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

Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

IAIN L. STRATTON
MASS COMMUNICATIONS SPECIALIST
SEAMAN RECRUIT (E-1), U.S. NAVY

NMCCA 201000637
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 July 2010.
Military Judge: CDR Douglas Barber, JAGC, USN.
Convening Authority: Commandant, Naval District Washington, Washington Navy Yard, DC.
Staff Judge Advocate's Recommendation: LT L.A. Faust, JAGC, USN.
For Appellant: LT Daniel Napier, JAGC, USN; Capt Michael Berry, USMC.
For Appellee: Capt Samuel Moore, USMC.

26 January 2012

OPINION OF THE COURT

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

MAKSYM, Senior Judge:

A general court-martial, composed of members with enlisted representation, acquitted the appellant of aggravated sexual assault, abusive sexual contact, and forcible sodomy under Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. However, the members convicted the appellant, contrary to his pleas, of consensual sodomy as a

lesser included offense of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. The members sentenced the appellant to confinement for ninety days, forfeiture of all pay and allowances for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant asserts in both assignments of error that his due process rights were violated in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The appellant's assignments of error are:

> I. POST-*LAWRENCE*, SODOMY IS NOT A CRIME UNLESS THERE ARE ADDITIONAL CRIMINAL ELEMENTS THAT FURTHER A LEGITIMATE STATE INTEREST. OVER DEFENSE OBJECTION, THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT SODOMY WAS A LESSER INCLDUED OFFENSE OF THE CHARGED CRIME OF FORCIBLE SODOMY. THE MEMBERS THEN RETURNED A VERDICT OF NOT GUILTY TO FORCIBLE SODOMY, BUT GUILTY TO SODOMY. THE THEORY OF PROSECUTION FOR SODOMY WAS BASED ON ADDITIONAL FACTS ALLEGED BY THE GOVERNMENT AFTER THE TRIAL BEGAN. THESE FACTS WERE: (1) NOT ELEMENTS DEFINED BY CONGRESS UNDER ARTICLE 125, UCMJ, (2) NOT ALLEGED ON THE CHARGE SHEET; AND (3) NOT SUBMITTED TO THE MEMBERS AND PROVED BEYOND A REASONABLE DOUBT. IS APPELLANT'S CONVICTION FOR CONSENSUAL SODOMY UNCONSTITUTIONAL IN LIGHT OF THESE DUE PROCESS VIOLATIONS?
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> II. APPELLANT ENGAGED IN PRIVATE, CONSENSUAL SODOMY WHILE OFF DUTY WITH ANOTHER ADULT, OF THE SAME AGE AND RANK, IN A LOCKED BATHROOM. DID THE MILITARY JUDGE ERR BY INSTRUCTING THE MEMBERS ON THE LESSER INCLUDED OFFENSE OF CONSENSUAL SODOMY, AND NOT DISMISSING THE CHARGE AS UNCONSTITUTIONAL IN LIGHT OF THE SUPREME COURT'S HOLDING IN *LAWRENCE V. TEXAS*?

After considering the pleadings of the parties, hearing oral argument, and reviewing the entire record of trial, we find that the military judge erred in his application of *Lawrence v. Texas* and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), and that Article 125, UCMJ, as applied to the specific facts of this case, is unconstitutional. We will set aside the findings and sentence and dismiss the charge in our decretal paragraph. The appellant is ordered to be restored from the deprivations of his sentence.

Background

In 2009 the appellant and Private First Class (PFC) JH, were 19-year-old students from different services at different points in the training pipeline at Defense Information School (DINFOS) located onboard Fort Meade, Maryland. A planned social meeting on base, which involved alcohol, morphed into a sexual encounter with vastly differing testimony as to what transpired. PFC JH maintained, as was the Government's theory of the case throughout, the application of force and circumstances involving incapacitation. The appellant took the stand in his own defense and described an entirely consensual encounter, which he appropriately ended upon sensing the incapacitation of PFC JH. In presenting his defense, the appellant testified to acts of sodomy occurring during the encounter. In the course of the court-martial, the military judge made an anomalous finding as to the privacy of the venue for the sexual encounter, finding it to be "semi public." Also, in an effort to perfect a military nexus to the privacy issues raised if the conduct was deemed consensual, the trial counsel made representations about a policy prohibition on the relationship itself, allegedly codified within a student handbook, which representations proved to be incorrect. The military judge, initially relying on that same misinformation in his rationale and findings of fact, reconsidered, but did not change his ruling.

