

**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.**

**Shaun J. GORSKEY  
Damage Controlman Fireman Apprentice (E-2),  
U.S. Navy**

NMCCA 200301580

Decided 21 February 2007

Sentence adjudged 09 January 2003. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

Capt. R.A. VICZOREK, USMC, Appellate Defense Counsel  
LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel  
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Chief Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members. The military judge convicted the appellant, pursuant to his pleas, of two specifications of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. Contrary to his pleas, the members convicted the appellant of rape, sodomy, and indecent assault, in violation of Articles 120, 125, and 134, UCMJ. On 9 January 2003, the appellant was sentenced to confinement for 5 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. On 10 July 2003, the convening authority approved the sentence as adjudged. The record of trial was docketed with the court on 14 August 2003. The appellant filed a brief and assignments of error with the court on 31 August 2005, alleging that the evidence was factually insufficient to sustain a conviction for rape, that the trial defense counsel's cumulative errors amounted to ineffective assistance of counsel, that the convening authority erred in taking action on the court-martial by failing to note a companion

case, and that the convening authority erred in taking his action without the benefit of advice in the staff judge advocate's recommendation (SJAR) as to legal errors raised in clemency matters submitted by the trial defense counsel. The assignments of error are uniformly without merit. Having considered the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that there was no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### **Background**

The appellant spent the late night of 14 August 2002 and the early morning hours of 15 August 2002 eating pizza and drinking with five fellow Sailors, two males and three females. Two of the females were visibly drunk and stumbling on the walk back to the base in the early morning hours of the 15th. Prior to getting back to base, the six stopped under an overpass to smoke and talk on a nearby grassy area. Eventually, one of the males and one female left the group to return to base. The two female Sailors who remained were noticeably intoxicated, one asleep and one lying beneath the appellant, not moving. The appellant and the remaining male Sailor removed the girls' clothing and had sex with both females, including sexual intercourse. Both females testified that they did not consent to the acts. The appellant did not testify. Other Sailors testified that, later in the morning of the 15th, the appellant was bragging about his sexual conquest, stating that one of the victims was saying "no" and trying to get away, but that he grabbed her and said, "You're going to take this bitch!" Record at 767, 797.

### **Factual Sufficiency**

The evidence of rape was overwhelming. The victim testified that she did not remember everything she said and could not discount the possibility that she had spoken some words of consent, but did specifically remember telling the appellant to stop during intercourse and trying to get away, only to be held in place by the appellant. This testimony was corroborated by other witnesses who recounted the appellant's own words in bragging about his lurid conquest. The evidence also shows that the victim was intoxicated to the point where she was incapable of giving consent. This fact is also corroborated by the appellant's later statement to other Sailors that he had "got those bitches" and that the girls were "stupid and gullible." *Id.* at 775. We are convinced of the appellant's guilt beyond any reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

### **Effective Assistance of Counsel**

The appellant presents no evidence that his trial defense counsel was ineffective, other than citations to the record by

the appellate defense counsel. To the contrary, there is no evidence that the appellant is actually unhappy in any way with the representation he received at trial. Moreover, the trial defense counsel submitted an affidavit in the face of the allegations of ineffective assistance that demonstrates sound trial strategy for each of the allegations raised by the appellate defense counsel in brief.

In attempting to make a case for the appellant, the appellate defense counsel, Captain (Capt) Richard A. Viczorek, USMC, misstates facts contained in the record. The appellant's brief avers that the trial defense counsel opted not to challenge one court-martial member so as to not "bust quorum." Appellant's Brief and Assignments of Error of 31 Aug 2005 at 8. This clearly was not the case, as the record reveals that the military judge sua sponte raised a concern regarding this member that, although he currently had no memory of command actions regarding the appellant, could, because of his duties, remember something about the appellant's prior nonjudicial punishment during the course of the trial. Record at 292-93. The military judge noted that, should that occur, the court would be below quorum in the middle of trial. The trial defense counsel asked for and received a recess to discuss the matter with co-counsel. Following that recess, the trial defense counsel accurately noted that there was currently no basis upon which to challenge the member and indicated they would not do so at that time. The trial defense counsel also noted, again correctly, that, should the member recall something about the appellant during the trial, additional voir dire would be necessary. The military judge agreed. It was during the latter exchange that the trial defense counsel made a passing reference to the fact that, if he successfully challenged the member at that time, the court would go below quorum. Capt Viczorek takes this comment completely out of context and fails to note the surrounding discussion in arguing the appellant's claim of error. We express our disapproval of this practice.

The balance of the averments of ineffective assistance are similarly without merit. The appellant states that the trial defense counsel should have objected to the testimony of two Sailors who listened to the appellant bragging about the rape, but does not state a basis for such an objection. The appellant's brief also states that there could be no reasonable explanation for the trial defense counsel's failure to call an essential witness, yet the record reveals the efforts that had been made to secure this reluctant witness and the trial defense counsel's affidavit provides a substantial reason for not having the witness appear in person at trial. This issue lacks merit. *Strickland v. Washington*, 466 U.S. 668 (1984).

### **Conclusion**

The remaining assignments of error are similarly without merit. The convening authority stated in his action that he considered the clemency matters submitted by the trial defense

counsel on 23 June 2003. The information as to the companion case was provided in detail in those clemency matters for the convening authority's consideration. Additionally, the trial defense counsel raised no legal errors in his clemency submission. Although not raised as error, we have considered the delay in briefing and deciding this case at the appellate level. We find no due process violation caused by the facially unreasonable delay in this case. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004). We have also analyzed the delay under our broad Article 66(c), UCMJ, mandate. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We do not find that the delay in this case affects the findings and sentence that should be affirmed under Article 66(c), UCMJ. The findings of guilty and sentence, as approved by the convening authority, are affirmed.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL  
Clerk of Court