

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BENJAMIN H. HARTMAN
SONAR TECHNICIAN (SUBMARINES) SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200900389
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 April 2009.

Military Judge: LCDR William F. Martin, JAGC, USN.

Convening Authority: Commander, Submarine Group TWO, Naval Submarine Base New London, Groton, CT.

Staff Judge Advocate's Recommendation: LCDR J.L. Marsh, JAGC, USN.

For Appellant: Maj Kirk Sripinyo, USMC.

For Appellee: Maj Elizabeth Harvey, USMC; Capt Jonathan N. Nelson, USMC.

29 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of sodomy in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925. The military judge announced a sentence of confinement for 1 month, forfeiture of all pay and allowances for 1 month, reduction to pay grade E-1, and a bad-conduct discharge from the U.S. Navy. The convening authority (CA) issued a promulgating order, *see* RULE FOR COURTS-MARTIAL 1114, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), setting out the sentence as follows: "confinement for a period of 30 days, total forfeiture of pay for 1 month, reduction in rate to pay grade E-1, and to be

discharged from the U.S. Navy with a bad-conduct discharge." In the CA's action contained within the promulgating order the CA stated that he approved the sentence.

Before us, the appellant raises two allegations of error: that Article 125 is unconstitutional as applied to what he claims is his consensual conduct with another male Sailor, and that the military judge abused his discretion in admitting, during the sentencing proceedings, evidence that the sodomy was by force and without consent of the other Sailor. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm the finding of guilty of consensual sodomy. As noted above, the promulgating order does not correctly state the amount of adjudged confinement and forfeitures. This calls into question what sentence the CA approved. In the interest of judicial economy, we will take corrective action. After that action, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was originally charged with forcible sodomy committed aboard the Naval Submarine Base in Kings Bay, Georgia. In accordance with a pretrial agreement he entered a guilty plea to, and was found guilty of, the lesser offense of consensual sodomy. The appellant was attached to a fast-attack submarine that was in Georgia for some routine work, and he was staying in a room in the base's transient visitors' quarters that another Sailor from his submarine had procured. According to his responses during the plea colloquy, the appellant awoke to find another male Sailor fondling his penis. The appellant eventually assisted the other Sailor in penetrating the appellant's anus. This activity all occurred while a third occupant of the room, a petty officer also attached to the submarine, slept in one of the two beds in the room.

Constitutionality of Article 125 as applied

We analyze the appellant's claim in light of military precedent, specifically *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Because the appellant raises a constitutional claim, we review his case *de novo*. *Id.* at 202-03 (citing *Jacobellis v. Ohio*, 378 U.S. 184 (1964)). In *Marcum*, the Court of Appeals for the Armed Forces applied *Lawrence v. Texas*, 539 U.S. 558 (2003), in the military context and determined that Article 125, as applied to Marcum's case, was constitutional. We reach a similar conclusion with respect to the appellant.

Analyzing the appellant's claim:

requires consideration of three questions. First, was the conduct that the [appellant] 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 citation omitted). While the plea colloquy is spare, there is sufficient information in the record to remove the appellant's activity from the realm of the protected and place it in the realm of the prohibited.

It appears that the appellant's activity did, in fact, involve consensual homosexual sodomy with another Sailor, at least as far as the appellant's plea and responses to the military judge's questions indicate. Thus the first *Lawrence/Marcum* factor can be answered "yes" -- this activity is within the liberty interest identified by the Supreme Court. On the other hand, this activity occurred in a transient living space aboard a Naval Submarine Base in the presence of a third, albeit apparently unconscious, Sailor. This fact places it more in the "public" than "private" context. See *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956) (act of intercourse "open and notorious," and therefore violative of Article 134, when the participants know that a third person is present). See also *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999). See generally *Lawrence*, 539 U.S. at 578. The answer to the second *Lawrence/Marcum* factor is "yes" -- the conduct includes a factor outside the analysis in *Lawrence*. We need not address the final *Lawrence/Marcum* factor (which could include such considerations as the tight quarters on a submarine, a base instruction or a ship instruction barring fraternization or sexual relations, a description of watch standing duties, none of which were adduced or advanced during the providence inquiry), given the fact that this conduct was "open and notorious" as those terms are defined in military jurisprudence.

Improper Sentencing Evidence

We turn now to the appellant's second assignment of error. We will disturb a military judge's ruling on the admission of evidence only when there is an abuse of discretion. *E.g.*, *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997). We find no such abuse in this case. Even if the military judge did abuse his discretion, the likelihood of harm to the appellant is near nonexistent given the sentence adjudged and approved.

The Government may offer evidence of the circumstances surrounding an offense or the effect of an offense in its case on sentencing. RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). See, *e.g.*, *United States v. Loya*, 49 M.J. 104, 108 (C.A.A.F. 1998). Here, the Government offered testimony from the other participant in the sodomy, a third class petty officer, that provided a comprehensive picture

of the events of 19 October 2008 and the effect that those events had on him.

The appellant could be punished only for a crime whose elements had been established beyond a reasonable doubt. See *Jones v. United States*, 526 U.S. 227, 251-52 (1999). While the evidence offered by the Government could have pushed the sentence toward the upper limit of the maximum allowable for consensual sodomy (confinement for 5 years; reduction to E-1; forfeiture of all pay and allowances; and a dishonorable discharge; contrast this with the maximum for forcible sodomy, the offense originally alleged, of life), there is no danger in this case that the appellant would have been punished for anything other than the offense of which he stood convicted. The appellant was properly advised that the maximum confinement that he faced for the offense to which he pleaded guilty was 5 years. Record at 20-21. See also Appendix 12, *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.). We are confident that the military judge, sitting as the sentencing authority, understood and properly applied the law regarding the maximum sentence and confined his consideration to the offense before him. Record at 100.

Conclusion

The finding of guilty of consensual sodomy is affirmed. Only so much of the sentence as provides for confinement for 30 days, forfeiture of \$1399.00 pay per month for one month, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

Chief Judge GEISER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court