

Thursday, 20 July 2017 (1000)
U.S. Navy-Marine Corps Court of Criminal Appeals Courtroom
Washington Navy Yard
1254 Charles Morris Street SE, Washington, DC 20374

United States v. Motsenbocker, NMCCA No. 201600285

Before Panel 2 of the Court: Senior Judge Campbell
Judge Fulton
Judge Hutchison

For Appellant: CDR Donald Ostrom, JAGC, USN

For Appellee: Maj Kelli O'Neil, USMC

A panel of officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of abusive sexual conduct and one specification of sexual assault, each in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The members sentenced the appellant to confinement for six months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged and ordered it executed.

The issues to be argued before the Court are as follows:

- I. **THE GOVERNMENT IS REQUIRED TO PROVIDE FAIR NOTICE OF THE CHARGE AN ACCUSED MUST DEFEND AGAINST. HERE, THE GOVERNMENT CHARGED THE CASE AS A VIOLATION OF ARTICLE 120(B)(1)(B), UCMJ, BUT ARGUED A THEORY OF LIABILITY UNDER ARTICLE 120(B)(3)(A), UCMJ. WAS THIS A FAILURE OF FAIR NOTICE?**
- II. **THE MILITARY JUDGE IS REQUIRED TO PROVIDE ACCURATE INSTRUCTIONS TO MEMBERS. HERE, THE MILITARY JUDGE INSTRUCTED MEMBERS ON CONSENT FOR ARTICLES 120(B)(1)(B) AND 120(D) , UCMJ, USING DEFINITIONS FOR CONSENT IN RELATION TO THE ARTICLE 120(B)(3)(A) , UCMJ, INCAPACITY ELEMENT. WAS THIS INSTRUCTIONAL ERROR BY THE MILITARY JUDGE?**
- III. **TRIAL COUNSEL MAY NOT MAKE IMPROPER ARGUMENT TO THE MEMBERS. TRIAL COUNSEL ARGUED THE NEED TO RELY ON BYSTANDER INTERVENTION AND NAVY TRAINING ON SEXUAL ASSAULT CONTRARY TO THE MILITARY JUDGE'S PRELIMINARY INSTRUCTION. ADDITIONALLY, TRIAL COUNSEL REPEATEDLY CALLED THE**

APPELLANT A LIAR, BOLSTERED THE ALLEGED VICTIM'S TESTIMONY, MISCHARACTERIZED EVIDENCE, INSERTED PERSONAL OPINION IN THE ARGUMENT AND SHIFTED THE BURDEN TO DEFENSE. WAS THIS PROSECUTORIAL MISCONDUCT?

- IV. TRIAL COUNSEL MAY NOT MAKE IMPROPER ARGUMENT. TRIAL COUNSEL ARGUED A THEORY OF LIABILITY THAT THE ACCUSED WAS NOT CHARGED WITH. HE DID THIS BY PROPERLY ARGUING THE VICTIM HAD CAPACITY TO CONSENT UNDER THE CHARGED OFFENSES OF ARTICLES 120(B)(1)(B) , AND 120(D), UCMJ, WHILE ALSO IMPROPERLY ARGUING THAT THE VICTIM DID NOT HAVE THE CAPACITY TO CONSENT UNDER AN UNCHARGED OFFENSE OF ARTICLE 120(B)(3)(A), UCMJ. WAS THIS PROSECUTORIAL MISCONDUCT?**