

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

C.A. PRICE

M.J. SUSZAN

J.L. FALVEY

UNITED STATES

v.

**Bradley A. STORY
Aviation Electronics Technician Airman (E-3), U.S. Navy**

NMCCA 200301271

Decided 19 April 2004

Sentence adjudged 7 December 2001. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Carrier Group THREE, Naples, Italy.

CDR JEFFREY MCCRAY, JAGC, USNR, Appellate Defense Counsel
Maj J. ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR ROBERT TAISHOFF, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FALVEY, Judge:

Pursuant to his pleas, the appellant was convicted of conspiracy to commit rape and forcible sodomy, rape, forcible sodomy, indecent assault, and indecent acts, in violation of Articles 81, 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 920, 925, and 934. A military judge sitting as a general court-martial sentenced the appellant to confinement for 10 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but suspended execution of confinement in excess of five years for a period of 60 months from the date sentence was announced pursuant to a pretrial agreement.

The appellant's case was submitted on its merits without any specific assignments of error for review pursuant to Article 66, UCMJ.

We have carefully considered the record of trial and conclude that, with one exception, the findings are correct in

law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. We further conclude, however, that the military judge erred in accepting a guilty plea to indecent assault because he failed to explain the elements of this offense, but rather explained the elements of a lesser included offense, indecent acts with another. It is to this offense, indecent acts, to which the appellant providently pled and we approve a finding of guilty to this lesser included offense of indecent acts pursuant to Article 59(b), UCMJ. Finally, we have reassessed and affirm the sentence as approved by the convening authority.

Background

After the appellant was sworn, the military judge ascertained that there was a stipulation of fact to assist him in conducting the providence inquiry. Upon determining that the appellant voluntarily and knowingly entered into the stipulation of fact and agreed to its use, the military judge explained the elements of the crimes charged. Regarding Charge IV, Specification 1, which alleges an indecent assault, the military judge erroneously explained the elements of indecent acts with another. In so doing, the military judge failed to define assault, failed to explain that the offense could only be committed against someone other than one's spouse, and failed to explain the required specific intent to gratify one's sexual desires.

The military judge then questioned the appellant about the facts of the offenses. Review of the providence inquiry colloquy reveals that the military judge continued to confuse indecent assault with indecent acts and asked questions of the appellant more appropriate to an inquiry into the factual basis for indecent acts rather than the charged offense of indecent assault. The military judge did, however, ask the appellant if the victim was his wife at the time of the assault/acts to which the appellant admitted she was not. Moreover, the appellant volunteered in response to a question regarding why he had engaged in the assault/acts that he did so to gratify his sexual desires.

In the stipulation of fact, the appellant admitted to "committing an indecent assault" on the victim. Further review of the stipulation of fact fails to demonstrate that the appellant was fully aware of the elements of the indecent assault that he admitted to committing.

Discussion

Our review of the charge sheet, pretrial agreement, providence inquiry colloquy, and stipulation of fact leads us to conclude that the appellant fully intended to enter a guilty plea to indecent assault. However, the military judge erroneously instructed the appellant on the elements of indecent acts and

then conducted an inquiry into the factual basis for a plea to this offense instead of the charged offense. Thus, the question before us is whether this error renders the appellant's plea improvident.

In conducting a providence inquiry under the Uniform Code of Military Justice, the military judge must explain the elements of the offense. If the military judge fails to do so, he commits reversible error unless the entire record clearly shows that the appellant knew the elements, freely admitted that those elements were true, and pleaded guilty because he was, in fact, guilty. *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003) (citing *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)). "Rather than focusing on a technical listing of the elements of an offense, this court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *Id.*

In this case, the military judge erred by failing to explain the elements of indecent assault. Under the Manual for Courts-Martial, the elements of indecent assault are:

- (1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
- (2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) Part IV ¶ 63b.

Instead, the military judge explained the elements of indecent acts with another. The elements of indecent acts with another are:

- (1) That the accused committed a certain wrongful act with a certain person;
- (2) That the act was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV ¶ 90b.

Although indecent assault and indecent acts are both violations of Article 134, UCMJ, and indecent acts is a lesser included offense of indecent assault, MCM, Part IV ¶ 63d(2), the two offenses require explanation of different elements and definitions. Review of the context of the complete record of trial leads us to conclude that the appellant was not fully aware of the elements of the charged offense, and we are reluctant to

attribute adequate awareness where the military judge has failed to fully explain the elements of indecent assault. Without an explanation of the nature and definition of assault and the specific intent required of an indecent assault, the appellant was not adequately informed of two critical elements of an offense.

Conclusion

Because the record before us does not evidence, either explicitly or inferentially, that the appellant understood the nature of assault and the specific intent required for his acts to constitute an indecent assault, we conclude that the appellant's plea of guilty to indecent assault is improvident. Accordingly, we affirm a finding of guilty of the offense of indecent acts with another as a lesser included offense of indecent assault charged under Charge IV, Specification 1. The finding of guilty of indecent assault is set aside. The remaining findings are affirmed. We have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) and conclude that the sentence as approved by the convening authority is both appropriate and free of any potential prejudice caused by the trial error. Accordingly, the sentence, as approved by the convening authority, is affirmed.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court