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

BEFORE

D.A. WAGNER **K.K. THOMPSON** **R.G. KELLY**

UNITED STATES

v.

David R. MITCHELL
Seaman (E-3), U.S. Navy

NMCCA 200602365 Decided 7 August 2007

Sentence adjudged 26 August 2005. Military Judge: S.F. Day. Staff Judge Advocate's Recommendation: K.E. Kubas. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Mayport, FL.

Maj JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

THOMPSON, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of one specification each of attempted pandering, false official statement, two specifications of assault consummated by a battery, and one specification each of pandering and attempting to impede an investigation, in violation of Articles 80, 107, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 907, 928, and 934. The appellant was sentenced to confinement for 18 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises two assignments of error. He first asserts that his acts of pandering and attempted pandering constitute constitutionally protected conduct under *Lawrence v. Texas,* 539 U.S. 558 (2003). His second assignment of error challenges the factual and legal sufficiency to support the finding of guilt for these offenses.

We have examined the record of trial, the assignments of error, and the Government’s response. 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was involved in a sexual relationship with DS. During the course of this relationship, he was controlling and manipulative, subjugating DS to his will through the use of physical and verbal abuse. The appellant committed assaults on DS in front of his shipmates and DS' former boyfriend. DS testified that she was beaten severely at one point in the relationship when she stood up to the appellant. In addition, the appellant constantly asked DS to engage in sexual activity with other men, indicating his desire to watch as she did so. Although DS repeatedly refused the appellant's demands, he told her she would eventually do what he wanted.

On one occasion, the appellant and DS were at the apartment of Seaman (SN) Mickouma, a shipmate of the appellant's. While there, the appellant asked SN Mickouma if he wanted to have sex with DS. SN Mickouma refused to do so. He testified that DS' reaction to this proposal was negative as well. She was crying and visibly upset. The appellant was angry with both SN Mickouma and DS for their refusal to engage in sexual activity. Prior to this incident, SN Mickouma had witnessed the appellant's assaultive behavior toward DS. He testified that he had observed the appellant grab DS' neck and choke her while riding in a car together. He had physically attempted to get the appellant to release his hold on DS, who was struggling and calling for him to stop.

On another occasion, the appellant was at DS' residence with another shipmate, SN Adhemar. The appellant told SN Adhemar that he wanted to show him some "pimp like shit."[1] The appellant then called DS into the room and told her he wanted her to "do my boy right quick."[2] DS refused, saying he had asked her to do this before but she did not want to do it. DS was visibly upset and looked like she was going to cry. Seeing this, SN Adhemar told the appellant he did not want to have sex with DS. DS testified that the appellant continued to pressure her into having sex with SN Adhemar, repeatedly telling her she was "going to do it" and "tomorrow's the day".[3] The next morning, DS testified that she approached SN Adhemar to have sex with her. She indicated that she just wanted to get it over with, so the appellant would not hound or hit her anymore.[4] After acceding to the appellant's demands to have sex with SN Adhemar, DS testified that the verbal abuse by the appellant increased significantly.

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[1] Record at 837-38.
[2] *Id*. at 839.
[3] *Id*. at 968.
[4] *Id*. at 975.

Lawrence v. Texas Challenge to Pandering Conviction

In the appellant's first assignment of error, he contends that his convictions for pandering and attempted pandering violate his constitutional right to privacy, relying upon *Lawrence v. Texas,* which held unconstitutional a Texas statute that criminalized consensual sodomy between adults. We disagree and decline to grant relief.

In *Lawrence,* the Supreme Court ruled that, with a few exceptions, criminalizing consensual sodomy, whether homosexual or heterosexual, violated the right to liberty under the due process clause of the Fifth and Fourteenth Amendments to the Constitution. *Lawrence,* 539 U.S. at 578. However, the Court did not announce a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct. The majority was not commenting on, or concerned with, governmental regulation of sexual acts in other situations. *Lawrence,* 539 U.S. at 567. *See also Muth v. Frank,* 412 F.3d 808, 817-18 (7th Cir. 2005)(no protected privacy interest for incestuous relationship), *cert. denied*, 546 U.S. 988 (2005); *United States v. Thompson,* 458 F.Supp.2d 730 (N.D. Ind. 2006)(holding prostitution not a protected activity under *Lawrence*); and *United States v. Orellana,* 62 M.J. 595, 601 (N.M.Ct.Crim.App. 2005)(adultery not constitutionally protected conduct under *Lawrence* where offense is service discrediting or prejudicial to good order and discipline), *rev. denied*, 63 M.J. 295 (C.A.A.F. 2006). Laws prohibiting the acts of prostitution, adultery, and incest do not have the same far-reaching consequences as laws that regulate private sex acts of consenting adults in the home. Under this analysis, it is an untenable stretch to find that *Lawrence* renders (or even implies) that laws prohibiting pandering, as defined by the UCMJ, are unconstitutional.

