

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JACOB E. CASTILLO
MASTER-AT-ARMS SEAMAN (E-3), U.S. NAVY**

**NMCCA 201200020
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 October 2011.

Military Judge: CDR Lewis T. Booker, Jr., JAGC, USN.

Convening Authority: Commanding Officer, Marine Corps
Security Force Battalion, Naval Base Kitsap, Bangor,
Silverdale, WA.

Staff Judge Advocate's Recommendation: LT A.T. Jennings,
JAGC, USN.

For Appellant: LT Gregory M. Morison, JAGC, USN.

For Appellee: Capt David N. Roberts, USMC.

31 May 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of three specifications of failure to obey a lawful general order, one specification of wrongful sexual contact, one specification of sodomy, and two specifications of adultery in violation of Articles 92, 120, 125, and 134, Uniform Code of Military

Justice, 10 U.S.C. §§ 892, 920, 925, and 934. The military judge sentenced the appellant to one year of confinement, reduction to pay grade E-1, forfeiture of \$900.00 pay per month for 12 months, and a bad-conduct discharge.

The convening authority (CA) approved only so much of the sentence as provided for confinement for one year and a bad-conduct discharge. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 180 days for the period of confinement adjudged plus twelve months thereafter. The CA also suspended automatic reduction for a period of six months.

The appellant raises four assignments of error (AOE) on appeal: (1) that the sodomy specification failed to state an offense; (2) that the sodomy specification did not provide sufficient notice of the criminality he was to defend against; (3) that the court-martial was improperly convened and lacked jurisdiction; and, (4) that the CA acted without a proper staff judge advocate's recommendation (SJAR).

We have examined the record of trial, the appellant's assignments of error, and the pleadings of the parties. We conclude that the findings and the 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.

Background

The appellant was a master-at-arms seaman (MASN) assigned to Marine Corps Security Force Battalion providing security of national assets at Strategic Weapons Facility Pacific, Silverdale, Washington. In a supervisory capacity, he sexually harassed and variously engaged in inappropriate sexual conduct and adultery with female subordinates.

Failure to State an Offense and Notice

The appellant argues that the sole sodomy specification failed to state an offense because it did not allege specific factors outlined in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). He additionally assigns error for lack of notice as to the sodomy specification. *Marcum*, however, did not judicially create additional elements under Article 125, UCMJ, and does not require that special facts be plead to allege an offense. *United States v. Useche*, 70 M.J. 657, 662 (N.M.Ct.Crim.App. 2012). The appellant entered an unconditional

guilty plea to the specification, having sought no greater particularity and following the Government's modification of the specification weeks before trial to remove an allegation of force. In advance of trial, the appellant and his trial defense counsel stipulated to facts that included the status of the victim as a military subordinate who performed the act of sodomy, "while standing watch inside the wire . . .", establishing the military nexus in *Marcum* and clearly demonstrating that this was not private consensual sodomy protected by *Lawrence v. Texas*, 539 U.S. 558 (2003). Prosecution Exhibit 1, at 4. The Sixth Amendment guarantees the appellant the right to be informed of the accusations and charges against him. In the instant case, the appellant alleges that the sodomy specification was insufficiently specific to provide notice of the criminality he was to defend against. Such an argument is unpersuasive based on the appellant's actions relative to this specification.

On the record before us, the first two assigned errors are without merit. See generally *Useche*, 70 M.J. at 657; *United States v. Stratton*, No. 2010000637, 2012 CCA LEXIS 16 (N.M.Ct.Crim.App. 26 Jan 2012).

Jurisdiction

The appellant asserts that charges were improperly preferred by a civilian employee not subject to the UCMJ and thus the special court-martial (SPCM) lacked jurisdiction. Though trial defense counsel did not raise this issue, jurisdictional challenges survive apparent waiver and may be raised for the first time on appeal. See *United States v. Reid*, 46 M.J. 236, 240 (C.A.A.F. 1997); RULES FOR COURTS-MARTIAL 905(e), and 907(b)(1)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We may rely upon documentary evidence to resolve the matter. See *United States v. Oliver*, 57 M.J. 170, 172-73 (C.A.A.F. 2002). A failure to object to a defect in preferral constitutes waiver. See *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994) (citing *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988)). No objection was raised in this case, with the status of the civilian employee fully developed on the record.

Here, a retired member of the armed forces preferred the charges against appellant. Charge Sheet. Additionally, we have appended to the record an affidavit submitted by the Government dated 30 March 2012, establishing that the accuser in this case is a retired member entitled to pay who remains subject to the UCMJ and is authorized to prefer charges at courts-martial.

Article 2(a)(4), UCMJ. The charges were validly preferred and this court-martial had jurisdiction.

SJAR

The appellant asserts that the SJAR of 12 December 2011 failed to issue an addendum informing the CA of legal error identified by trial defense counsel. The assigned error is without merit because no legal error was raised and no addendum to the SJAR was required. The appellant's clemency request of December 19, 2011, states, "The undersigned trial defense counsel reserves the identification of legal error for appellate defense counsel, but notes that MASN Castillo was found guilty in accordance with his plea to one specification of consensual heterosexual sodomy in violation of Article 125." *Id.* at 1-2. With the issue reserved but not raised as legal error, the SJA had no requirement to respond. Instead, the issue was deliberately highlighted for appellate defense counsel's attention, raised as error before us, resolution of which appears *supra*.

Findings

While not raised as error, we note that the court-martial promulgating order fails to account for the fact that the Government withdrew the words, "and making unwanted sexual contact" from all of the specifications under Charge I. Record at 34. There has been no allegation of prejudice as a result of this action and we find none. However, since the appellant pleaded guilty to Specifications 1, 5 and 6 under Charge I, the supplemental court-martial order shall correctly capture these specifications as amended. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court