

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

**Before  
W.L. RITTER, J.F. FELTHAM, E.S. WHITE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**SEAN D. HABIAN  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200600753  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 5 November 2004.

**Military Judge:** LtCol John Schum, USMC.

**Convening Authority:** Commander, Marine Corps Base Hawaii,  
Kaneohe Bay, HI.

**Staff Judge Advocate's Recommendation:** LtCol J.F. Havranek,  
USMC.

**For Appellant:** Maj Brian Jackson, USMC.

**For Appellee:** LT Justin Dunlap, JAGC, USN.

**18 September 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

RITTER, Chief Judge:

The appellant was tried by a general court-martial composed of officer members.<sup>1</sup> Contrary to his pleas, the appellant was convicted of violating a lawful general regulation (fraternization), sodomy, and indecent acts. His offenses violated Articles 92, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, and 934. The appellant was sentenced to confinement for 3 years, total forfeitures,

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<sup>1</sup> At an earlier proceeding, similar charges were dismissed without prejudice by the same military judge who presided over this case, based on a defense motion alleging improper referral. The previous proceedings are contained in the record, as volumes I and II.

reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence, except with regard to forfeitures. Pursuant to a post-trial agreement, the convening authority suspended adjudged forfeitures for a period of six months, which were then remitted without further action. He also agreed to defer and waive automatic forfeitures for six months. In an act of clemency, the convening authority also suspended confinement in excess of 28 months.

The appellant contends: (1) his conviction for nonforcible sodomy violates his constitutional right to privacy; (2) the charges of sodomy and violating a lawful general regulation were multiplicitious in his case; (3) the same charges and specifications constituted an unreasonable multiplication of charges; (4) the military judge committed prejudicial error by admitting into evidence an inflatable doll seized from the appellant's home; (5) the Government's evidence was insufficient to prove the indecent acts offense; (6) the post-trial delay in this case violated the appellant's right to timely review of his case; and (7) the sentence was inappropriately severe.

We have carefully examined the record of trial, the appellant's brief, the Government's answer, and the appellant's reply. We conclude that the findings and 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.

### **Facts**

Lance Corporal (LCpl) L, a 21-year-old radio repairman with less than 2 years experience in the Marine Corps, was sent by his unit to augment Military Police Company as a day-shift clerk at the base pass office. The appellant, a 36-year-old sergeant with over 8 years' experience in the Marine Corps, also worked in the pass office, on the night shift. Prior to the incident, their contact was purely professional, and limited to passing official information from one shift to the other. In January 2004, LCpl L returned to the pass office after his shift to use the computer to type homework from a college class he was taking. While there, the appellant mentioned that his wife would be going out of town, and asked LCpl L if he would be interested in coming over to the appellant's house to "hang out." LCpl L agreed, and several weeks later, on 20 February 2004, the appellant called, asking him if he wanted to come over.

LCpl L arrived at the appellant's on-base quarters, and the appellant encouraged him, over LCpl L's initial protest, to drink alcoholic beverages. The two men played video games, musical instruments, darts, with the appellant's dogs, and briefly wrestled in the course of the evening. Both men drank alcohol throughout the evening. LCpl L drank approximately 5 - 6 drinks, each one a combination of 2 shots of vodka mixed with Red Bull, a non-alcoholic beverage. LCpl L testified that he became

extremely intoxicated, and could not recall anything that happened after he sat down on the downstairs sofa around 0300.

When LCpl L awoke, he was in the appellant's upstairs bedroom, and could feel a hand rubbing his anus and digitally penetrating it. He felt a second hand reaching for his genital area. He still felt intoxicated, but attempted to push his elbow back to stop the person touching him. The touching was repeated, with a hand rubbing his anus and a finger penetrating it "every once in awhile." He heard the person saying "one more time. One more time." After LCpl L again pushed back with his elbows, the appellant got off the bed, slapped LCpl L on the buttocks and yelled at him to get out of bed and leave the house. LCpl L was groggy, and the appellant slapped him two more times, a few minutes apart, before LCpl L finally got up off the bed. Realizing he was naked, LCpl L had a heated conversation with the appellant, asking the latter what had taken place and the location of his clothes.

LCpl L found his clothes around the downstairs couch, where he last remembered sitting down. After considering the possibility of physically attacking the appellant, he left the house, and found LCpl Holbrooks, a friend he knew from the military police unit. After consulting with LCpl Holbrooks, LCpl L called the Criminal Investigative Division (CID). Special Agent (SA) Ryan arrived at LCpl Holbrooks' quarters, and drove LCpl L to Tripler Army Medical Center for testing.

While discussing the incident with SA Ryan, LCpl L vaguely recalled an additional incident in which he woke up during the night and saw gay pornography on the television. He remembered waking up yet again due to a lack of air, with the appellant's groin area in his face and neck area. He could also feel the appellant sucking on his penis. LCpl L did not remember having any clothing on at this time, although he had been fully clothed when he sat down on the couch at approximately 0300. As LCpl L attempted to move his head to catch his breath, he opened his eyes and saw the television screen, on which he saw a man performing oral sex on another man.

