UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NICHOLAS M. DILLARD
United States Air Force

ACM 36749

29 October 2007

Sentence adjudged 15 February 2006 by GCM convened at Al Udeid Air Base, Qatar. Military Judge: Adam Oler.

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was convicted of two specifications of violating orders, one specification of making a false official statement, and five specifications of assault consummated by battery, in violation of Articles 92, 107, and 128, UCMJ, 10 U.S.C. §§ 892, 907, 928. His approved sentence consists of a bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

We have reviewed the record of trial, the assignment of error, and the government's answer thereto. The appellant asserts the government violated his

Constitutional Due Process right to privacy when it failed to narrowly tailor a general order that prohibited all Air Force members from visiting the sleeping quarters of the opposite gender, and then convicted him for entering the sleeping quarters of his wife and allowing her to enter his sleeping quarters.

Background

The appellant met his wife, Airman (Amn) AB, in February 2005 while in technical training school. They married in May 2005, and thereafter, were stationed in Germany. In September 2005, both the appellant and his wife were deployed to Al Udeid, Qatar in support of the Global War on Terrorism. While in Al Udeid, the appellant and his wife were stationed with the same unit. They were each assigned separate, small dormitory rooms,[1] and roommates of the same gender.

Paragraph 2.m. of USCENTAF General Order 1A states, "Visitation by persons of the opposite gender to an Air Force member's sleeping quarters is prohibited except for official purposes or as approved by the Air Expeditionary Wing Commander or the Air Expeditionary Group Commander." At trial, the military judge determined this order to be lawful. The appellant visited his wife or had her visit him almost daily from the time of his deployment until he was placed in pretrial confinement 28 November 2005. According to the appellant, no visit was for official purposes and the appellant never requested approval to visit or be visited. The appellant pled providently to this specification and agreed with the lawfulness of the order.

Law

Whether the issue is waived by the appellant's plea or not is a decision to be made another time. *See* Rules for Courts-Martial 905(e) and 910(j); *United States v. Corcoran*, 40 M.J. 478, 482 (C.M.A. 1994); *United States v. Hilton*, 27 M.J. 323, 326 (C.M.A. 1989).

Constitutional questions are reviewed by the Court de novo. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004). The legality of an order is a question of law we also review de novo. *United States v. Moore*, 58 M.J. 466, 467 (C.A.A.F. 2003). Orders requiring performance of military duties are presumed to be lawful when issued by superiors. *United States v. McDaniels*, 50 M.J. 407, 408 (C.A.A.F. 1999); *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 14.c(2)(a)(i) (2005 ed.).

It is well established that the "mere existence of a constitutionally protected zone of privacy does not 'automatically invalidate every state regulation in this area.'" *United*

[1] The appellant agreed the rooms were about 10 feet by 10 feet, and that he could reach his roommate's bed from his bed.

States v. Bygrave, 46 M.J. 491, 495-96 (C.A.A.F. 1997) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977)). The Supreme Court has long recognized the principle that the "military is, by necessity, a specialized society." *Moore*, 58 M.J. at 468 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)). "By donning the uniform, the servicemember knowingly accepts restrictions on liberty and privacy – in the name of military necessity, effectiveness, and discipline – that his civilian counterpart would not tolerate." *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989).

Discussion

Clearly, the order to not visit members of the opposite gender in their sleeping quarters had a patently obvious and valid military purpose, especially in the deployed environment during a time of war, which does not warrant further discussion. The fact that the appellant was married, and his wife was at the same deployed duty location did not make this order invalid. Furthermore, the appellant was not without recourse. He could have sought permission to visit his wife privately, although whether he would have been granted an exception or not is immaterial to the validity of this order in this environment. The appellant's Constitutional Due Process right to privacy was not violated. The appellant's issue is without merit.

Conclusion

The approved findings and sentence 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court