

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**Charles Wm. DORMAN**

**M.J. SUSZAN**

**C.A. PRICE**

**UNITED STATES**

**v.**

**Duncan P. MYERS  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200201623

Decided 10 February 2005

Sentence adjudged 3 August 2001. Military Judge: P.J. Betz, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Security Battalion, Marine Corps Base, Camp Pendleton, CA.

LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel  
Capt WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was tried by a special court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of making a false official statement, sodomy, two specifications of assault consummated by battery, and adultery. The appellant's crimes violated Articles 107, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 925, 928, and 934. The adjudged and approved sentence consists of confinement for 60 days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant has raised two assignments of error. He first argues that his conviction for private, consensual, heterosexual sodomy is unconstitutional. He next asserts error based upon the content of the trial counsel's sentencing argument. We have thoroughly reviewed the record of trial, the appellant's brief, and the Government's reply. Following that review, we conclude that the findings and sentence are correct in law and fact and that no error was committed that was

materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

### **Background**

On 23 September 2000 the appellant received fellatio from CW, the wife of a Navy Petty Officer. Both the appellant and the Petty Officer were stationed at Marine Corps Base Camp Pendleton, CA, at the time of the offense. On that day, CW called the appellant while he was at work because she wanted to go out with him. The appellant agreed to meet her after work. Phone records show that the appellant called CW's phone at 1938 that evening. CW's husband was standing duty at the time. The appellant went to see CW at the on base quarters she shared with her husband and young son. While there the appellant drank beer with CW. She performed fellatio on him and they eventually engaged in sexual intercourse that evening. The relationship between the appellant and CW was consensual.

### **Sodomy**

In his first assignment of error the appellant asserts that his conviction for private, consensual, heterosexual sodomy violates the appellant's constitutional right to privacy. Appellant's Brief of 8 Jun 2004 at 2. Specifically, he relies on the decision of the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas statute that criminalized same sex sodomy. The appellant now contends that the proscription of Article 125, UCMJ, of consensual sodomy is unconstitutional. Appellant's Brief at 3.

Subsequent to the submission of appellate briefs in this case our superior court rejected a generalized constitutional attack on Article 125, UCMJ. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). The question that must be addressed is "whether Article 125 is constitutional as applied to [a]ppellant's conduct." *Id.* at 206. To answer this question we are to focus on 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*? Third, are there additional factors relevant solely in the military environment that affect

the nature and reach of the *Lawrence* liberty interest?

*Id.* at 206-207 (citation omitted); see also *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

In this case we answer the first question in the affirmative and the second question in the negative. When addressing the third question, we are cognizant of the fact that due to concerns for the "military mission . . . servicemembers, as a general matter, do not share the same autonomy as civilians." *Marcum*, 60 M.J. at 206 (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974)). It is thus appropriate to consider the "military interests of discipline and order" in evaluating the appellant's claim. *Stirewalt*, 60 M.J. at 304.

We thus answer the third *Marcum* question in the affirmative. The appellant's crime was committed in military housing, and the liaison was planned while the appellant was on duty. It was made possible due to the fact that CW's petty officer husband was standing duty that evening. Further, the fellatio was apparently the precursor to the adultery, which occurred shortly thereafter. The combined impact of the appellant's crimes with CW on military interests and order is apparent when examining the testimony of her petty officer husband during the sentencing phase of the court-martial. Record at 343-348. Finally, the appellant gave a false official statement concerning his sexual liaison with CW, thus compounding his criminal liability. Clearly, the appellant's misconduct with CW, the wife of a petty officer assigned to the same base as was the appellant, had a detrimental impact on military interests and order. Accordingly, these facts place the appellant's sodomy "outside the protected liberty interest recognized in *Lawrence*; it is also contrary to Article 125. As a result, Article 125 is constitutional as applied to [a]ppellant." *Markum*, 60 M.J. at 208.

### **Trial Counsel's Argument**

The appellant's second assignment of error focuses on the trial counsel's argument on sentencing. During that argument, the trial counsel addressed the members as follows, "So lets talk about who Lance Corporal Myers is, what he is. Well, he's a law enforcement official. He's a Marine. He is a United States Marine. Military police. He's also a predator." Record at 350. The appellant also objects to other portions of the argument wherein the trial counsel asked the members if they

could "trust [the appellant] patrolling your neighborhoods while you're on duty? On float? TAD?" Record at 352. The appellant made no objections to these comments during the trial.

In that the appellant failed to object to the comments of the trial counsel, we review for "plain error." *United States v. Kropf*, 39 M.J. 107, 110 (C.M.A. 1994). The "legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)(citing *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976) and *United States v. Gerlach*, 37 C.M.R. 3 (C.M.A. 1966)). Finally, when evaluating the argument of counsel for error, the argument is not viewed in isolation but in context of the entire trial. *Baer*, 53 M.J. at 238.

In applying these standards we find error in the comments of the trial counsel when referring to the appellant as a "predator." We find no evidence in the record to support that characterization. We also find that trial counsel's question to the members concerning whether they could trust the appellant patrolling their neighborhoods was improper. *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985); see also *Shamberger*, 1 M.J. at 377. Nevertheless, given the appellant's offenses, and the relatively lenient adjudged sentence, we do not find "plain error." Accordingly, we decline to grant relief.

### Conclusion

After thoroughly considering the record of trial and the legal issues that have been raised and briefed, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL  
Clerk of Court