

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARIO SERNA
AVIATION MACHINIST'S MATE (E-4), U.S. NAVY**

**NMCCA 201000272
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 December 2009.

Military Judge: CDR Bethany Payton-O'Brien, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR D.C. King, JAGC, USN.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: Maj William Kirby, USMC.

5 May 2011

OPINION OF THE COURT

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

BEAL, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of sodomy with a child under the age of 12 and indecent acts with a child in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced by officer members to 14 years confinement and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The appellant's sole assigned error is that the military judge failed to resolve a factual inconsistency set up by the appellant during the providence inquiry and thereby abused her discretion by accepting the appellant's guilty plea for sodomy with a child under the age of 12. The Government concedes the victim was over 12 at the time of the offense, and argues we should find the appellant guilty of sodomy with a child who had attained the age of 12, but was under the age of 16, as a lesser included offense. Following our corrective action, we find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

Background

The original language of the sodomy specification alleged the appellant committed sodomy with EA, a child under the age of 12, "on divers occasions" between 1 July 2004 and 22 April 2006. The appellant pled guilty except for the words "on divers occasions" and admitted to only one instance of sodomy with EA. Record at 304-07. At the outset of the providence inquiry the appellant affirmed the incident occurred within the period charged in the specification and that his step-daughter was under the age of 12 at the time of the offense. *Id.* at 304. The appellant also entered into a stipulation of fact which included the statement, "One time when [EA] was almost twelve years old I again performed cunnilingus and fellatio upon [EA]." ¹ Prosecution Exhibit 2 at 2. The stipulation also specifically stated that EA "was under 12 years old at the time." At one point during the providence inquiry when the military judge attempted to identify the actual date of the offense, the appellant stated the incident occurred sometime in July 2006, a period of time that occurred 10 - 14 weeks after EA's 12th birthday (22 April 2006).² Record at 305. The military judge did not reconcile the appellant's statements that his step-daughter was age 11 at the time of the offense and that the offense occurred in July 2006. Instead, she elicited from the appellant that he did not know his step-daughter's birthday but he was nonetheless convinced that she was 11 years old at the time of the offense. Record at 305, 309, 312. Two additional items of evidence were admitted during the presentencing hearing that also contradicted the appellant's statement that the incident occurred when EA was 11 years old. First, EA testified for the Government that the last act occurred "a month before

¹ The appellant also stipulated to committing sodomy with EA on approximately three occasions before he enlisted in the Navy when EA was between 4 to 10 years old. Prosecution Exhibit 2; Record at 300.

² The military judge was reasonably placed on notice of EA's birth date. Months before the guilty plea, the trial counsel informed the court that the victim's birth date was 22 April 1994. Record at 48. Furthermore, the military judge reviewed *in camera* several of EA's medical records which indicated the same date of birth. Appellate Exhibits LIV and LVI-LVIII.

June 12th" a timeframe also occurring a week or two after EA's 12th birthday. *Id.* at 461. Additionally, the appellant offered Defense Exhibit H, a psychological evaluation, which indicated that EA was 14 years old at the time of the last incident. Notwithstanding these inconsistencies, the military judge did not re-open the providence inquiry.

Providence of the Plea

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea we review *de novo*. *United States v. Edwards*, 69 M.J. 375, 376 (C.A.A.F. 2011). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id.* (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). If the facts elicited make out each element of the offense, a guilty plea will be found provident. *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). However, if an accused "sets up matter inconsistent with the plea," the military judge has a duty to resolve the inconsistency or reject the plea. *Garcia*, 44 M.J. at 498 (quoting Article 45(a), UCMJ).

In this case, the appellant set up matters inconsistent with his plea to committing sodomy of a child under the age of 12 when he stated he committed the offense during a period occurring after the victim's 12th birthday. Furthermore, the admission into evidence of Defense Exhibit H was additional matter inconsistent with the plea because it indicated (incorrectly) that the victim was 14 years old at the time of the offense. Accordingly, the military judge had a duty to resolve the inconsistencies but did not. Rather than reconcile the inconsistency between the appellant's timing of the event with the alleged victim's age, the military judge merely reaffirmed the appellant's belief that EA was 11 years old at the time of the offense; there was no resolution of the inconsistencies between when the incident occurred and the age of the victim at the time of the incident. Because the military judge did not resolve the inconsistency, she had a duty to reject the plea; it was an abuse of discretion to accept the appellant's plea of guilty to sodomy with a child under the age of 12. The question we are now faced with is whether we can affirm a finding of guilty to sodomy with a child over the age of 12 and less than the age of 16. We conclude that we can.

Lesser Included Offense

When analyzing the offenses codified by Congress under the UCMJ, the courts have treated the President's analysis as persuasive but not binding. *United States v. Miller*, 47 M.J. 352, 356 (C.A.A.F. 1997) (citing *United States v. Gonzalez*, 42

M.J. 469, 474 (C.A.A.F. 1995). As a result, the substantive criminal law, including the elements of the punitive articles, is defined by Congress, and the President does not have the authority to change the elements of an offense. *United States v. Zachary*, 61 M.J. 663, 667 (Army Ct.Crim.App. 2005) (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)), *aff'd*, 63 M.J. 438 (C.A.A.F. 2006). This principle, however, does not affect the President's ability to create the maximum punishment for offenses under the UCMJ, in addition to establishing what aggravating circumstances might increase the punishment. Article 56, UCMJ; *Zachary*, 61 M.J. at 669.

