

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

**Before
THE COURT EN BANC**

UNITED STATES OF AMERICA

v.

**KOREY L. PETERSON
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900688
GENERAL COURT-MARTIAL**

Sentence Adjudged: 2 July 2009.

Military Judge: Col John Ewers, USMC.

Convening Authority: Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: LtCol R.J. Ashbacher, USMC.

For Appellant: LT Michael Maffei, JAGC, USN.

For Appellee: LT Brian Burgtorf, JAGC, USN.

21 September 2010

OPINION OF THE COURT

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

BOOKER, S.J., delivered the opinion of the court in which CARBERRY, S.J., PRICE, J., PERLAK, J., and FLYNN, J., concur. MAKSYM, S.J., filed an opinion concurring in the result joined by REISMEIER, C.J., MITCHELL, S.J., and PAYTON-O'BRIEN, J.. BEAL, J., filed an opinion concurring in the result.

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of drug distribution, aggravated sexual assault on a substantially incapacitated person, and committing an indecent act with that

same person, violations, respectively, of Articles 112a, 120(c), and 120(k), Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 920(c), and 920(k). The military judge convicted the appellant, consistent with his pleas, of violating a general order, Article 92, UCMJ, 10 U.S.C. § 892. The military judge also found the appellant not guilty of two charged conspiracies in violation of Article 81, UCMJ, 10 U.S.C. § 881. The approved sentence extended to confinement for 28 months, forfeiture of all pay and allowances, and a bad-conduct discharge from the U.S. Marine Corps.

The appellant alleges the following errors: that Article 120, UCMJ, is unconstitutional in certain particulars; that he was denied his right to conflict-free counsel; that his defense team rendered ineffective assistance; that the evidence is factually insufficient to support the conviction for aggravated sexual assault; and that the evidence is factually insufficient to support the conviction for committing an indecent act. We have determined that error materially prejudicial to the substantial rights of the appellant did occur, and we therefore grant relief. Our resolution of some errors will obviate discussion of the others.

Discussion

When we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In order to convict the appellant of the aggravated sexual assault alleged in Specification 1 of Charge II, the Government was required to prove that the victim, Private First Class (PFC) KR, was substantially incapacitated at the time of the incident. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45a(c).

From the record, we can discern that the appellant engaged in sexual intercourse with PFC KR, that around the time of intercourse PFC KR had consumed some quantity of alcoholic beverages and displayed some indicia of impairment, and that PFC KR has imperfect memories of the sexual activity that occurred that night. A statement made by the appellant to the Naval Criminal Investigative Service, admitted against him as Prosecution Exhibits 8 and 9 (respectively a video recording and a transcription of the conversation on the recording), recounts multiple conversations with PFC KR immediately preceding the sexual intercourse in which, in the appellant's estimation, she indicated a clear understanding of the act and a clear willingness to engage in it. He does note, and this is

consistent with other witnesses' testimony, that PFC KR was nauseated from the alcohol, but nausea does not suggest incapacity. She was carrying on voice and text communications on her mobile phone before and after the sexual encounter, and while her colloquists described her as giddy and intoxicated, none said that she was incapacitated, although one witness did say he found PFC KR in the appellant's barracks room lying on a bed and apparently immobilized, a "thousand yard stare" on her face.

The duty noncommissioned officer in the barracks testified that he escorted PFC KR from the appellant's barracks room back to her own, less than 30 minutes after the encounter, but that she did not require any assistance in making the trip. A forensic toxicologist testified that a blood sample collected some six hours after the incident showed an undetectable level of alcohol, and urine collected showed no evidence of drugs. The presence of alcohol in the urine meant, in the expert's opinion, only that PFC KR had consumed alcohol at some point. When given a hypothetical question of the correlation between the alcohol level in the blood and the amount supposed to have been consumed by PFC KR, the expert stated he would have expected to see a level "much higher than our cutoff" for "undetectable".

Mindful that the military judge saw and heard the witnesses and acknowledging this is a close case, we are not ourselves convinced beyond a reasonable doubt that PFC KR was substantially incapacitated. We will set aside the finding of guilty to Specification 1 of Additional Charge II and dismiss that specification in our decretal paragraph.

In order to convict the appellant of committing an indecent act, the Government was required to show that the appellant engaged in certain conduct and that the conduct was indecent. MCM, Part IV, ¶ 45a(k). "Indecent conduct" is defined as a form of immorality relating to sexual impurity . . . [that] includes . . . making . . . reproduced visual material, without another person's consent . . . of that other person while engaged in a sexual act *Id.* at ¶ 45a(t)(12). The record is devoid of any evidence showing lack of consent on the part of PFC KR to her appearance in the photos allegedly showing her and the appellant engaged in sexual intercourse, photos which we note were not introduced at trial and which, according to the only witness to see them, did not show participants' faces. As we are not convinced of the appellant's guilt of this offense, we will set aside the finding of guilty to Specification 2 of Additional Charge II and dismiss that specification in our decretal paragraph as well.

Conclusion

The guilty findings to Additional Charge II and its underlying specifications are set aside, and that charge and its underlying specifications are dismissed. Our action with respect to Additional Charge II and its two specifications renders moot the appellant's first three assignments of error. The remaining findings of guilty are affirmed. The sentence is set aside.

A rehearing on sentence may be ordered with respect to the two offenses of which the appellant now stands convicted. The record of trial is returned to the Judge Advocate General for transmission to an appropriate convening authority for the rehearing on sentence. After that rehearing, the record will be returned to this court. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

Senior Judge CARBERRY, Judge PRICE, Judge PERLAK, and Judge FLYNN concur.

