C.A.A.F. 1996). Where an accused is misinformed as to possible defenses, a guilty plea must be set aside. Article 45(a), UCMJ (stating that a court shall not accept a plea of guilty where "an accused . . . sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect"); *United States v. Zachary*, 63 M.J. 438, 444 (C.A.A.F. 2006).

Appellant was originally charged with two specifications[4] of assault by means likely to produce death or grievous bodily harm for engaging in sexual activity without disclosing his HIV-positive status; however, Appellant pled guilty to the lesser included offense of assault consummated by a battery. The first specification alleged that Appellant engaged in unprotected oral sex with divers sexual partners without disclosing his HIV-positive status. During his providence inquiry, Appellant explained he had unprotected oral sex with divers sexual partners in both Las Vegas, Nevada, and Columbia, South Carolina; and he did not tell any of them that he was HIV positive. When the military judge specifically asked Appellant if he agreed that he engaged in a battery with the unlawful application of force, Appellant responded, "Yes, since they would not have consented if they knew my status. I now understand that constitutes force."

The second specification addressed the assaults consummated by a battery committed by Appellant when he engaged in protected anal sexual intercourse with divers sexual partners without informing them of his HIV-positive status. Appellant explained he used a condom when he engaged in anal sex with another male at the Las Vegas bathhouse. Appellant admitted he also had protected anal sex with men at each of the South Carolina hotel parties. He did not inform any of these partners that he was HIV positive. Appellant again admitted that his sexual activity with these men amounted to bodily harm because he

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[4] The referred charges included five specifications of assault with means likely to produce death or grievous bodily harm. Three of the specifications were withdrawn after arraignment pursuant to the pretrial agreement.

did not tell them he was HIV positive and, that by not telling them, his bodily contact with them was without their knowing consent.

Our superior court has examined the intersection of HIV transmission and the crime of assault since 1989.[5] Its analysis recently culminated in *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), which was decided after Appellant's court-martial. In *Gutierrez*, the appellant was charged with aggravated assault for engaging in oral and vaginal sex while he was HIV positive. *Id.* at 63–64. In determining whether the conviction was legally sufficient, the operative question was whether grievous bodily harm was "the likely consequence of . . . sexual activity." *Id.* at 66. Finding the risk of transmission not "likely" based upon the evidence presented during that trial, our superior court overturned the aggravated assault convictions. *Id.* at 67. However, the court determined the evidence was legally sufficient to affirm a conviction to the lesser included offense of assault consummated by a battery. *Id.* at 68.

The offense of assault consummated by a battery requires that the accused did bodily harm with unlawful force or violence. *Manual for Courts-Martial* (*MCM*), Part IV, ¶ 54.c.(1)(a) ("An 'assault' is an attempt or offer with unlawful force or violence to do bodily harm to another. . . ."). For force or violence to qualify as unlawful, "no legally cognizable reason [can] exist[] that would excuse or justify the contact." *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011). One of those legally cognizable reasons is consent. *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000). Our superior court determined that the offense of assault consummated by a battery is legally sufficient when a person does not inform his sexual partners of his HIV-positive status.

> The offense of assault consummated by battery requires that the accused "did bodily harm." *MCM* pt. IV, para. 54.b.(2). "'Bodily harm' means any offensive touching of another, however slight." *MCM* pt. IV, para. 54.c.(1)(a). Here, Appellant's conduct included an offensive touching to which his sexual partners did not provide meaningful informed consent. *See R. v. Cuerrier*, [1998] 2 S.C.R. 371, 372 (Can.) ("Without disclosure of HIV status there cannot be a true

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[5] *See, e.g.*, *United States v. Womack*, 29 M.J. 88, 90–91 (C.M.A. 1989) (noting that the military has a compelling interest in prosecuting sexual contact which risks transmitting the acquired immunodeficiency syndrome (AIDS) virus); *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990) (confirming that semen containing HIV equates to a means capable of transmitting a deadly disease and that the threshold for causing grievous bodily harm was only "more than merely a fanciful, speculative, or remote possibility" of transmission); *United States v. Joseph*, 37 M.J. 392, 396–97 (C.M.A. 1993) (finding that "unwarned sexual intercourse by an HIV-infected person, even if ostensibly protected by a condom, was an assault with a means likely to cause death or grievous bodily injury"); *United States v. Outhier*, 45 M.J. 326, 328 (C.A.A.F. 1996) (noting that our jurisdiction applies the same standard to HIV cases as to all other aggravated assault cases); *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998) (dividing the "likelihood" component of aggravated assault cases into two elements: (1) the risk of harm and (2) the magnitude of harm); *United States v. Dacus*, 66 M.J. 235, 240 (C.A.A.F. 2008) (Ryan, J., concurring) ("*Weatherspoon* does not state that because the magnitude of harm from AIDS is great, the risk of harm does not matter.").