Of paramount significance in this litigation, prior to deliberating on findings the members were given instructions by the military judge which included an explanation of consensual sodomy as a lesser included offense of forcible sodomy under Article 125, UCMJ. Record at 1370. Trial defense counsel objected to this instruction twice, both before and after deliberations, arguing that it could not pass constitutional muster in light of the Supreme Court's decision in *Lawrence*. *Id.* at 1276, 1297. The trial judge considered these objections and applied the principles of *Lawrence* and *Marcum* in both instances. Initially the military judge found that the sexual encounter was in a public or semi-public place, that the appellant had violated the DINFOS Student Handbook by having sex with PFC JH, and that there was a general disruption to the unit caused by the events. Record at 1295-96. This ruling was based in part upon information proffered by the trial counsel, namely that the DINFOS student handbook barred sexual relations between students. The members were thus instructed on the lesser included offense of sodomy as part of the findings instructions and the court was closed for deliberations. *Id*. at 1370. The

members acquitted the appellant of all charges save the lesser included offense of sodomy. *Id*. at 1390.

Upon reviewing the Student Handbook, trial defense counsel, in sharp contrast to the Government's representations to the trial judge, discovered that, in fact, the appellant and PFC JH were not prohibited from having a sexual relationship. PE 43 at 7; Record at 1422. After receiving the verdict, trial defense counsel made another motion asking the military judge to reconsider the conviction on the sodomy charge pursuant to RULE FOR COURTS-MARTIAL 1102(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 1419. The trial judge applied the *Marcum* factors again and found, again, that one of the exceptions to *Lawrence* as described in *Marcum* had been met. *Id*. at 1433. In this instance, notwithstanding testimony that the appellant had locked the door, the military judge determined that the bathroom was not a private area but instead "public or at least semi-public." *Id.* at 1296. He additionally cited the unauthorized absence status of PFC JH at the time of the sexual encounter with the appellant, a matter that he had not noted during the defense's first motion. *Id*. Subsequently, the members sentenced the appellant. *Id*. at 1541.

Constitutionality of Article 125, UCMJ

Whether the appellant's conviction must be set aside in light of the Supreme Court's holding in *Lawrence* is a constitutional question reviewed de novo. *Marcum*, 60 M.J. at 202-03 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)).

It is clear, per *Lawrence*, that individuals have a liberty interest that protects consensual "private sexual conduct," including oral and anal sodomy. 539 U.S. at 578 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). However, it is also clear that there are tangible limits to this liberty interest. The Supreme Court explained that the facts in *Lawrence*, which involved a challenge to a state law that banned same-sex sodomy, did not involve "minors ... persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Id*. Additionally, *Lawrence* did not involve "public conduct or prostitution." *Id*.

In *Marcum*, the Court of Appeals for the Armed Forces (CAAF) applied the *Lawrence* decision in the "military context." 60 M.J. at 205. At issue in *Marcum* was the constitutionality of Article 125, UCMJ, which criminalizes both forcible and consensual sodomy. The CAAF determined that Article 125, UCMJ,

was not facially unconstitutional but that, per *Lawrence*, it might be unconstitutional in certain, as applied, situations. *Id*. at 206. In order to determine whether Article 125, UCMJ, was constitutionally applied, the CAAF outlined a three-part test. 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?" *Id*. In other words, did the "conduct involve private, consensual sexual activity between two adults?" *Id*. at 207. Second, "did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence . . .* ," including the involvement of minors, vulnerable or easily exploitable persons, public conduct, or prostitution. *Id*. at 206-07. Third, "are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?" *Id*. at 207.

While the three-part *Marcum* analysis forms the basic framework for analyzing a challenge to a sodomy conviction, the appellant's first assignment of error raises a preliminary question that must be answered. The appellant argues that the *Marcum* framework effectively incorporated new elements into the Article 125, UCMJ, charge and that these new elements should have been properly plead and submitted to the trier of fact. Essentially, the appellant argues that the *Marcum* factors are questions of fact to be answered by the trier of fact. Appellant's Brief of 15 Feb 2011 at 10-11. In the appellant's case, however, the *Marcum* factors were deemed questions of law by the military judge and were subsequently analyzed and answered by the military judge. Record at 1296, 1421. This basic question, whether the *Marcum* factors should be analyzed by the military judge as questions of law or, rather, by the trier of fact as questions of fact, is a threshold issue that must be answered before examining the *Marcum* factors themselves.

