

**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.**

**Larry L. KNEPPER  
Major (O-4), U. S. Marine Corps**

NMCCA 200401159

Decided 31 January 2007

Sentence adjudged 26 Jun 2003. Military Judge: S.F. Day.  
Review pursuant to Article 66(c), UCMJ, of General Court-Martial,  
convened by Commanding General, Marine Corps Recruit  
Depot/Eastern Region, Parris Island, SC.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel  
Capt BRIAN KELLER, USMC, JAGC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STONE, Judge:

The appellant entered pleas of guilty at a general court-martial consisting of a military judge alone to charges of willful disobedience of a superior commissioned officer, carnal knowledge, sodomy, conduct unbecoming an officer, indecent language, adultery, indecent acts with a child under the age of 16, indecent acts with another, inducing a minor to commit criminal sexual acts, and traveling in interstate commerce to commit sexual criminal acts with a minor, in violation of Articles 90, 120, 125, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 920, 925, 933, and 934. The military judge convicted the appellant and sentenced him to confinement for ten years, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the sentence as adjudged. Pursuant to the terms of a pretrial agreement, the convening authority suspended all confinement in excess of 38 months. The appellant alleges that the military judge failed to exclude sentencing witnesses from the courtroom during the providence inquiry, that his conviction for consensual heterosexual sodomy was unconstitutional, that his plea of guilty to the charge of indecent acts was improvidently made, that

numerous specifications of various charges were multiplicitous and/or constituted an unreasonable multiplication of charges, and that he was denied speedy post-trial review of his court-martial. After considering the record of trial, the appellant's assignments of error, and the Government's response, we will take corrective action by modifying the court-martial's finding regarding the sole specification of Charge II. After taking corrective action on that finding, we 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 remains. Arts. 59(a) and 66(c), UCMJ.

### **Non-Exclusion of the Sentencing Witnesses**

The military judge denied trial defense counsel's request to exclude the parents of the 16-year-old victim and a special agent of the Naval Criminal Investigative Service (NCIS) from hearing the providence inquiry portion of the court-martial as they were anticipated to be witnesses for the Government during sentencing. All three witnesses in fact testified during the appellant's sentencing hearing. On appeal, the appellant alleges that one of the witnesses, the victim's father, altered his testimony in response to hearing the providence inquiry of the appellant, and that he also altered his testimony in response to hearing the testimony of his wife (that is, the victim's mother). The appellant alleges that this was legal error and that the sentence in this case should be set aside. We agree that the non-exclusion of one of the parents and the NCIS agent was error and that they subsequently should not have testified at the sentencing hearing. MILITARY RULE OF EVIDENCE 615, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). However, in this trial before the military judge alone, we find that this error was harmless. The appellant provides no evidence that the father's testimony on sentencing was affected in anyway by his hearing of appellant's responses to the military judge during the providence inquiry or by hearing the testimony of his wife. *United States v. Ducharme*, 59 M.J. 816, 819 (N.M.Ct.Crim.App. 2004). This assignment of error is without merit.

### **Sodomy with a 16-Year-Old Female**

The appellant plead guilty to committing sodomy with a young female, "E", in the sole specification of Charge II. The specification alleges that the sodomy took place between November 1999 and June 2002. The record reveals that, for the period from November 1999 until 8 February 2002, the victim was a child under the age of 16 years. For the rest of the charged period, the victim was 16 years old. Thus, for the bulk of the period charged, the victim had not attained the age of 16 years. The appellant, citing to *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) for the proposition that private consensual sodomy between consenting adults is constitutionally-protected behavior, contends that because some of the acts of sodomy occurred while the victim was age 16, the specification must be set aside.

We disagree. As it is clear from the providence inquiry and the stipulation of fact that the appellant committed sodomy with the victim on divers occasions during the period from November 1999 until 8 February 2002, a period of 15 months, during which she had not attained the age of 16, we may therefore affirm the finding of this specification by exceptions and substitutions to correctly reflect only that period when female victim "E" was a child under the age of 16 years old. We will take corrective action in our decretal paragraph.

### **Indecent Acts**

The appellant contests the providence of his plea of guilty to indecent acts with "E", Specification 7 of Charge IV, on the basis that he did not admit facts amounting to indecency regarding his sexual behavior with "E". During the providence inquiry, the appellant admitted to kissing her on the mouth, neck, and breast, fondling her breast and genitals, and inserting his fingers into her vagina. The appellant told the military judge that he believed his sexual behavior with "E" was indecent due to the difference in their ages and her status as the daughter of one of the appellant's friends.

