

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KENDAL P. HEEREN
YEOMAN SEAMAN (E-3), U.S. NAVY**

**NMCCA 201000509
GENERAL COURT-MARTIAL**

Sentence Adjudged: 1 July 2010.

Military Judge: CAPT Bruce MacKenzie, JAGC, USN.

Convening Authority: Commander, Strategic Communications
Wing 1, Tinker Air Force Base, OK.

Staff Judge Advocate's Recommendation: LT C. Christen,
JAGC, USN.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: Mr. Brian K. Keller, Esq.

30 November 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:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of two specifications of aggravated sexual contact with a child who had attained the age of 12 but who had not attained the age of 16, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The approved sentence included confinement for 14 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant's case was submitted to this court without a specific assignment of error. Upon review, we find that

corrective action is necessary which we will take in our decretal paragraph. Following our corrective action, we conclude that the findings and the 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

In June 2008, the appellant met the 15-year-old victim, K.M.S., via MySpace, an internet social networking website, and thereafter developed a romantic relationship with her, to include sexual intercourse. Their sexual intercourse began in July 2008 and continued until 16 November 2008.¹ The appellant's sexual liaisons with K.M.S. occurred in the barracks on board Tinker Air Force Base, Oklahoma, as well as off base in his private residence in Oklahoma City. The appellant and K.M.S. had sexual intercourse on five occasions in the barracks between July and August 2008, Record at 30, and on approximately five occasions in the appellant's off-base residence between August 2008 and 16 November 2008, *id.* at 33.

Military Judge's Findings

After conducting a thorough providence inquiry, the military judge entered findings by exceptions and substitutions to the two specifications by altering the dates of the offenses, in accordance with the appellant's statements under oath. However, the military judge inadvertently announced the incorrect beginning date for Specification 1 and the incorrect ending date for Specification 2. No prejudice is alleged and we find none.

It is clear from the record that the appellant had sexual intercourse with K.M.S. in his barracks room commencing in July 2008 until some time in August 2008, when he moved off base. Record at 30, 32. After the appellant moved off base to Oklahoma City, he continued his relationship with the underage victim, until she turned 16 years old. *Id.* at 32. We therefore consolidate the two specifications into one specification.

Sentence Reassessment

Having consolidated the two specifications, we conclude that there has not been a drastic change in the penalty landscape. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after carefully considering the entire record, to include the judge's ruling that he considered the two specifications merged for sentencing purposes, we are satisfied beyond a reasonable doubt that the military judge would not have adjudged a sentence less than that approved by the convening

¹ K.M.S. turned 16 years old on 17 November 2008.

authority in this case. Accordingly, no further action is deemed necessary.

Conclusion

Specification 1 of the Charge is amended to read as follows:

"In that Yeoman Seaman Kendal P. Heeren, U.S. Navy, Fleet Air Reconnaissance Squadron 3, on active duty, did, at or near the State of Oklahoma, on divers occasions, from on or about July 2008 to on or about 16 November 2008, engage in a sexual act, to wit: sexual intercourse with Ms. [K.M.S.], who had attained the age of 12 years, but had not attained the age of 16 years."

Specification 2 of the Charge is ordered dismissed. The guilty findings, as modified herein, and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court