Article 125, UCMJ, states "Any person . . . who engages in unnatural carnal copulation with another person of the same or opposite sex . . . is guilty of sodomy." In addition to the statutory element of this offense, the President promulgated the following facts as potential aggravating elements of the offense: (a) that the act was done with a child under the age of 12[; or] (b) that the act was done with a child who had attained the age of 12 but was under the age of 16[; or], (c) that the act was done by force and without the consent of the other person. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 51b.

Despite being listed under the "elements" section in the MCM, we conclude that in a sodomy case, the age of a victim is not a statutory element of the offense, but an aggravating circumstance which must be pleaded in the specification. *United States v. Whitner*, 51 M.J. 457, 458 n.1 (C.A.A.F. 1999) ("Consent is not an element of a sodomy offense. . . . Lack of consent, however, does authorize a more severe punishment."); *United States v. Thomas*, 45 M.J. 661, 664 n.4 (Army Ct.Crim.App. 1997) (deciding mistake of fact as to age is not a defense because an accused's state of mind as to age is irrelevant and is a "sentence-increasing circumstance[], [but] not [a] statutory element[]). *But see United States v. Wilson*, 66 M.J. 39, 51 (C.A.A.F. 2008) (Baker, J., dissenting) (arguing age is an element of sodomy according to the MCM, and not merely a "sentence enhancer"). Our analysis below relies on the principle that there is only one statutory element to sodomy under Article 125, UCMJ, and age is an aggravating circumstance created by the President to "establish a graduated punishment scheme." *Zachary*, 61 M.J. at 669.

We therefore turn to our review of whether there is a sufficient factual basis to affirm a conviction for sodomy with a child between the ages of 12 and 16. We note that the class of victims aged under 12 years old is a sub-set of victims aged under 16 years old. Other than the appellant's statement that the incident occurred in July of 2006, no specific facts were elicited during the providence inquiry to establish that EA was between 12 and 16 at the time of the offense. However, we are permitted to look to the record as a whole in evaluating the factual basis for his plea and are not limited to considering only the appellant's statements. *See United States v. Jordan*, 57

M.J. 236, 239 (C.A.A.F. 2002). We consider EA's various medical records, all of which record her date of birth to be 22 April 1994, to be reliable evidence of her age.

A thorough review of the record shows the appellant provided a sufficient factual basis to meet the sole statutory element of sodomy under Article 125, UCMJ. He clearly admitted that he voluntarily allowed EA to take his condom-clad penis into her mouth. Record at 304-07. The appellant's plea was ambiguous only as to the aggravating circumstance of EA's age at the time the offense. While the appellant steadfastly maintained EA was under the age of 12 at the time of the offense, EA would have been a few weeks older than 12 if the offense was committed in July 2006. Regardless, what remains crystal clear is that the appellant committed sodomy with a child under the age of 16.

Due to the military judge's error, the appellant requests that we set aside his conviction for sodomy under Charge II. Appellant's Brief of 27 Aug 2010 at 5. We need not, however, dismiss the conviction in its entirety, and may affirm a guilty finding to the extent it is correct in law and fact based on our review of the entire record. Art. 66(c), UCMJ. Our discussion above demonstrates there is a sufficient factual basis in the record as a whole to find the appellant guilty of sodomy under the less aggravating circumstance that EA had attained the age of 12 but was under the age of 16. Therefore, we affirm the finding of guilty to the sole specification of Charge II, except for the words "under the age of 12," substituting therefor the words "who had attained the age of 12 but was under the age of 16."

Sentence Reassessment

If we can determine a sentence would have been at least of a certain magnitude, then we may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). Our conclusion about the sentence that would have been imposed must be made with confidence, and a "dramatic change in the penalty landscape" gravitates away from our ability to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006).

Notwithstanding the effect our corrective action has on the maximum imposable sentence,³ we find under the circumstances of this case that the sentencing landscape has remained virtually unchanged. Rather than EA being just shy of age 12, she was just over age 12. During the presentencing hearing, EA testified that the appellant, her step-father, started to sexually abuse her when she was four or five years old and the abuse continued regularly through the years. Accordingly, we are convinced that the sentence adjudged would be at least as severe had the members

³ The maximum authorized confinement is reduced from life without possibility of parole to 27 years.

sentenced on the appropriate aggravating circumstance. *See Doss*, 57 M.J. at 185.

Conclusion

The finding of guilty to Charge II is affirmed. The finding of guilty to its sole specification is affirmed except for the words "under the age of 12," substituting therefor the words "who had attained the age of 12 but was under the age of 16." The findings of the Additional Charge and its sole specification are affirmed. The sentence approved by the convening authority is affirmed.

Chief Judge REISMEIER and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court