> consent."). He is therefore guilty of assault consummated by battery, and we affirm that offense as a lesser included offense of aggravated assault.

Gutierrez, 74 M.J. at 68.

Appellant submits that the Government misinterpreted the impact of *Gutierrez*, arguing our superior court's citation to Canadian law now requires the prosecution to prove Appellant's sexual partners were exposed to a significant risk of serious bodily harm to sustain a conviction for assault consummated by a battery. Appellant further argues our superior court's citation to Canadian law requires us to adopt and be bound by later developments in the case law of that foreign jurisdiction. We believe Appellant's reading of *Gutierrez* is flawed, and we reject his argument that our superior court's citation to Canadian case law modifies the elements of the offense contained in the *Manual*.

Whatever the law in Canada is, was, or may be in the future, *Gutierrez* is binding precedent and applicable to those subject to the Uniform Code of Military Justice. *See United States v. Nerad*, 69 M.J. 138, 154 (C.A.A.F. 2010) (Stucky, J., dissenting) (noting the fundamental importance of the doctrine of stare decisis); *United States v. Kelly*, 45 M.J. 259, 262 (C.A.A.F. 1996) (stating that the courts of criminal appeals must follow their superior court's holdings); *United States v. Alberry*, 44 M.J. 226, 227–28 (C.A.A.F. 1996) ("A precedent-making decision may be overruled by the court that made it or by a court of a higher rank. That discretion, however, does not reside in a court of a lower rank." (citation and quotation marks omitted)). A service court of criminal appeals does not have discretion to depart from the precedent of its superior court. *Alberry*, 44 M.J. at 227–31. Accordingly, "if a precedent of [a superior court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving [the superior court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Appellant providently pled guilty to the offense of assault consummated by a battery as clarified in *Gutierrez*.[6] Appellant admitted that he had unprotected oral sex and protected anal sex with multiple sexual partners. Appellant admitted he did not inform any

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[6] Our superior court, in deciding to affirm convictions for the lesser included offense of battery in *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), did not tie its rationale to a traditional fraud analysis. Ordinarily, employing deception, best described as fraud in the inducement, to obtain a partner's consent to sex does not vitiate that consent. *See, e.g.*, *Outhier*, 45 M.J. at 330 ("Fraud in the inducement does not necessarily invalidate consent, especially in a simple assault and battery situation, whereas fraud in the factum goes to the heart of the nature of the consent, and will invalidate any consent so given."); *United States v. Booker*, 25 M.J. 114, 116 (C.M.A. 1987) ("[W]e take it that even the most uninhibited people ordinarily make some assessment of a potential sex partner . . . before consenting to sexual intercourse. Thus, consent to the act is based on the identity of the prospective partner."). As Appellant admitted that the contact constituted an offensive touching because of his failure to disclose his HIV-positive status, we need not resolve whether a lie about HIV status would constitute a fraud in the inducement or a fraud in the factum.

of these partners that he was HIV positive. Appellant was asked whether his partners at the HIV-negative hotel parties consented:

> MJ: Do you agree that they would not have consented to you having unprotected oral sex with them if you had told them that you were HIV positive . . . ?
>
> [Appellant]: They would not have if they had been HIV negative at that time, sir.

On appeal, we now consider the implication that if his partners had been HIV positive they would have consented. However, we find this bare speculation—without any support in the record—does not amount to a "substantial basis" to have us question the providence of Appellant's guilty plea. *See United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (stating that the mere possibility of a conflict between the plea and an appellant's statements or other evidence is not sufficient to set aside a guilty plea). The military judge may consider the information in the stipulation of fact and the entire inquiry when determining if a guilty plea is provident. *Id*. During his inquiry, Appellant admitted that he listed his status as HIV negative on the website that led to his party invitation. He admitted that the party goers would not have consented to sexual activity with him had they known of his actual HIV-positive status. Later, he again admitted that his partners would not have consented had they known of his status.

