UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2011-01**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
JAMES M. BOORE,	)	
USAF,	)	
Appellee	)	**Panel No. 1**

The appellee was charged with dereliction of duty, abusive sexual contact with JG while she was substantially incapacitated, and wrongful sexual contact with JG, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920.

At trial, defense counsel filed a motion to dismiss the abusive sexual contact charge asserting that, in *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces (CAAF) held Article 120 to be "constitutionally unenforceable." The appellee argued that similar to *Prather*, in order for him to show consent or a mistake of fact as to consent, the appellee would have to prove JG was not substantially incapacitated and therefore would be forced to disprove an element of the offense. The appellee contended the military judge did not have the legal authority to provide instructions different than what was stated in the law and further, the military judge could not sever the problematic sections of Article 120 because it would render the remainder of the statute incoherent and in contravention to Congressional intent. The trial defense counsel maintained that it was not the province of the military judge to fix a constitutionally invalid law.

Trial counsel responded by arguing the military judge could avoid the constitutional problem by severing the language contained in Article 120(t)(16) and substituting instead the instruction recommended by the Military Judges' Benchbook[1]. Applying this instruction would only require the accused to present some evidence of

[1] Department of the Army Pamphlet (D.A. Pam.) 27-9, Legal Services, *Military Judges' Benchbook*, Instruction 3-45-6, NOTE 6 (2010):

> "The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual contact concerning the offense of abusive sexual contact … Consent is a defense to that charged offense … The prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense of abusive sexual contact … you must be convinced beyond a reasonable doubt that, at the time of the sexual contact alleged (state the name of the alleged victim) did not consent.

consent/mistake of fact as to consent and the burden would then shift to the government to prove consent or mistake of fact as to consent did not exist beyond a reasonable doubt.

The military judge dismissed the abusive sexual contact charge (Article 120(h)) ruling:

> CAAF clearly and unambiguously stated that the only course left open is not to perpetuate an unconstitutional statute. *Medina*, footnote 5. Trial counsel has argued that this court should provide similar instructions to those given by the military judge at the trial in *Medina* and rely on the canon of constitutional avoidance. However, CAAF prohibits such a course of action as it stated, "It is not the province of this court to rewrite a statute to conform to the Constitution, as that would invade the legislative domain." This court holds that the interplay of Articles 120(h), 120(t)(14) and 120(t)(16) results in an unconstitutional burden shift to the accused. This court also holds that any curative instructions would result in the court rewriting the statute and invading the legislative domain. This court concludes that the only course left open to the trial judge is to find Charge II and its specification unconstitutional. Therefore, the defense motion to dismiss Charge II is granted.

The military judge denied the government's request for reconsideration.[2] The government filed a timely appeal of this dismissal pursuant to Article 62, UCMJ, 10 U.S.C. § 862.

Argument

Appellant argues on appeal that the military judge made incorrect conclusions of law when he: (1) found Article 120(h) to be facially unconstitutional; (2) erroneously applied dicta in a manner contradicting the actual holding in *United States v. Medina*[3]; and (3) failed to apply the canon of constitutional avoidance.

Standard of Review

Because this case arises by way of a Government appeal under Article 62, UCMJ, we are limited to reviewing the military judge's decision only with respect to matters of law. Article 62, UCMJ; Rule for Courts-Martial 908(c)(2). Unless the military judge's findings of fact were clearly erroneous, we are bound by his determinations and may not find facts or substitute our own interpretation of the facts. *See United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). Interpretation of a statute and its legislative history

[2] In conjunction with hearing argument on reconsideration, the military judge received evidence and made findings of fact that some evidence of consent or mistake of fact as to consent existed if the charge went to trial.
[3] *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

are questions of law that we review de novo. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005).

Law

In *Prather*, the accused was convicted, inter alia, of aggravated sexual assault of a victim who was substantially incapacitated. The military judge instructed the members in accordance with the statutory language of Article 120(t)(16), stating that the accused had the burden of proving the affirmative defense of consent by a preponderance of the evidence, in which case the government would then have to prove the victim did not consent beyond a reasonable doubt. On appeal, CAAF reversed the conviction, holding "the interplay of sections Article 120(c)(2), UCMJ, Article 120(t)(14), UCMJ, and Article 120(t)(16), UCMJ, results in an unconstitutional burden shift to the accused." *Prather*, 69 MJ at 343. The Court went on to explain where the members were instructed consistent with the statutory scheme found in Article 120, UCMJ, the unconstitutional burden shift was not cured by standard 'ultimate burden' instructions.

Shortly after *Prather*, CAAF decided *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). As in *Prather*, the accused was convicted of aggravated sexual assault with a substantially incapacitated victim, in violation of Article 120(c)(2). Unlike *Prather* however, the military judge chose not to instruct the members on the affirmative defense of consent in accordance with Article 120(t)(16), but instead used the recommended Benchbook instruction. Our superior court held that, while the military judge committed error by not adequately explaining why he did not follow the statutory scheme outlined in Article 120, such error was harmless and the court affirmed the conviction.