It is the military judge who decides questions of law. Art. 51(b), UCMJ; R.C.M. 804(a)(4). Moreover, "whether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for determination by the triers of fact." *United States v. Carson*, 35 C.M.R. 379, 380 (C.M.A. 1965). This principle has been repeatedly applied to situations in which certain questions of fact must be answered by the military judge in order to resolve a question of law. *See United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005). The military judge can decide that the *Marcum* factors are questions of law. *United States v. Harvey*, 67 M.J. 758, 763 (A.F.Ct.Crim.App. 2009). The military judge does not "abuse his

discretion by failing to instruct the members on the *Marcum* analysis." *Id*. at 764.[1]

Given that the military judge in this case properly determined that the *Marcum* analysis was a question of law, the next question is whether the military judge properly analyzed the *Marcum* factors or whether, as the appellant's second assignment of error avers, the military judge improperly determined that the appellant's conduct was not protected. Unusually, the military judge applied the *Marcum* factors to the facts of this case twice, first in response to trial defense counsel's objection to a proposed jury instruction on the lesser included offense of sodomy and second, in response to trial defense counsel's motion to reconsider the verdict pursuant to R.C.M. 1102(b)(2). Record at 1276, 1420. In both instances, the military judge erred in not properly analyzing the *Marcum* factors in light of the facts of the case.

At the close of evidence, prior to deliberations, trial defense counsel objected to the jury instruction explaining the lesser included offense of sodomy. *Id.* at 1276-79. He argued that the conduct upon which the lesser included offense was based, oral and anal sodomy, was protected conduct per *Lawrence* in that it was consensual sex between adults, there was no senior or subordinate relationship, and no additional factors were present that relate to the military environment. *Id*. In response, trial counsel asserted that the DINFOS Student Handbook prohibited sexual relationships between students. According to the trial counsel, this instruction, combined with other factors, implicated at least one *Marcum* factor and thus took the sexual actions out of the protected sphere of liberty outlined in *Lawrence*. *Id*. at 1282.

The military judge agreed with the trial counsel that the *Marcum* factors were implicated. He ruled that the sexual activity occurred in a "semi public" bathroom that could have

[1] The appellant cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Gaudin*, 115 S. Ct. 2310 (1995) in support of interrelated propositions that an accused must be given proper notice of the *Marcum* factors and that those factors must be submitted to the members as additional elements under an Article 125, UCMJ, sodomy charge. Appellant's Brief at 9-11. This argument assumes that the *Marcum* factors have become de facto elements because they are questions of fact that must be decided in order to convict under Article 125, UCMJ. Because we have determined that the *Marcum* analysis can be considered a question of law to be decided by the military judge, we decline to examine whether constitutional precedent requires notice, pleading, and submission to the trier of fact any additional elements not already listed under Article 125, UCMJ.

been accessed by "anybody who had the cipher lock [code]", implicating the first and second *Marcum* factors. *Id*. at 1295-96. The military judge also concluded that the DINFOS instruction barring sexual relationships between students had been violated and thus the third *Marcum* factor was implicated. *Id*. Finally, the military judge concluded that the general disruption to good order and discipline caused by the sexual interaction between students and the subsequent investigation implicated the third *Marcum* factor. *Id*. The military judge did not analyze the *Marcum* factors correctly.

The military judge ruled that the bathroom located on the Fort Meade campground was a "semi-public" place. We do not agree. This court has held that a barracks room is not "public" under the *Marcum* analysis. *United States v. Humphreys*, No. 200300750, 2005 CCA LEXIS 401, at 7, unpublished op. (19 Dec 2005). As in *Humphreys*, "[t]he Government's assertion that the appellant's roommate or 'any other tenant' of the barracks could have walked in and observed this conduct is purely speculative." *Id*. Courts determining whether an act was "open and notorious" and therefore "indecent" have drawn similar conclusions. *See United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999) (explaining sex in barracks room behind closed but unlocked door was not open and notorious because there was no reasonable likelihood that the act would be seen by others); *United States v. Frazier*, 51 M.J. 501 (C.G.Ct.Crim.App. 1999) (finding parked car in isolated area at night not open and notorious because there was no reasonable likelihood of being viewed).

According to the record, the bathroom in which the appellant and JH engaged in sexual conduct had both an external cipher lock and an internal lock. Prosecution Exhibits 4-6. The door window was virtually opaque in order to ensure privacy in a bathroom that included a shower and was meant for individual use. PE 6. Furthermore, the sexual encounter occurred at night and there is no indication that any other person was in the area or attempted to enter the bathroom. Record at 616, 958, 1133. If an unlocked barracks room in close proximity with other, occupied barracks rooms is considered a private space, a locked and isolated bathroom is also a private space for the purposes of the *Marcum* analysis.[2]

[2] This is not to say that it is solely the fact that the appellant and PFC JH were not seen by a third party that makes their conduct "private." The presence of other persons, regular access to the bathrooms, an absence of locks or proximity with other buildings would all weigh against a finding of privacy.