At Tripler, LCpl L was physically examined, and some of his clothing was taken for laboratory testing. Later that day, the appellant also submitted to a sexual assault kit examination at Tripler. Nine out of ten stains from LCpl L's underwear tested high in amylase, an enzyme indicative of saliva. Three of the stains contained a mixing of deoxyribonucleic acid (DNA) from both LCpl L and the appellant. LCpl L's semen was found on one stain from his crotch area. Trace amounts of sperm cells were found on 3 other stains from LCpl L's underwear, but in insufficient quantity to type them. A rectal swab taken from LCpl L showed only his own DNA, but it also showed a trace amount of sperm cells in too small an amount to be typed by DNA. A penile swab from the appellant tested positive for his own semen.

SA Hutson testified at the appellant's court-martial regarding his questioning of the appellant, who consented to speak to SA Hutson and to a search of his home. The appellant admitted that he invited LCpl L over to his home, and that he offered the latter drinks containing two shots of vodka and Red Bull. The appellant stated that he had become extremely intoxicated, and did not remember much that occurred. He stated that he awoke at noon the next day, after LCpl L had already left the house. When informed of the allegations against him, the appellant responded that he was glad LCpl L reported the incident, opining that LCpl L might have assaulted him and become afraid that the appellant would remember. The appellant denied all of the allegations, saying that he had not sexually assaulted LCpl L or touched him in any way.

The day before he invited LCpl L to his house, the appellant went to an adult store and purchased a transsexual inflatable doll kit. The doll had both an anal and oral orifice, but no vaginal orifice. The appellant also purchased a videotape, entitled "Transsexual Streetwalkers," depicting homosexual sexual activity. After the incident, agents from the Naval Criminal Investigative Service found the doll, inflated, in the appellant's closet. It was tested for the presence of body fluids, but none was found. A homosexual video was found in the appellant's VCR, attached to his television set.

Although the appellant was charged with forcible sodomy by taking LCpl L's penis into his mouth by force and without consent, the court members found him guilty of the offense, excepting the words "by force and without consent." He was also convicted of fraternization with LCpl L, and with an indecent acts offense for rubbing LCpl L's anus, fondling LCpl L's penis and testicles, and penetrating LCpl L's anus with his fingers. The members excepted language from the indecent acts specification that alleged further acts LCpl L described as having occurred during the sodomy offense.

#### **Application of *Lawrence* to Sodomy Conviction**

The appellant contends that his conviction for non-forcible sodomy violates his constitutional right to privacy, as explained in *Lawrence v. Texas*, 539 U.S. 558 (2003). We disagree.

Whether the appellant's conviction for non-forcible sodomy must be set aside in light of *Lawrence* is a constitutional question we review de novo. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004). In *Lawrence*, the United States Supreme Court found a constitutionally-protected liberty interest in consensual sodomy between adults, under some circumstances. In *Marcum*, our superior Court found that *Lawrence* applies to the military and adopted a three-part framework for determining whether Article 125, UCMJ, is constitutional as applied to the facts of a given case. The test poses three questions for analysis:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

*Id.* at 206-07 (internal citations omitted).

Applying the first question, we are not convinced that the appellant's conviction for nonforcible sodomy falls within the protected liberty interest established in *Lawrence*. The mere fact that the court members found the Government failed to meet its high burden of proof concerning the element "by force and without consent" does not logically require us to find that the appellant's sodomy offense was therefore consensual. While our superior Court in *Marcum* assumed, without deciding, that the jury's verdict of non-forcible sodomy in that case satisfied the first question in the appellant's favor, we note that, in *Marcum*, there was at least some evidence of consensual sodomy. Here, there was none. Nevertheless, assuming *arguendo* that the appellant's conviction for non-forcible sodomy satisfies the first part of the three-part framework, the appellant's contention fails because of the second and third parts.

Applying the second question, we find that the appellant's conduct encompassed behavior specifically excepted from the privacy interest, as articulated by the U.S. Supreme Court in *Lawrence*. Specifically, it involved a "relationship in which consent might not easily be refused." *Lawrence*, 539 U.S. at 578. The evidence clearly shows that the appellant was senior to LCpl L in rank, age, and experience. Furthermore, although LCpl L had transferred from the pass office back to his own unit a few weeks prior to the incident, he and the appellant had recently been in a senior-subordinate working relationship for at least several months at the pass office. We also note the record is devoid of evidence to suggest there were any prior social contacts between the two men that might indicate a less than purely professional relationship. Finally, it is undisputed that LCpl L was extremely intoxicated at the time of the sodomy offense. Under such circumstances, we are confident that the record establishes a relationship in which consent might not easily be refused.

Finally, regarding the third question of the *Marcum* analysis, we find the appellant's sodomy offense involves factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest. Here, as in *Marcum*, the difference in rank and the senior-subordinate working relationship, combined with the intimate contact, created the kind of situation that undermines unit cohesion and morale. And,

as the court members concluded, it clearly violated the military's policy against fraternization. See also *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), *cert. denied*, 544 U.S. 923 (2005). We thus conclude that the appellant's conviction for sodomy does not violate his constitutional right to privacy under *Lawrence*.

