UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT A. JOHNS
United States Air Force

ACM 36406

25 May 2007

Sentence adjudged 13 April 2005 by GCM convened at Aviano Air Base, Italy. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major John N. Page III, Major David P. Bennett, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain John S. Fredland.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

OPINION OF THE COURT

BRAND, Judge:

In accordance with his pleas, the appellant was convicted of disobeying a lawful order, wrongful use of cocaine on divers occasions, and adultery in violation of Articles 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 934. In addition, a panel of officers convicted the appellant, contrary to his pleas, of assault and battery and sodomy in

violation of Articles 128 and 125, UCMJ, 10 U.S.C. §§ 928, 925.[1] The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Background

The appellant and a number of other active duty airmen used cocaine on a variety of occasions between August 2002 and June 2004. In December 2003, the drug ring was busted, and the members were interviewed by the Air Force Office of Special Investigations (OSI). The appellant gave his statement on 13 December 2003 and confessed to using cocaine on six separate occasions. In August 2004, the appellant was given a no-contact order.[2] In November 2004, he and one of the other airmen named in the order were seen talking together by Security Forces personnel.

Sometime in December 2003, the appellant met HRC, the dependent spouse of Airman First Class (A1C) C who deployed to Qatar on 7 December 2003. To help HRC get over her loneliness, the two had an affair that lasted approximately eight months. Sometime in about February 2004, the appellant and HRC were in a car with other individuals when the appellant unlawfully grabbed HRC in an attempt, ostensibly, to keep her quiet. A1C C returned from his deployment in March 2004. The appellant befriended A1C C, and would have both A1C C and HRC over to his house along with other military members. On several occasions while A1C C was downstairs, the appellant would have HRC orally sodomize him in the hallway upstairs. In May 2004, the appellant went home on leave to Georgia and, conveniently, HRC went to nearby Tennessee. They met at the appellant's parents' house and continued their relationship.

The appellant asserts two errors on appeal. First, the appellant avers his guilty plea to the specifications of adultery is improvident because the appellant's inquiry failed to establish the conduct was service discrediting or prejudicial to good order and discipline. Second, the appellant avers his conviction for consensual sodomy must be set aside in light of *Lawrence v. Texas,* 539 U.S. 558 (2003) and *United States v Marcum,* 60 M.J. 198 (C.A.A.F. 2004).

Discussion

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v.*

[1] The appellant was acquitted of one wrongful use of cocaine and attempted possession of cocaine, in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a.

[2] This no-contact order named the other individuals thought to be involved in the drug ring.

Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providency inquiry must reflect the accused understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). When reviewing a providency inquiry, the Court does not end its analysis at the edge of the providence inquiry. It can look at the entire record to determine whether the dictates of Article 45, UCMJ, 10 U.S.C. §845; Rule for Courts-Martial 910(e); and *United States v. Care*[3] and its progeny have been met. *Jordan*, 57 M.J. at 239. We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

During the thorough providency inquiry, the military judge provided the elements and definitions for the offense of adultery, including an explanation of service discrediting conduct and conduct prejudicial to good order and discipline. The appellant acknowledged his conduct was both service discrediting and prejudicial to good order and discipline. He further informed the military judge he was aware HRC was married to another active duty member, he knew at the time he was violating the UCMJ, and other airmen were aware of the affair and it was notorious. He admitted his actions were service discrediting because, if the public knew a military person was having an affair with another military member's wife, that would bring discredit upon the armed forces. Further, he informed the military judge his conduct was prejudicial to good order and discipline. At the conclusion of the inquiry on the adultery specifications, both the military judge and the trial defense counsel stated the plea was provident. Although the Court is permitted to look at the entire record, which is replete with reasons this conduct was both service discrediting and prejudicial to good order and discipline, it is not necessary in this case. It is clear the appellant understood the criminal nature of his conduct and provided the military judge with a substantial basis in law and fact for concluding the appellant's guilty plea was provident and the appellant was, in fact, guilty. There was no abuse of discretion.

Relying on the decisions of the United States Supreme Court and the Court of Appeals for the Armed Forces in *Lawrence* and *Marcum*, the appellant attacks his conviction for private, consensual, heterosexual sodomy with HRC. The *Marcum* case provides guidance on how to apply the principles of *Lawrence v. Texas* to the military environment. We conduct a de novo review in determining whether Article 125, UCMJ,

[3] 40 C.M.R. 247 (1969).

as applied to the appellant's conduct in this case, is constitutional. *Marcum*, 60 M.J. at 202-03 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)). Challenges to a conviction under Article 125, UCMJ, are reviewed on a case-by-case basis, and in doing so, we must answer three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? [Citations omitted.]. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Marcum, 60 M.J. at 206-07.

The trial defense counsel raised this issue at trial. Counsel for both sides agreed the first question should be answered in the affirmative, the second question in the negative, and argued the third question. The military judge denied the motion and stated the fact that HRC was the dependent wife of an active duty A1C was sufficient to meet the requirements of *Marcum*.

In addressing the third question, we note that it is appropriate to consider the "military interests of discipline and order" in evaluating the appellant's claim. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

The appellant and his counsel entered into a stipulation of fact for the purposes of determining the motion to dismiss the sodomy charge for failure to state an offense. The appellant was aware of HRC's marital status and the fact her spouse was active duty. They had an on-going affair which took place while HRC's husband was deployed and continued after his return. Other military members were aware of the affair. The appellant befriended A1C C and, in fact, had both A1C C and HRC to his house on a number of occasions along with other military members. The sodomy took place in his upstairs hallway while A1C C was downstairs playing video games. When determining additional factors relevant solely to the military environment, the stipulation is enlightening. We find the evidence presented at trial goes far beyond these factors but the stipulation provided more than enough information to determine this conduct was clearly a military matter that affected the military interests of discipline and order. We conclude Article 125, UCMJ, is constitutional as applied to the appellant.

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

LAQUITTA J. SMITH
Documents Examiner