

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BENJAMIN H. HARTMAN
SONAR TECHNICIAN (SUBMARINES) SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200900389
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 April 2009.

Military Judge: CDR William Martin, JAGC, USN.

Convening Authority: Commander, Submarine Group TWO, Naval Submarine Base New London, Groton, CT.

Staff Judge Advocate's Recommendation: LCDR J.L. Marsh, JAGC, USN.

For Appellant: Maj Kirk Sripinyo, USMC.

For Appellee: Maj Elizabeth Harvey, USMC; Capt Jonathan N. Nelson, USMC.

22 June 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

In a summary disposition dated 24 May 2010, the United States Court of Appeals for the Armed Forces set aside our decision of 29 December 2009 and remanded this case for further review consistent with *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999), and the court's order directed our attention to whether it was "reasonably likely" that the third party would have observed the conduct at issue. We invited the appellant to submit a further pleading in an order dated 26 May 2010, but he declined to do so. We will therefore re-analyze this case in

light of *Izquierdo* and the pleadings filed before the Court of Appeals.

In his filing before the Court of Appeals, the appellant maintains that his engaging in homosexual intercourse in the presence of a third party is constitutionally protected activity, reasoning that most forms of what at one time may have been considered sexual deviancy, such as *ménages à trois* and exhibitionism, are now protected under the umbrella of *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court of Appeals did not address the merits of the appellant's petition before it; we do so now.

In our view, the guilty finding by the military judge is wholly consistent with *Izquierdo*, its antecedent *United States v. Berry*, 20 C.M.R. 325 (C.M.A. 1956), and *Lawrence* as that case has been applied in a military context through *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). In *Izquierdo*, for example, the Court of Appeals affirmed an indecent act conviction for intercourse that occurred in the presence of two other persons, even though neither one of them (one asleep, the other shielded by a thin fabric barrier) witnessed the intercourse. The court reminded the parties of its opinion in *Berry* that "[an] act is 'open and notorious,' flagrant, and discrediting to the military service when the participants know that a third person is present." 51 M.J. at 422-23 (citing *Berry*, 20 C.M.R. at 330).

We acknowledge that the correct standard to apply is that of *Berry*. See *Izquierdo*, 51 M.J. at 423; *id.* at 424 (Sullivan, J., concurring). Applying that standard, it is quite evident that the appellant's activity was outside the boundaries of protected activity, as he admitted to having anal sex with a male shipmate in the presence of an uninvolved third party who was sleeping in the room, and he admitted as well that this activity occurred on-base in transient quarters. We are further satisfied, on the record before us, that it is "reasonably likely" that the third Sailor, had he been conscious, would have been in a position to observe the activity between the appellant and Fireman B, as the appellant knew that the third Sailor was in the room and there is no indication that the appellant took any of the steps mentioned in *Izquierdo* to hide his activity.

The appellant's answers to the military judge's providence questions clearly establish that he knew of the presence of a third party. Record at 33-37. Further, the third party was a petty officer assigned to the same command as the appellant and Fireman B. The petty officer was of the same rating -- Machinist's Mate -- as Fireman B, and he knew Fireman B well enough to ask that Sailor's permission to stay the night in Fireman B's room in the on-base transient quarters. *Id.* at 37. The activity, therefore, had a reasonably likelihood of a prejudicial effect within the work center.

To be sure, the Code is not intended to regulate the wholly private moral conduct of an individual, see *Berry*, 20 C.M.R. at 330 (citing *United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952)), and it is a fair reading of *Lawrence* and especially *Marcum* that homosexual activity can be considered "moral conduct" under the Code. Still, the activity involved here is not "wholly private," nor is there any indication that the third person present in the room would have been a willing participant in, or observer of, the activity between the appellant and Fireman B. We therefore reiterate our previous holding that the homosexual sodomy between the appellant and Fireman B that occurred in a transient barracks room aboard Naval Submarine Base Kings Bay, in the presence of a third party, was not constitutionally protected activity.

Conclusion

We incorporate by reference our earlier disposition of the appellant's assignment of error regarding improper sentencing evidence. We likewise incorporate by reference our previous recitation of the facts and adopt, as modified by this opinion, our previous conclusion with respect to the constitutionality of Article 125.

The finding of guilty of consensual sodomy is affirmed. As noted in our earlier opinion, only so much of the sentence as provides for confinement for 30 days, forfeiture of \$1,399.00 pay per month for one month, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

For the Court

R.H. TROIDL
Clerk of Court