#### **Insufficient Evidence for Indecent Acts Offense**

Although styling his contention as one of insufficient evidence, the appellant argues that the appellant's acts in rubbing LCpl L's private parts and digitally penetrating his anus were simply "homosexual foreplay" and cannot be found indecent under *Lawrence*. We disagree.

Assuming the sodomy offense was consensual, indecent acts occurring contemporaneously with that offense might indeed be deemed homosexual foreplay. But the indecent acts of which the appellant was convicted involved actions occurring later in time; that is, as LCpl L was just awakening and trying to shake off an intoxicated stupor. Nothing in the members' findings by exceptions requires us to conclude they found these particular acts to be consensual, and we find no evidence to support such a conclusion. Thus, LCpl L's vulnerable condition and the lack of any express consent render the indecent acts of which the appellant was convicted coercive in nature. Even if they were not, we find the indecent acts in question fall outside the *Lawrence* liberty interest for the same reasons outlined above concerning the sodomy offense.

#### **Multiplicity and Unreasonable Multiplication of Charges**

We find no merit in the appellant's contention that the sodomy and fraternization offenses were either multiplicitious or an unreasonable multiplication of charges. The appellant waived any multiplicity argument by failing to make it at trial, and because the fraternization offense includes a larger scope of conduct than that which constituted the sodomy offense. Specifically, the fraternization offense includes the indecent acts offense that occurred some hours after the sodomy offense.<sup>2</sup> Thus they are not "factually the same" and the issue is forfeited. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). And as they involve distinctly separate criminal acts, we

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<sup>2</sup> Although not argued, we also find that the fraternization offense is not an unreasonable multiplication of charges with the indecent acts offense. The appellant did not object at trial. The fraternization offense extends to additional acts beyond the sexual offenses; e.g., the two men both became extremely intoxicated in a private setting and spent a significant period of time in bed together. We further find no evidence of prosecutorial overreaching, exaggeration of the appellant's criminality, or unreasonable increase in his punitive exposure. See *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

find no prosecutorial overreaching and therefore no unreasonable multiplication of charges. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

### **Post-Trial Delay**

The appellant contends that he was materially prejudiced by the post-trial delay in his case. We disagree.

Having considered the post-trial delay in light of the analysis adopted by our superior court in *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005), we find no grounds for relief in this case. As the appellant's case was tried and docketed at this court prior to the effective date of our superior court's decision in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), the presumptions of unreasonable delay set forth in that case do not apply here. Nevertheless, the 572 days from trial to docketing at this court is facially unreasonable, and unexplained by the record. We also note the appellant asserted his right to a timely review of his case in a post-trial submission dated 3 October 2005.

The appellant claims he was prejudiced by the delay because he missed opportunities for parole while confined, and because it resulted in his not being granted a request for transfer to a particular confinement facility. We find his assertion that his clemency and parole rights were prejudiced both speculative and unsubstantiated. See *United States v. Khamsouk*, 58 M.J. 560, 562 (N.M.Ct.Crim.App. 2003). Similarly, the appellant does not assert or demonstrate that he was entitled to be transferred to a particular confinement facility, nor does he even document his request for transfer. We thus find this assertion also speculative and unsubstantiated, and conclude the appellant has failed to demonstrate that he was prejudiced by the post-trial delay in his case. We also find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. *Jones*, 61 M.J. at 83.

Balancing all the relevant factors, we conclude that there has been no due process violation resulting from the post-trial delay. Even assuming error, the lack of any showing of prejudice would lead us to conclude such error was harmless. We also find that the delay does not affect the findings and sentence that should be approved in this case, particularly in view of the clemency already granted by the convening authority. Art. 66(c), UCMJ; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

### **Other Assignments of Error**

We find no merit in the appellant's remaining two assignments of error. While the military judge eventually

determined to exclude the inflatable doll after initially admitting it as evidence, we find no prejudice resulting from this decision. First, while we find no abuse of discretion in the military judge's determination to exclude it as unduly prejudicial under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), we are not convinced that it was error to admit the evidence in the first place. Combined with the purpose of the doll and its purchase so close in time to the offenses, we agree with the Government that the evidence was relevant as proof of the appellant's motive, intent, and plan, and therefore admissible under Mil. R. Evid. 404b. *United States v. Whitner*, 51 M.J. 457, 460 (C.A.A.F. 1999). Second, the military judge followed up his discretionary decision to exclude the evidence with a remedial instruction to the members, including individual *voir dire* of each member to ensure they could follow his instruction. We find no evidence that they failed to follow the military judge's instruction, and thus we follow our normal presumption that they did. *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

Finally, considering the entire record, we specifically find that the sentence in this case is not inappropriately severe for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

We therefore affirm the findings and the sentence, as approved by the convening authority.

Senior Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL  
Clerk of Court