

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

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

UNITED STATES OF AMERICA

v.

**LUCAS P. RANGEL
MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100094
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 December 2010.

Military Judge: CAPT Carole Gaasch, JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: CDR T.F. De Alicante,
JAGC, USN.

For Appellant: Capt Michael D. Berry, USMC.

For Appellee: Capt Paul M. Ervasti, USMC.

23 June 2011

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as general court-martial convicted the appellant, pursuant to his pleas, of abusive sexual contact in violation of Article 120(h), Uniform Code of Military Justice, 10 U.S.C. §920(h). The approved sentence included confinement for two years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a bad-conduct discharge.

The appellant raises a single assignment of error on appeal: that Article 120 is facially unconstitutional and his conviction should be overturned. We have carefully examined the record of trial and the pleadings of the parties, and 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Constitutionality of Article 120

The appellant cites *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011), in support of his argument that Article 120 is facially invalid. The appellant argues that Article 120 impermissibly shifts the burden to an accused who offers the affirmative defense of consent to disprove an element of the offense. The appellant maintains that the burden shift constitutes a Due Process violation, and because one cannot be convicted by an unconstitutional law, the appellant's guilty plea is a nullity.

In light of the facts of this case, the holding in *Prather* is not dispositive. Although the court in *Prather* analyzed the shifting burdens where the appellant raised an affirmative defense, as found in Article 120(t)(16), UCMJ, and held that the statutory interplay among Article 120(c)(2), UCMJ, Article 120(t)(14), UCMJ, and Article 120(t)(16), UCMJ, resulted in a unconstitutional burden shift to an appellant, this is not the case before us. The court specifically held that *under the circumstances presented* in that case, where the appellant was required to prove the affirmative defense of consent, the burden shifted to the defense to disprove an essential element of the offense. 69 M.J. at 343. Notably, the court in *Prather* did not find Article 120, on its face, unconstitutional.

Unlike *Prather*, there was no burden shift in this case; no statutory interplay of the sort leading to the decision in *Prather*; no Due Process violation; and no faulty or insufficient instructions from the military judge. In *Prather*, the appellant pled not guilty and raised the affirmative defense of consent to a charge of aggravated sexual assault by engaging in sexual intercourse with a person who was substantially incapacitated. Here, the appellant pled guilty and admitted in his stipulation of fact, Prosecution Exhibit 1, and to the military judge during the providence inquiry that he removed the pants of another Sailor and sexually assaulted the Sailor while he slept. The appellant admitted that his victim was soundly asleep, that the victim never said or did anything that would lead the appellant to believe that he wanted the appellant to touch him, and the appellant repeatedly disavowed the existence of consent and mistake of fact as to consent. Record 121-24. The holding in *Prather* is not applicable to these facts.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court