UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2011-09**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Senior Airman (E-4)	)	
TALON J. SPENCER,	)	
USAF,	)	
Appellee	)	**Panel No. 1**

WEISS, Judge:

On 22 November 2011, the United States filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862, challenging the ruling of the military judge dismissing without prejudice the sole charge and specification of wrongful sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920, on the grounds that the specification fails to state an offense. The appellee joins the Government in requesting that this Court reverse the ruling of the military judge. We find that the charge and specification, as alleged, are sufficient to state the offense of wrongful sexual contact. We, therefore, grant the Government's appeal.

Background

A single charge and specification alleging wrongful sexual contact, in violation of Article 120, UCMJ, was preferred against the appellee and referred to a general court-martial. The Specification of the Charge alleges:

> In that SENIOR AIRMAN TALON J. SPENCER . . . did, at or near Hurlburt Field, Florida, on or about 26 May 2011, engage in sexual contact with [AS], to wit: penile penetration of the vulva, and such sexual contact was without legal justification or lawful authorization and without the permission of [AS].

The defense did not contest the sufficiency of the specification at trial; however, the military judge sua sponte questioned whether it stated an offense. Although the trial and defense counsel agreed that the offense of wrongful sexual contact was properly alleged, the military judge found that the specification failed to state an offense. He dismissed the charge and specification without prejudice. The basis of the military judge's ruling is his interpretation that, by defining a "sexual act" as penile penetration of the vulva, Congress intended to exclude this same conduct from the definition of "sexual

contact" and thus from the conduct proscribed by the offense of wrongful sexual contact under Article 120, UCMJ. We disagree.

Discussion

In ruling on an appeal under Article 62, UCMJ, this Court "may act only with respect to matters of law." Article 62(b), UCMJ; Rule for Courts-Martial (R.C.M.) 908(c)(2). The question of whether a specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); *see also United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). Interpretation of a statute is also a question of law that we review de novo. *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999) (citations omitted).

Effective 1 October 2007, Congress amended Article 120, UCMJ, and consolidated numerous acts of sexual misconduct under its various subsections. Drafter's Analysis, *Manual for Courts-Martial, United States* (*MCM*), A23-15 (2008 ed.). The appellee is charged with a subsection of Article 120, UCMJ, titled "wrongful sexual conduct," which constitutes the following: "Any person . . . who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact . . . ." Article 120(m), UCMJ. The term "sexual contact" is defined as:

> [T]he intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person, to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(t)(2), UCMJ.

A "sexual act," on the other hand, is a distinguishing element of the more serious offenses of rape and aggravated sexual assault under Articles 120(a) and 120(c), UCMJ. The term "sexual act" means, in relevant part, "contact between the penis and the vulva . . . contact involving the penis occurs upon penetration, however slight . . . ." Article 120(t)(1)(A), UCMJ. Viewing the issue as a question of statutory construction, the military judge concluded that the Government was precluded from charging a "sexual act" (penile penetration of the vulva) as wrongful sexual contact.

In reaching this conclusion, the military judge applied "a basic rule of statutory construction that when a list includes certain items, items not included in the list [are] intended to be excluded." The military judge went on to note:

> Significantly, Congress chose to use the words "penis" and "vulva" when defining "sexual act"; [therefore,] one must reasonably infer that because Congress failed to use those words when defining "sexual contact," that omission was intentional. Similarly, Congress chose to use the word "contact" in the definition of "sexual act," whereas it required "touching" for "sexual contact." And perhaps most importantly, Congress did not include words such as "for example" or "including" when defining "sexual contact," suggesting that Congress intended its list to completely define the type of conduct that constituted "sexual contact." . . . [Therefore] Congress intended to *exclude* penile contact with the vulva from the definition of "sexual contact."

We find that the military judge's interpretation of Article 120, UCMJ, is unduly restrictive and led him to an erroneous legal conclusion that sexual conduct described as penile penetration of the vulva cannot be charged as the offense of wrongful sexual contact. In interpreting a statute "we must look *first* to the plain language of the statute and construe its provisions in terms of its object and policy . . . . [A]bsent evidence to the contrary, the ordinary meaning of the words used expresses the legislative intent." *Falk*, 50 M.J. at 390 (citations omitted) (emphasis added). *See also United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) (citation omitted) ("In deciphering the meaning of a statute, we normally apply the common and ordinary understanding of the words in the statute.").

The common meaning and understanding of the word "genitalia" or genitals, as used in the Article 120, UCMJ, definition of "sexual contact," is "the reproductive organs; [especially] the external sex organs." WEBSTER'S NEW WORLD DICTIONARY 562 (3d College Edition 1988). "Vulva" is defined as "the external *genital* organs of the female, including the labia majora, labia minora, clitoris, and the entrance to the vagina." *Id*. at 1498 (emphasis added). Plainly, the anatomical part referred to as the "vulva" is included within the meaning of the broader term "genitalia" and is commonly understood as such. It also logically follows that penile penetration of the vulva must also involve touching the genitalia.

Therefore, in applying this ordinary meaning construction, we find that the sexual conduct alleged in this case is included within both the Article 120, UCMJ, definition of "sexual act" and "sexual contact." Furthermore, we find nothing in the language of Article 120, UCMJ, or in considering the object and policy of the statute, that otherwise prevents an allegation of "penile penetration of the vulva" from being charged as the offense of wrongful sexual contact, even with its lesser degree of criminal liability than those offenses requiring a "sexual act" as an element of proof. In this case, the charging decision was a matter of prosecutorial discretion. Contrary to the ruling of the military judge, we find that the specification alleges every element of the offense of wrongful sexual contact and is sufficient to state an offense.

Conclusion

We find that the military judge was incorrect as a matter of law in finding that the charge and specification failed to state an offense. We set aside the decision of the military judge 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 26th day of January 2012,

ORDERED:

That the United States appeal under Article 62, UCMJ, is hereby **GRANTED**.

ORR, Chief Judge, and GREGORY, Senior Judge, concur.

FOR THE COURT

OFFICIAL

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court