UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DANNY M. BURNS
United States Air Force

ACM 37847

24 July 2013

Sentence adjudged 13 November 2010 by GCM convened at MacDill Air Force Base, Florida. Military Judge: W. Thomas Cumbie.

Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn; Major Nathan A. White; Captain Zaven T. Saroyan; and Frank J. Spinner (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Scott C. Jansen; Major Tyson D. Kindness; Major Brian C. Mason; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was tried by a general court-martial comprised of officer members. He was charged with one specification of wrongful use of cocaine, one specification of wrongful use of Ecstasy, one specification of having sexual intercourse with a substantially incapacitated person, and one specification of forcible sodomy, in violation of Articles 112a, 120, and 125, UCMJ, 10 U.S.C. §§ 912a, 920, 925. Consistent with his pleas, he was found guilty of the two wrongful use specifications, and found not guilty of having sexual intercourse with a substantially incapacitated person. Contrary to his plea,

he was found guilty of forcible sodomy. He was sentenced to a bad-conduct discharge, confinement for 6 months, and reduction to the grade of E-1.

The appellant raises three issues on appeal: (1) the evidence is factually and legally insufficient to sustain the conviction for forcible sodomy; (2) the judge erred by instructing the jury to disregard the requirement of sex offender registration when determining a punishment;[1] and (3) the staff judge advocate's recommendation erroneously referred to a separate court-martial when recommending a course of action to the convening authority. We find the evidence factually insufficient to support the appellant's conviction for forcible sodomy in Charge III and set aside the conviction for that offense.

Background

The appellant went out drinking and dancing with three other male Airmen. One of their first stops was at a party at a hotel room, where they met then-Airman First Class (A1C) P. She had never met the appellant or any of his friends before that evening. The appellant's group only stayed a short while and then walked to a nearby area known for its bars and restaurants. They were accompanied by A1C P and several other women. After going to a bowling alley as a group, the four men went to a nearby nightclub, and A1C P decided to join them.

At the nightclub, A1C P purchased and drank several alcoholic drinks. Later that night, she ended up at the appellant's apartment with the four men. The appellant was charged with raping A1C P while she was substantially incapacitated and forcibly sodomizing her. She testified about what she remembered from the events of the night, as did the three Airmen. The appellant was convicted of forcible sodomy but acquitted of rape.

Factual Sufficiency

When testing for factual sufficiency, we must review de novo the entire record of trial, including the evidence presented by the parties and the findings of guilt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66, UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Id.* We apply "neither a presumption of innocence nor a presumption of guilt . . . and must make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id.* "This awesome, plenary de novo power of review grants" our Court the authority to substitute

[1] This issue is mooted by our decision on the first issue.

our judgment for that of the court members. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

To convict the appellant of forcible sodomy, the Government must prove two elements beyond a reasonable doubt: that the accused engaged in unnatural carnal copulation with A1C P, and the act was done by force and without her consent. Article 125, UCMJ. The Government also has the burden of proving beyond a reasonable doubt that the mistake of fact defense did not exist. For both offenses, the Government's theory was that A1C P was substantially incapacitated when the appellant engaged in sexual intercourse and oral sodomy with her. In contrast, the defense argued A1C P consented to the activity and was not substantially incapacitated. He also argued that the appellant had an honest and reasonable mistake of fact as to A1C P's consent to the activities.

At trial, A1C P was unable to recall some of the events from that night. She remembered taking several sips from her second Long Island Ice Tea at the nightclub and then her memory became "very blurry" with "significant gaps." She testified that, "I can't be particular about certain events that were occurring around me, certain conversations I may have had. I wasn't aware of other's behavior or my behavior. It's very fuzzy." Prior to trial, she had described these memory losses as "blackouts."

The three Airman with the appellant and A1C P that evening testified about their observations. Two of them admitted to being intoxicated themselves while the third Airman, SSgt H, had consumed only four beers during the course of the entire evening. Although SSgt H noticed A1C P was intoxicated, as were most of the others, all three witnesses described A1C P as ambulatory and engaged in conversations after leaving the nightclub and remaining so up until the time she went into the bedroom with the appellant. A1C P confirmed she had some memory of engaging in conversation, and walking and talking just before getting into the cab to the appellant's apartment about 10 to 15 minutes away.