In attacking his plea of guilty on appeal, the appellant relies primarily on *United States v. Stocks*, 35 M.J. 366 (C.M.A. 1992), which holds that foreplay precedent to sexual intercourse between consenting adults cannot be considered an indecent act or acts when the following intercourse is itself a legal act. We disagree with his analysis. The appellant, according to his testimony during the providence inquiry, and also as admitted to in his stipulation of fact, was at all times married to another person when he engaged in the aforementioned sexual activity with "E". Therefore, all of the acts of intercourse he engaged in with "E" were illegal acts of adultery. Indeed, the appellant successfully pleaded guilty to a charge of adultery with "E". Inasmuch as the holding in *Stocks* applies only to foreplay precedent to legal acts of intercourse, we find the appellant's reliance on *Stocks* inapposite. Moreover, we find that all of the appellant's sexual conduct with "E" was indecent by virtue of the fact that, again, as he admitted during the providence inquiry regarding his adultery charge and also in his stipulation of fact, the appellant was married to another person at the time of the sexual conduct with "E". This assignment of error is without merit.

### **Multiplicity and Unreasonable Multiplication of Charges**

The appellant alleges multiplicity of charges and unreasonable multiplication of charges. We disagree. Regarding the claim of multiplicity, the appellant forfeited this issue when he entered unconditional pleas of guilty to all charges and specifications and where, as here, the charges and specifications are not facially duplicative. *United States v. Heryford*, 52 M.J.

265, 266 (C.A.A.F. 2000); *United States v. Lloyd*, 46 M.J. 19, 20 (C.A.A.F. 1997).

Regarding the claim of unreasonable multiplication of charges, while the appellant did object at trial, each of the charges and specifications are aimed at distinctly separate criminal acts and did not unreasonably increase the appellant's punitive exposure. Moreover the charges and specifications fairly represent the appellant's expansive criminality in this case and there is no evidence of prosecutorial overreaching. This assignment of error is without merit. *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

### **Post-Trial Delay**

As a general matter, we are free to dispose of a due process issue by making an initial determination that any error is harmless beyond a reasonable doubt under the circumstances of an individual case. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006) ("As a general matter, we can dispose of an issue by assuming error and proceeding directly to the conclusion that any error was harmless."); *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006) ("[I]n cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt."). In determining whether the error is harmless beyond a reasonable doubt, we are to apply a totality of the circumstances test and consider all of the relevant facts before us *de novo*. *United States v. Toohey* (Toohey II) 63 M.J. 353, 363 (C.A.A.F. 2006). Having done so in this case, we easily conclude that even assuming that a due process violation has occurred, such violation was harmless beyond a reasonable doubt. In reaching this conclusion, we have considered, among numerous other factors that we can find no evidence of actual harm or specific prejudice flowing from the delay.

We are also required to determine, in every case before us, what findings and sentence should be approved based on all the circumstances in the record, including the delay in post-trial processing. Art. 66, UCMJ. We have published the factors we consider in making such a determination. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Having considered these factors, including the post-trial delay in this case, we conclude that the findings and sentence, as approved by the convening authority, should not be disturbed.

We note that the appellant has placed before the court two motions requesting expedited review of his court-martial. We view these motions as redundant with this assignment of error. In making our decision we have considered all periods of post-trial delay, including delay before this court. Additionally, the appellant posits no legal authority as a basis for the giving of higher priority to the review of his case before that of other

appellants who possess an equal right of speedy review. The motions are denied.

### Conclusion

We affirm the finding to the sole specification of Charge II, sodomy with "E", a child under the age of 16 years old, by excepting the words "June 2002" and "initially" and substituting the words "8 February 2002" to reflect that the appellant committed that offense on "divers occasions between November 1999 and 8 February 2002" with victim "E", a child under sixteen years of age. We direct that the supplemental convening order correct the date of offense alleged in the sole specification of Charge II based upon our decision to affirm the finding by exceptions and substitutions. The remaining findings are affirmed.

As a result of our action on the findings, we have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having reassessed the sentence, we affirm the sentence as approved by the convening authority. We conclude that such a sentence is appropriate for the offenses and the offender, and is no greater than that which would have been awarded in the absence of the error. *See United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Chief Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court