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

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

UNITED STATES OF AMERICA

v.

ERIC R. CASTRO
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200027
GENERAL COURT-MARTIAL

Sentence Adjudged: 30 September 2011.
Military Judge: LtCol David Jones, USMC.
Convening Authority: Commanding General, Marine Corps Base Camp Smedley D. Butler, MCAS, Iwakuni, Japan.
Staff Judge Advocate's Recommendation: Col W.G. Perez, USMC.
For Appellant: LT Kevin Quencer, JAGC, USN.
For Appellee: CAPT Martin Grover, JAGC, USN; Capt David Roberts, USMC.

26 June 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of assault consummated by a battery upon a child under the age of 16 years and one specification of drunk and disorderly conduct in violation of Articles 128 and 134, Uniform

Code of Military Justice, 10 U.S.C. §§ 928 and 934.[1] Members with enlisted representation sentenced the appellant to twelve months confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. The appellant raises a single assignment of error: that the specification alleging assault consummated by a battery upon a child under the age of 16 years fails to state an offense as Congress did not intend that Article 128, UCMJ, include the crime of battery.

We have examined the record of trial, the appellant's assignment of error, and the pleadings of the parties. 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.

Analysis

We recently addressed this argument in *United States v. Weller*, No. 201100043, 2012 CCA LEXIS 154, unpublished op. (N.M.Ct.Crim.App. 30 Apr 2012).[2] In *Weller*, as in this case, the appellant argued that Congress did not intend to include assault

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[1] Charge I originally contained four specifications of assault under Article 128, UCMJ. Prior to trial, the Government withdrew and dismissed Specification 1. Record at 20; Appellate Exhibit IX. At trial, the appellant pleaded guilty to the three remaining specifications. Following the providence inquiry and prior to entering findings, the military judge merged Specifications 3 and 4 with Specification 2 for unreasonable multiplication of charges. Record at 34. After announcing the additional language from Specifications 3 and 4 that was added to Specification 2, the military judge stated "[s]o that would be the new Specification 2. There will be no Specifications 3 and 4." *Id*. Following the providence inquiry, the military judge entered guilty findings as to the sole remaining specification --Specification 2-- under Charge I and the sole specification under Charge II. *Id.* at 80. The military judge clearly intended to dismiss Specifications 3 and 4 of Charge I, but did not expressly announce dismissal on the record. We note that the convening authority's action (CAA) incorrectly lists the appellant's pleas to Specifications 1, 3, and 4 of Charge I as not guilty. General Court-Martial Order No. 11-2011 of 5 Jan 12 at 1. In addition, the CAA incorrectly lists the findings for Specifications 3 and 4 of Charge I as not guilty. We discern no prejudice to the appellant from these errors and will order corrective action in our decretal paragraph.

[2] In *Weller*, the appellant argued that his conviction for assault with a deadly weapon was legally insufficient. In the case at bar, the appellant argues that the specification alleging assault consummated by a battery upon a child under the age of 16 years fails to state an offense. Although couched under different theories, the underlying argument is the same;

by a battery under Article 128, UCMJ, rather only assault by attempt or assault by offer. Concomitantly, the appellant here argues that the Article 128 specification fails to state an offense since it does not allege either an attempt or offer to do bodily harm.[3] Appellant's Brief of 29 Mar 2012 at 7. In adopting his interpretation of the statute, he urges us to read Congress' failure to explicitly reference battery in the statute as evidence that "Congress specifically excluded any [battery] as separate from the act they criminalized, assault by attempt or offer." *Id*. As authority, he cites Judge Wiss' concurring opinion in *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993).

We are not persuaded by the appellant's argument and conclude, as we did in *Weller*, that Article 128, UCMJ contemplates assault by attempt, offer or by battery. First, we note the historical precedent for this proposition as established in *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963) and later reaffirmed in *Joseph*.[4] Second, the elements for the crime of assault consummated by a battery upon a child under the age of 16 years as outlined in the Manual specifically include the element of a battery. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54b(3)(c). And while the elements of this particular offense derive from the President's rulemaking authority and not the actual text of the statute, they still are given considerable persuasive authority. *See United States v. Miller*, 67 M.J. 87, 89 (C.A.A.F. 2008). Therefore, we decline to adopt the statutory interpretation

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namely, that Article 128, UCMJ, does not include the crime of battery.

[3] The specification as originally pleaded states the following: "In that [the appellant] did, on board Marine Corps Air Station Iwakuni, Japan, on or about 14 December 2010, unlawfully strike [CMC], a child under the age of 16 years, on the lower back, right torso, and buttocks with a plastic coat hanger.

[4] In *Joseph*, Judge Cox reasoned that every battery by its very nature includes an assault, therefore one way to prove assault was to prove a battery. *Joseph*, 37 M.J. at 395. We disagree with the appellant's argument that the words "whether or not the attempt or offer is consummated" in the statute exclude battery as an underlying theory of assault. In construing the text of Article 128, we give the statute its plain meaning. *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citation omitted). We also assume that Congress meant what it said. *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006). If this clause, as the appellant argues, was intended to exclude battery as an underlying theory, then Congress would have used terms of exclusivity, such as 'unless' or 'except' ". . . in cases where the attempt or offer is consummated". By including this clause, however, we believe Congress specifically intended the statute to include an assault by offer, assault by attempt and, in cases where bodily harm is inflicted, assault by battery.

urged by the appellant. We conclude that Article 128(a), UCMJ includes "assault by battery" as an element of assault and the specification under Charge I states an offense.

Conclusion

The findings as announced by the military judge and the sentence as approved by the convening authority are affirmed. The supplemental court-martial order will reflect no plea was entered as to Specification 1 of Charge I and that the pleas to Specifications 3 and 4 of Charge I were Guilty, and that Specifications 3 and 4 of Charge I are dismissed.

For the Court

R.H. TROIDL
Clerk of Court