The group went to a restaurant where A1C P said she was "horny" and "want[ed] to be f##ked." She french-kissed one of the Airman at the restaurant and again in a taxi on their way to the appellant's apartment. When she got out of the taxi, SSgt H heard her say "who's going to f##k me" as she walked towards the apartment. She went into the first bedroom with the appellant. A1C P recalled none of these events. She did not recall saying she wanted to have sex but "cannot say for sure" that she did not say it.

Her next memory was realizing she had a penis in her mouth with no recollection as to how the oral sex began. She leaned her head away to remove his penis from her mouth, but someone her head back onto it. She did remember speaking to her partner about a bump she had noticed on the penis, and the man told her it was a mole.[2] She

[2] A medical examiner testified this was consistent with the appellant's anatomy.

does not recall saying anything else to the man or taking any other action that might indicate lack of consent. That is her last memory of the incident. When asked if it was possible her behavior could have indicated to the man that she was willing to engage in oral sex, she replied "I cannot say for sure." When asked if she consented to the activity, she replied "I do not believe I did."

The next thing A1C P recalled was being vaginally penetrated, but she could not tell by whom. The only thing she remembered saying was to ask the man if he was wearing a condom and then reaching down to check after he told her he was. Her memory lapsed again, and she next recalled someone ejaculating on her thigh. When asked if it was possible she consented to sexual intercourse and just does not recall doing so, she replied "I am not sure about that." The appellant was acquitted of raping A1C P.

Under Article 66, UCMJ, 10 U.S.C. § 866(c), we act under a weighty and profound obligation to affirm only those finding of guilty we find correct in law and fact. In doing this we must weigh the evidence ourselves. There was no testimony that A1C P was substantially incapacitated up to the point she and the appellant entered the bedroom. A1C P's lack of memory of the incident does not automatically mean she did not consent to the sodomy or was unable to do so. However, we need not decide whether A1C P consented to the sodomy because, given the totality of the circumstances in this case, we are not ourselves convinced beyond a reasonable doubt that the Government has disproven the defense of mistake of fact. Accordingly, we do not find the evidence to be factually sufficient to find the appellant guilty of forcible sodomy.[3] Accordingly, we dismiss Charge III and it Specification.[4]

Sentence Reassessment

We must now reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307–09 (C.M.A. 1986). In reassessing the sentence, we find that there has been a change in the sentencing posture of this case. While the appellant remains convicted of two specifications under Article 112a, UCMJ, which, together, carry a maximum sentence of a dishonorable discharge, 10 years of confinement, total forfeitures, and reduction to E-1, the forcible sodomy offense under Article 125, UCMJ, carries a maximum punishment of a dishonorable discharge, confinement for life, as well as total forfeitures and reduction to E-1. We believe the dismissal of the forcible sodomy conviction under Article 125, UCMJ, creates a significant difference in what would be an appropriate punishment. At trial, the appellant was sentenced by the members to a bad-conduct discharge, six months of confinement, and reduction to E-1. Given the difference

[3] The panel was not instructed on consensual sodomy.

[4] Having dismissed Charge III and its Specification on the basis of factual insufficiency, we do not address legal sufficiency.

between the maximum sentence he faced when sentenced at trial and the new, reduced maximum sentence, we conclude the sentence must be reduced. We find that only a bad-conduct discharge, three months of confinement, and a reduction to E-1 would be appropriate punishment in this case.

The Staff Judge Advocate's Recommendation

The appellant also argues that the addendum to the staff judge advocate's recommendation contained an error. We find no merit to this claim and also conclude that the reassessed and reduced sentence would cure any possible error. *See United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988); *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996).

Conclusion

The Specification of Charge III is dismissed. The remaining findings and 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[5] Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] We note the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).