The appellant contends that his acts constituting the pandering offenses are constitutionally protected where no consideration or remuneration was involved, and the sexual activity occurred between two *consenting* adults (emphasis added).[5] He asks this court to extend the protected liberty interest recognized in *Lawrence* to his acts of pandering and attempted pandering, claiming associational standing as a beneficiary of the rule announced in *Lawrence. See United States v. Stirewalt,* 60 M.J. 297 (C.A.A.F. 2004) and *United States v. Marcum,* 60 M.J. 198, 204 (C.A.A.F. 2004). We decline to do so, finding the appellant's acts to be outside the protected liberty interest recognized in *Lawrence.*

Even if we assume, *arguendo,* that the appellant's acts in arranging for DS to engage in sexual intercourse with SN Mickouma and SN Adhemar constitute protected conduct under *Lawrence* and meet the first test in *Marcum,* we would nonetheless agree with

[5] Appellant's Brief of 16 Mar 2007 at 10.

the Government that both the second and third parts of the test exclude the appellant's acts from the protections of the Constitution. As to the second part of the test, we find that DS was situated in a relationship where consent was negated because of the ongoing physical and mental abuse practiced upon her by the appellant.

As to the third part of the test, we find additional factors in the military environment which support the convictions. The appellant was convicted of pandering under Article 134, UCMJ. The third element of that offense required the court members to find beyond a reasonable doubt that his conduct was either of a nature to bring discredit upon the armed forces or was prejudicial to good order and discipline. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶97b(3)(c). There is little doubt in our minds that arranging and attempting to arrange an act of sexual intercourse between his girlfriend and shipmates through the implied threat of future physical or mental abuse by the appellant, a member of the U.S. Navy, brought discredit upon the armed forces. The offenses also had a detrimental impact on the military interests of good order and discipline. This assignment of error is without merit.

Factual and Legal Sufficiency

In the appellant's second assignment of error, he contends that the evidence of guilt is factually and legally insufficient to support the convictions for pandering and attempted pandering. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed,* 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd,* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

To prove attempted pandering, it must be shown that: (1) the accused did a certain overt act (in this case, arranging for SN Mickouma to have sexual intercourse with DS); (2) that the act was done with the specific intent to commit the offense of pandering; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. MCM, Part IV, ¶4(b).

There are three elements to the offense of pandering (as charged against this appellant): (1) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in an act of sexual intercourse or sodomy with another person; (2) that the arranging was wrongful; and (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, Part IV, ¶97b.

In this case, contrary to the appellant's contentions, we find the testimony of the witnesses supporting the charged offenses in question credible and consistent with the other evidence adduced at trial. The evidence fully supports that the appellant did, indeed, arrange for DS to have sexual intercourse with his shipmates, SN Mickouma and SN Adhemar, and that the arranging was wrongful. SN Mickouma refused to engage in intercourse with DS, SN Adhemar did not. Both were aware of DS' reluctance to engage in the sexual activity as urged by the appellant. Throughout the period of this relationship, the appellant exercised control over DS by repeated physical and mental abuse if she disagreed with him or tried to stand up to him, even in the presence of other persons. The past physical abuse implied the possibility of future abuse at his hands, which operated to overcome DS' resistance to the appellant's demands to engage in sexual intercourse with SN Adhemar.

We have no doubt that a reasonable fact finder could have found all the essential elements of each charge beyond a reasonable doubt. In addition, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. This assignment of error has no merit.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge WAGNER and Senior Judge THOMPSON participated in the decision of this case prior to detaching from the court.