Discussion

Although it is not clear from the military judge's ruling, to the extent that he found Article 120 to be facially unconstitutional, he is in error. Our superior court determined in *Prather* that the burden shifting provision of Article 120(t)(16) when coupled with Article 120(c)(2) and Article 120(t)(14) creates a due process violation. It did not hold, however, that Article 120 was void. Indeed, CAAF's subsequent decision in *Medina*, affirming the appellant's conviction would have been logically impossible had the court held Article 120 itself to be invalid.

The military judge's reliance on footnote 5 in *Medina* to support his conclusion that CAAF prohibits application of the canon of constitutional avoidance is erroneous. While the military judge is correct that it is not the province of the court to rewrite a statute to conform to the Constitution, he is mistaken that CAAF has barred the use of the avoidance doctrine, in this case or any other. In fact, for CAAF to have done so would contradict its own precedent on this issue. *See United States v. Neal*, 68 M.J 289 (C.A.A.F. 2010) (court declines to adopt a broad interpretation of Article 120(r) that

would raise conflict with constitutional rights when a narrow interpretation of that section is possible that avoids this conflict); *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979) ("a court should, if consistent with the language of a statute, adopt a construction of it that is reasonable and raises no doubt as to its constitutionality, over a construction that renders the statute constitutionally suspect."). It is clear that footnote 5 was intended as a response to the concurring opinion's concern that the court was not providing uniform guidance to the field. It was not designed to limit a military judge's use of an established legal principle.

The Supreme Court has long recognized that, where a statute contains both constitutionally valid and invalid provisions, a court may sever the impermissible section so long as the remaining language is consistent with Congress' basic objectives in enacting the statute. *Allen v. Louisiana*, 103 U.S. 80, 83–84 (1881) (describing the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."); *Ayotte v. Planned Parenthood of Northern New England* 546 U.S. 320, 329 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact.") (internal citations omitted).

The principle test to determine whether unconstitutional portions of a statute may be severed is whether what remains after the severance is "fully operative as a law." *I.N.S. v. Chadha*, 462 U.S. 919, 934 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curium) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (citing *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932))); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) (The relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with Congress' intent.).

Applying the severance doctrine to the case at hand, we have no difficulty determining the constitutional infirmity created by the interaction of Article 120(h)[4], Article 120(t)(14) and Article 120(t)(16) can be remedied by severing out Article 120(t)(16)'s requirement that the accused prove the affirmative defense, by a preponderance of the evidence, from the remainder of the statute. The accused need only raise some evidence of consent. The military judge must then craft appropriate instructions for the members, informing them that the government has the burden of

[4] Although this appeal specifically addresses abusive sexual contact under Article 120(h), UCMJ, 10 U.S.C. § 920(h), our holding would be applicable to any Article 120 offense in which the government alleges that the victim was substantially incapacitated and the accused intends to raise an affirmative defense of consent and/or mistake of fact as to consent.

proving the purported victim did not consent beyond a reasonable doubt.[5] *See United States v. Neal*, 68 M.J. 289, 304 (C.A.A.F. 2010) ("the military judge has the authority to craft an appropriate instruction ensuring that the burden of proof remains with the government."). This approach does not invalidate the remainder of the statute as it remains "fully operative as a law." The government must still prove all elements of the abusive sexual contact charge as well as carry the burden of proving the affirmative defense does not apply.

Contrary to appellee's assertions, severing this portion of the law does not "show a curious attitude toward the law." Rather, such action is in full accordance with recognized legal doctrine that "a Court should refrain from invalidating more of the statute than is necessary … Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, **it is the duty of this court to so declare,** and to maintain the act in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) (emphasis added).

Eliminating the problematic portions of Article 120(t)(16) will not frustrate Congressional intent. Although there is no formal legislative history from the 2006 National Defense Authorization Act discussing the revision of Article 120, it is clear from the language of the statute itself that the law's purpose is to criminalize sexual assault by military members. While Congress may have wanted to put more of a burden on the accused with respect to proving an affirmative defense, it is unrealistic to believe that Congress would have preferred to have the entire statute invalidated and thereby leave commanders without a means to prosecute sexual assault crimes rather than simply eliminating the offending burden shifting provision.

Conclusion

We disagree with the military judge's conclusion that the "only course left open" is to continue giving "erroneous instructions" in sexual assault cases. The military judge is well within his authority to sever the offending portions of Article 120(t)(16) and to craft necessary instructions ensuring that the burden of proof remains with the government. We hold the military judge erred as a matter of law in granting appellee's motion and set aside the military judge's decision and remand the case to the trial court for further proceedings.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 3rd day of August, 2011,

[5] The same analysis applies if the accused raises the affirmative defense of mistake of fact as to consent.

ORDERED:

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**.

Judges BRAND, GREGORY, and ROAN concur.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court