MAKSYM, Senior Judge (concurring in the result):

While I concur with the majority by way of remedy, I write separately relative to the dismissal of the aggravated sexual assault charge due to factual insufficiency. This was an extremely close case, the result of which is mandated by the absence of evidence. This court is bound by the record that lies before it. It cannot speculate beyond the four corners of that record. *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003).

The prosecution bears the burden of proof. In this case, for whatever reason, the Government did not call an expert witness to rebut the uncontroverted expert testimony advanced by the defense relative to the amount of alcohol consumed by and the impact of alcohol on the alleged victim, nor did they elicit sufficient concessions from the expert to undermine the conclusions he offered the court. Moreover, while I viewed with great import the testimony of Private (Pvt) Hansen -- arguably the most important Government witness when faced with the reality that the alleged victim recalls so very little about her ordeal -- his testimony was problematic. Pvt Hansen testified that he entered the barracks room in question and observed the alleged victim lying stripped on the bed, partially covered by a blanket, armed with "a thousand yard stare". According to Pvt Hansen, she was not blinking and presented absolutely no movement. Pvt Hansen testified that he became so concerned that

he shook the alleged victim by the jaw, and after realizing no response, checked her pulse. He testified that the appellant and Private First Class Lamb appeared nervous and were perspiring. He then freely admitted that he left the room, but rather than reporting the incident at once, waited 20 minutes to report the incident to anyone. In fact, he testified that he smoked a cigarette, chatted with his sister on the phone, and, after leaving what he described as a near-catatonic victim alone with two suspicious characters for 20 minutes, only then did he place an anonymous note at the duty desk requesting that someone look into what was happening in the barracks room in question.

On its face, Pvt Hansen's testimony was both compelling and problematic. However, on cross-examination Pvt Hansen's credibility and indeed his capacity to testify is fatally undermined when he admits that he had used illegal narcotics on the date in question. The transcript of the cross-examination of this witness is somewhat incongruous in that Pvt Hansen admits to drug use on the date in question only to be asked a contextually strange follow up question:

DC: Were you on drugs that night?

W: Yes.

DC: But [you] have done drugs?

W: Yes.

Record at 211.

Contextually, this exchange is very unusual. I note that there is no effort to rehabilitate the witness on re-direct examination relative to drug abuse on the date of the alleged assault and no inquiry regarding this issue by the military judge. While I suspect this may represent a stenographer's error, this is an authenticated record and the court may not speculate beyond the four corners of same.

However, even if Pvt Hansen was not then under the influence, his observations of a victim who could not be readily awakened were contradicted by the testimony of the duty noncommissioned officer in the barracks who testified that the victim was awakened by a "normal" shake one might use to arouse a sleeping person, that she seemed "wobbly" but coherent, and was able to put her shoes on from a standing position.

I also note that the Government failed to call Pvt Cates as a witness minus any apparent explanation. Pvt Cates was in the

room during the alleged assaults and was apparently blithely typing on his computer. He was, in fact, the person who told Pvt Hansen that there was sex occurring in the room in question. Yet he is not called by either party to tell us what he knew.

I am mindful that during my review of the record, I must recognize that the trial court saw and heard the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). However, this record presents a rare factual scenario where I can accept the testimony of all of the witnesses at face value yet still find a reasonable doubt as to guilt. The victim recalls little to nothing, and understandably considers the events as rape. The victim was clearly drinking, and was obviously intoxicated. Pvt Hansen viewed the victim in a non-responsive state. Shortly thereafter, the duty noncommissioned officer in the barracks easily awakened the victim and viewed her in a coherent state. Scientific testimony suggested that the victim may have suffered a blackout, but was unlikely intoxicated to the point of losing substantial capacity. On these facts, there is a reasonable doubt as to whether, at the time of the alleged sexual assault and indecent act, the victim was substantially incapacitated, or intoxicated to a lesser extent but clearly in a blackout state. Without testimony from an expert to testify to the contrary or some corroboration as to whether, at the time of the assault, the victim was in a state described by Pvt Hansen or in one described by the duty noncommissioned officer in the barracks, I am left in doubt.

Finally, from a statutory perspective, the United States must prevail upon the court by way of proof in illustrating beyond any reasonable doubt that the alleged victim was substantially incapacitated by alcohol or any other substance during the very short time frame in question. Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). I would note that military jurisprudence relative to the application of what does and does not constitute substantial incapacitation is far from well-developed. The Government's position is badly compromised by the absence of conventional and expert testimony.

I suspect that the court is presented with more than merely an alleged victim in this case. Concluding that there is a reasonable doubt is not the same as concluding no crime occurred. However, while I may have grave suspicion as to the existence of heinous crime, suspicion does not satisfy the Government's heavy burden of proof beyond any reasonable doubt.

Chief Judge REISMEIER, Senior Judge MITCHELL, and Judge
PAYTON-O'BRIEN joining

BEAL, Judge (concurring in the result):

I would set aside the conviction for aggravated sexual
assault alleged under Charge II for the reasons stated in my
dissent to *United States v. Medina*, 68 M.J. 587, 596
(N.M.Ct.Crim.App. 2009), *rev. granted*, ___ M.J. ___ (C.A.A.F. Mar.
30, 2010). I concur with the majority opinion in all other
respects.

For the Court

R.H. TROIDL
Clerk of Court