

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER A. STEPHENS
FIRE CONTROL TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200602368
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 June 2005.
Military Judge: CAPT James Wynn, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LCDR P.A. Walker,
JAGC, USN; **Addendum:** CDR K.E. Kubas, JAGC, USN.
For Appellant: LT Darrin MacKinnon, JAGC, USN.
For Appellee: Capt Geoffrey Shows, USMC.

11 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of wrongful appropriation and larceny, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. Members, with enlisted representation, convicted the appellant, contrary to his pleas, of consensual sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. The appellant was sentenced to confinement for 9 months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises two assignments of error. First, he contends that his conviction for adult, consensual sodomy is unconstitutional. Second, the appellant alleges that his due process rights were violated because there was no "military nexus" element in connection with his consensual sodomy conviction. Appellant's Brief of 29 Jan 2007 at 3 and 5.

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

On 3 July 2003, the appellant's wife, and Mrs. GMS had drinks at a local bar. Mrs. GMS was a military dependent whose husband had been deployed for approximately two months. At the end of the evening, both women returned to the appellant's house. Mrs. GMS testified that at some point, she lay down on the couch and passed out. She further testified that she subsequently awoke to discover the appellant orally sodomizing her and inserting his finger into her vagina. Mrs. GMS testified that she did not indicate a lack of consent, but instead "faked an orgasm" and then went back to sleep when the appellant left the room. Record at 300-01. Mrs. GMS did not tell anyone about the incident until February 2004.

Constitutionality of Consensual Sodomy Conviction

In the appellant's first assignment of error, he asserts that his conviction for "adult, consensual sodomy violates his vital interest in liberty and privacy protected by the due process clause of the Fifth Amendment" because his conduct "did not implicate any military-specific interests that would warrant prosecution under Article 125, UCMJ." Appellant's Brief at 3-4. We disagree and decline to grant relief.

We conduct a *de novo* review in determining whether Article 125, UCMJ, as applied to the appellant's conduct in this case, is constitutional. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004). By its terms, Article 125, UCMJ criminalizes sodomy without reference to the issue of consent. *Marcum*, 60 M.J. at 202-03. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court of the United States found a constitutionally-protected liberty interest in consensual sodomy between adults, under some circumstances. In *Marcum*, our superior Court, applied *Lawrence* to the military using a three-part analysis:

First, was the conduct . . . 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?

Marcum, 60 M.J. at 206-07 (internal citation omitted).

In regard to the first and second questions of the *Marcum* tripartite framework, we will assume without deciding that the appellant's conduct falls within the liberty interest identified by the Supreme Court and does not encompass behaviors or factors outside the *Lawrence* analysis.¹ *United States v. Sirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004). In assessing the third question, however, we find that it is appropriate to consider the "military interests of discipline and order" in evaluating the appellant's claim. *Sirewalt*, 60 M.J. at 304.

The appellant was a married service member, who engaged in oral sodomy with the spouse of a deployed service member. The appellant's sexual conduct with the wife of a deployed service member clearly impacts and undermines good order and discipline in the military. Given this impact, the appellant's conduct falls outside the protected liberty interest recognized in *Lawrence* and was appropriately punished as a matter of military discipline under Article 125, UCMJ. Under the facts and circumstances of this case, application of Article 125 to the appellant is constitutional.²

¹ As to the first part of the test, a compelling argument could be made that Mrs. GMS' consent was negated because of her intoxication. However, under the facts presented, we find that there was at least some evidence of consensual sodomy, and the members' verdict of consensual sodomy resolved the question in the appellant's favor.

² We have considered the appellant's second assignment of error and find it to be wholly without merit. The record is replete with evidence of the appellant's knowledge of the "military nexus" element of the lesser included offense of consensual sodomy, and his being afforded an opportunity to defend against it. See Record at 413-28, 455, 478-79, and Appellate Exhibits 8, 17, 18, 19. In addition, the trier of fact in this case, the members, were instructed on the elements of consensual sodomy as a lesser included offense of forcible sodomy, specifically advising them that they "must further be convinced that the facts and circumstances of the sexual conduct concern factors relevant solely to the military environment." Record at 487; Appellate Exhibit 19.

Conclusion

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

Senior Judge GEISER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court