Accordingly, we find no "substantial basis" to question the military judge's acceptance of Appellant's guilty plea. The findings of guilty for both specifications and the charge for assault consummated by a battery are affirmed.

Constitutional Challenge to the Safe-Sex Order

Appellant argues that his convictions for willful dereliction of duty for failing to obey his safe-sex orders should be overturned because the underlying safe-sex orders are unconstitutionally overbroad and void for vagueness. The safe-sex orders required Appellant to inform sexual partners of his HIV-positive status and to always use protection, designed to reduce the risk of HIV transmission during sex. Appellant claims that no government interest exists in upholding an order with no built-in exceptions—such as where the risk of transmission is low or where scientific evidence confirms that medical advances, such as pre-exposure prophylaxis, have reduced the risk (and the lethality) of contracting HIV. *See, e.g.*, *United States v. Atchak*, ACM 38526, unpub. op. at 8 (A.F. Ct. Crim. App. 10 August 2016) (noting that, concerning oral sex, "transmission is rare, and accurate estimates of risk are not available").

Appellant attempts to raise, for the first time on appeal, a constitutional challenge to the order by arguing that it is unconstitutionally overbroad. Generally, a guilty plea

waives nonjurisdictional errors that occurred in the earlier stages of the proceeding. *United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014). The waiver doctrine has limits; however, "those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained." *Id*. "The legality of an order is a question of law we review de novo." *United States v. Moore*, 58 M.J. 466, 467 (C.A.A.F. 2003). The burden is on the appellant to show there is no set of circumstances under which the order would be valid. *See United States v. Castillo*, 74. M.J. 160, 165 n.1 (C.A.A.F. 2015) (noting the standard for sustaining a facial challenge to constitutional validity is the same for statute and regulations). When determining if an order is overbroad, we focus on "the specific conduct at issue in the context of the purposes and language of the order." *Moore*, 58 M.J. at 468. Under a plain error review, given the issue was not raised at trial, Appellant has the burden to establish the particular facts in the record to demonstrate why his actions are constitutionally protected. *United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013).

Appellant argues that his activity falls within the protected liberty interest identified by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). However, the *Lawrence* case involved "two adults, who with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." *Id.* at 578. In contrast, this case involves incidents between adults engaged in sexual practices without full and mutual consent. As stated above, there is no meaningful, informed consent without disclosure of HIV-positive status. Appellant argues that an HIV-positive male should be allowed to engage in unprotected sexual activity if his partner consents. During his plea inquiry, Appellant stated that although he did not inform Mr. LG of his HIV-positive status, Mr. LG found out through a mutual friend. Appellant did not indicate whether this was before any sexual activity occurred between them, during the time frame they were engaging in oral sex, or after their sexual interactions had ceased. "We are not called to resolve 'hypothetical situations designed to test the limits of' the regulation, such situations are properly the subject of future litigation with the benefit of a developed factual record." *Castillo*, 74 M.J. at 166 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 22 (2010)). The order was applied to Appellant in a manner that does not violate the Constitution and is therefore not overbroad.

Appellant also makes a brief argument that the order is void for vagueness. "[T]he central question of this "void for vagueness" doctrine is whether Appellant "had actual knowledge of the order's nature and terms, and whether he was on fair notice as to the particular conduct which was prohibited." *Moore*, 58 M.J. at 469 (quoting *United States v. Womack,* 29 M.J. 88, 90 (C.M.A. 1989)). Appellant does not challenge the sufficiency of his plea and does not explain how he can providently plead guilty to a willful dereliction of a duty that is so vague as to be unconstitutional. Appellant admitted he had a duty, he knew of the duty, and he failed to perform that duty. He never indicated he had any problems understanding the order that created the duty. Appellant had actual knowledge of the order that imposed the duty and fair notice as to its requirements. "The guilty plea process within the military justice system thus ensures that an appellant has notice of the

offense of which he may be convicted and all elements thereof before his plea is accepted and, moreover, protects him against double jeopardy." *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012). Appellant's pleas were provident and the order was not void for vagueness.

Conclusion

The approved findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and the sentence are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist