

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

**BEFORE**

**D.A. WAGNER**

**R.E. VINCENT**

**E.B. STONE**

**UNITED STATES**

**v.**

**William M. BURDINE  
Gunnery Sergeant (E-7), U. S. Marine Corps**

NMCCA 200400985

Decided 15 February 2007

Sentence adjudged 30 October 2003. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LCDR JASON GROVER, JAGC, USN, Appellate Defense Counsel  
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

We have examined the record of trial, the appellant's five assignments of error<sup>1</sup>, and the Government's response. We

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<sup>1</sup> I. THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO ESTABLISH THAT GYSGT BURDINE TOUCHED MISS "W"'S OR MISS "F"'S FEET WITH THE INTENT TO GRATIFY HIS LUST OR SEXUAL DESIRES BECAUSE BOTH EXPERTS AGREED THAT APPELLANT'S PRIMARY MOTIVATION IN TOUCHING FEET WAS NOT SEXUAL IN NATURE.

II. THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE APPELLANT WRONGFULLY EXPOSED HIMSELF WHERE THE ONLY EVIDENCE TO SUPPORT THE CHARGES WAS THE TESTIMONY OF MRS. "H" AND SHE ADMITTED THAT SHE NEVER ACTUALLY SAW APPELLANT'S PENIS.

III. THE RECORD OF TRIAL IS NOT COMPLETE BECAUSE THE ARTICLE 32 INVESTIGATING OFFICER'S REPORT DOES NOT INCLUDE THE SUMMARIZED TESTIMONY OF THE WITNESS OR IO EXHIBIT 17.

IV. APPELLANT LACKED MENTAL RESPONSIBILITY FOR THE OFFENSES BECAUSE HE WAS UNDER MEDICATION FOR DEPRESSION AT THE TIME OF THE OFFENSES (Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

V. ARTICLE 50a, UCMJ, IS UNCONSTITUTIONAL BECAUSE IT SHIFTS THE BURDEN TO THE DEFENSE TO PROVE MENTAL INCAPACITY OR A LACK OF MENTAL RESPONSIBILITY.

conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

While we find that all the assignments of error are uniformly without merit, we nevertheless briefly comment on the first two assignments of error, both of which allege factual and legal insufficiency.

The appellant's first assignment of error alleges that his conviction under Specification 1 of Charge II (indecent assault upon Miss "F") and his conviction under the sole specification of Additional Charge II (assault consummated by a battery upon Miss "W"), are factually and legally insufficient in that there is no evidence that the appellant committed either crime for the gratification of his lust or sexual desires. Regarding Specification 1 of Charge II, the appellant's assertion that there was no evidence presented that he was attempting to gratify his lust or sexual desires is wholly without merit. Entirely to the contrary, Mrs. "H" testified that she observed the appellant lying on the floor reaching up underneath the seat by Miss "F" with his left arm while his right hand was on his penis as he was masturbating. Record at 185-86. In addition, Mrs. "H"'s husband, Hospitalman Second Class "H," also testified that he observed for more than 20 seconds that the appellant was masturbating his exposed, erect penis with his right hand while his left hand was up underneath the seat near Miss "F". *Id.* at 205, 208-09, 211, 214, 218-19.

As for the sole specification under Additional Charge II, it is clear from the appellant's brief that the appellant mistakenly believes he was convicted of committing an indecent act against Miss "W", vice an assault consummated by a battery. The appellant is incorrect. The record of trial, the staff judge advocate's recommendation, and the convening authority's action all properly indicate that he was convicted of the lesser included offense of assault consummated by a battery. Appellate defense counsel are strongly cautioned to carefully review the record of trial before submitting assignments of error.

In his second assignment of error, submitted in summary fashion, the appellant alleges that his conviction for wrongfully exposing his penis in an indecent manner to public view (set forth in Specification 2 of Charge II) was legally and factually insufficient because he claims that no witness testified that they actually saw his penis. This assignment of error is without

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*But see United States v. Martin*, 56 M.J. 91 (C.A.A.F. 2001)(Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

merit as it is abundantly clear from the record that Hospitalman Second Class "H" testified that he directly observed the appellant holding his erect penis in his right hand while masturbating. We reiterate our earlier abjuration that appellate defense counsel must carefully review the record of trial before submitting assignments of error for consideration by the court to ensure that the any statement of facts alleged in an assignment of error is reasonably supported by the record.

Accordingly, the findings of guilty and sentence, as approved on review below, are affirmed.

Chief Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court