

Thursday, 17 October 2013

1000

United States v. Payne

**Before Panel 3 of the Court: Chief Judge Modzelewski
Senior Judge Mitchell
Judge Price**

For Appellant: Capt Peters, USMC

For Appellee: LT Reutlinger, USN

The appellant entered mixed pleas at a general court-martial consisting of members with enlisted representation. He was convicted, pursuant to his pleas, of one specification of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907 (2008). Contrary to his pleas, members convicted the appellant of one specification of sexual assault on a person who was substantially incapacitated in violation of Article 120, UCMJ, 10 U.S.C. §920 (2008). Cryptologic Technician Third Class Payne was sentenced to two years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and except for the dishonorable discharge ordered it executed.

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

- I. **DUE PROCESS REQUIRES A MILITARY JUDGE TO INSTRUCT MEMBERS ON CONSENT WHEN "SOME EVIDENCE" OF CONSENT IS RAISED AT TRIAL. HERE, DURING CROSS-EXAMINATION, THE ALLEGED VICTIM TESTIFIED THAT IT WAS POSSIBLE SHE AND APPELLANT HAD CONSENSUAL SEX. BUT THE MILITARY JUDGE REJECTED APPELLANT'S REQUEST TO INSTRUCT THE MEMBERS ON CONSENT. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY FAILING TO INSTRUCT THE MEMBERS ON CONSENT RESULTING IN AN IMPROPERLY INSTRUCTED PANEL?**

- II. **APPELLANT WAS ACQUITTED OF ASSAULT CONSUMATED BY BATTERY. AT A LATER COURT-MARTIAL FOR SEXUAL ASSAULT, THE SAME MILITARY JUDGE WHO PRESIDED OVER APPELLANT'S FIRST COURT-MARTIAL RULED THAT M.R.E. 413 PERMITTED THE GOVERNMENT TO CALL THE ALLEGED VICTIM**

FROM THE FIRST COURT-MARTIAL TO TESTIFY AGAINST
APPELLANT. DID THE MILITARY JUDGE ABUSE HIS
DISCRETION BY ALLOWING THE ALLEGED VICTIM OF THE
FIRST COURT-MARTIAL TO TESTIFY REGARDING THE FACTS
UNDERLYING APPELLANT'S ACQUITTAL?