The military judge also ruled that the third Marcum factor was implicated because the DINFOS Student Handbook had been violated when the appellant and PFC JH, both students, had sexual intercourse. The military judge's ruling was incorrect because he based his decision, in part, upon faulty information. Trial counsel's assertion that the DINFOS Student Handbook prohibited sexual relationships between students was incorrect. PE 43 at 7, 14. The Handbook did not bar sexual relations between the appellant and PFC JH as long as those sexual relations were not in or near the barracks and were not in public. *Id*.

Finally, the military judge's ruling that the general disruption to the unit implicated the third *Marcum* prong is untenable. In effect, the military judge ruled that the criminal process inherent in this case, including the involvement of the military police, emergency management technicians, and command legal personnel, was a source of disruption substantial enough to satisfy the requirements of the third *Marcum* prong. We find the military judge erred in his application of this factor, essentially using the mere fact that the allegation was reported and required investigation, as is always the case when a crime is reported, to be held against the appellant as independent substantiation of impact on the command. Facts that implicate the third *Marcum* factor commonly include a superior/subordinate relationship, adultery, other serious crimes connected with sodomy, or a violation of military regulations. *Harvey*, 67 M.J. at 758. None of these facts are present save for, potentially, a violation of military regulations.

The appellant and PFC JH's sexual interaction, PFC JH's technical and deliberately entered period of unauthorized absence, and underage drinking are all factors that potentially implicate the third *Marcum* factor. Record at 607, 1433. However under the facts of this case, none form a sufficient legal basis for invalidating the *Lawrence* liberty interest.

PFC JH's unauthorized absence was briefly mentioned by the military judge or the Government during argument on trial defense counsel's second *Marcum* motion. *Id*. at 1433. However, the evidence surrounding PFC JH's unauthorized absence status at the time of the sexual interaction is contradictory. Although First Sergeant K, PFC JH's unit sergeant, testified that PFC JH was out after curfew, the DINFOS Student Handbook indicates that a Phase IV student, like PFC JH, has a school night curfew of 2400. *Id.* at 512; PE 43 at 7. Additionally, there is nothing

in the record to indicate that the appellant himself was in an unauthorized absence status. Finally, it should be noted that it was PFC JH herself who may have missed curfew, not the appellant.

Similarly, it was PFC JH's decision to consume alcohol. Record at 612. The three people present when alcohol was consumed on the night of 22 September 2009, including PFC JH herself, all testified that she freely and willingly consumed alcohol. *Id*. at 612, 948, 1126-30. Although the appellant was himself underage and consuming alcohol, this behavior cannot, by itself, adequately tilt the balance in the *Marcum* analysis, given our serious reservations regarding the accuracy of the Government's assertions regarding any other violations of military regulations.

The Government's theory was sexual assault and the charges and specifications alleged sexual assault. Appellate Exhibit XXII. The Government did not charge orders violations, unauthorized absence, or underage drinking. *Id*. By the time unauthorized absence and alcohol consumption became a concern for PFC JH's command, the sexual activity was over. Absent any other facts in the record which directly affect good order and discipline or the military environment, we cannot say that the third *Marcum* factor was implicated and that the sodomy was not protected conduct per *Lawrence*.

To be clear, there were three possible outcomes based on this evidence. If force was proved, then the forcible offenses and greater authorized punishments would apply. If the conduct was private and consensual, *Lawrence* would be implicated. If force was not proved, but a sufficient military nexus and impact on good order and discipline as a legal concept, and not as a judicially created element of the offense, was proved, (or some other distinguishing factor was present) Article 125 would be satisfied per *Marcum*. However, *Lawrence* and *Marcum*, as applied in this case, where force was not proved and the members have, *inter alia*, the appellant's own admissions of private consensual sodomy, we cannot affirm nonforcible sodomy based on erroneous resolutions of questions of law giving rise to the instruction for same. Because the sexual conduct between the appellant and PFC JH was not forcible, was private, was not in violation of the DINFOS Handbook, and did not substantially implicate other factors unique to the military environment sufficient to overcome the liberty interest at issue, the sodomy in this case falls within the liberty interest protected pursuant to *Lawrence*. As such, the military judge erred in his conclusions

of law and should not have instructed the members on nonforcible sodomy under Article 125, UCMJ, as a lesser included offense.

Conclusion

Accordingly, the findings of guilty and sentence are set aside and the charge is dismissed.

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court