

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, JOHNSON, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant DALE A. BOLDWARE
United States Army, Appellant

ARMY 20090665

Third Army, United States Army Central
Robert Rigsby, Military Judge
Colonel Thomas D. Cook, Staff Judge Advocate

For Appellant: Bridget J. Wilson, Esquire (argued); Lieutenant Colonel Jonathan F. Potter, JA; Major Richard Gorini, JA; Bridget J. Wilson, Esquire (on brief).

For Appellee: Captain Stephen E. Latino, JA (argued); Colonel Michael E. Mulligan, JA; Major Amber J. Williams, JA; Major Ellen S. Jennings, JA; Captain Stephen E. Latino, JA (on brief).

28 June 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

Per curiam:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of false official statement, three specifications of abusive sexual contact,¹ and one specification of forcible sodomy, in violation of Articles 107, 120, and 125 of the Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920, and 925 (2006) [hereinafter UCMJ]. The military judge sentenced appellant to a dishonorable discharge, to be confined for ten years, forfeiture of all pay and allowances for ten years, and reduction to the grade of E-1.

¹ Appellant was originally charged with the forcible sodomy of Private First Class MVB under Article 125, UCMJ, but was found guilty of abusive sexual contact under Article 120, UCMJ, as a lesser-included offense.

The convening authority approved the sentence. This case is before us for review pursuant to Article 66, UCMJ.

FACTS

Appellant's court-martial resulted from allegations that appellant, on two separate occasions while deployed to the Sinai, sexually assaulted junior enlisted soldiers in their barracks rooms after those soldiers had been drinking. Out of the incident involving Private First Class (PFC) MVB, appellant was charged with forcible oral sodomy and abusive sexual contact in touching PFC MVB's penis while PFC MVB was substantially incapacitated.² From the incident involving PFC REK, appellant was charged with forcible oral sodomy and abusive sexual contact in touching PFC REK's testicles and placing his fingers in PFC REK's anus while PFC REK was substantially incapacitated.

At trial, PFC MVB testified that he remembered briefly waking up in his bed with his pants down and with appellant's hands on PFC MVB's thigh and testicles. He also testified that appellant's hand made contact with PFC MVB's penis and that he saw and felt appellant's bottom lip rubbing on PFC MVB's penis. Upon questioning by the military judge, PFC MVB stated that he did not see his penis go into appellant's mouth "at all." Other witnesses corroborated PFC MVB's testimony by testifying that they saw appellant leaving PFC MVB's room immediately prior to finding PFC MVB "passed out" in his bed with penis exposed.

PFC REK testified that he awakened in his bed to find his pants around his ankles, his penis in appellant's mouth, appellant's hand on his testicles, and some of the appellant's fingers in his rectum. PFC REK remembered pulling away from appellant, covering himself with a sleeping bag, and curling into a fetal position at which point appellant departed the room.

At trial, appellant denied ever sexually touching PFC MVB and maintained that his sexual contacts with PFC REK were all consensual and initiated by PFC REK. Appellant argued that PFC REK falsely accused appellant of sexually assaulting him because PFC REK had previously been counseled for kissing another male soldier in public³ and was therefore afraid of being perceived as a homosexual and getting discharged from the Army.

In his closing, the trial defense counsel argued there was no sexual touching of PFC MVB whatsoever. He also offered the legal argument that even if there had

² Appellant was also charged with making a false statement to Criminal Investigation Division (CID) regarding the incident with PFC MVB.

³ The kiss in question was a non-sexual kiss that occurred at a bar on a dare at the instigation of two females that PFC K and another soldier were pursuing.

been a sexual touching there was no sodomy because PFC MVB emphatically denied that his penis had ever penetrated the mouth of appellant.⁴

As to the specifications involving PFC REK, the trial defense counsel argued that PFC REK consented to both the oral sodomy and to the contemporaneous touching of his genitals and his rectum. Additionally, the trial defense counsel argued that if there was a mistake on the part of appellant as to the contemporaneous touching, such a mistake was reasonable.

After hearing the evidence, the military judge found appellant not guilty of forcible sodomy, but guilty of abusive sexual contact under Article 120, UCMJ as a lesser-included offense (apparently based upon the lower lip to penis contact) and guilty of the charged abusive sexual contact arising out of the touching PFC MVB's penis with appellant's hand.⁵ As to the offenses relating to PFC REK, the military judge found appellant guilty of both forcible sodomy and abusive sexual contact as charged.

LAW AND DISCUSSION

Unconstitutional Burden Shifting

Appellant alleges, inter alia, that he was unconstitutionally required to disprove the element of incapacity by a "preponderance of the evidence" in order to assert the affirmative defense of consent. Appellant further argues that "it is impossible to invoke the affirmative defense of 'consent' as a preliminary matter without relieving the government of its burden of proof." These allegations are based, not upon anything said or done by the military judge at trial, but on the mere existence of Article 120(t)(16), UCMJ, which defines the term "affirmative defense" and lays out a burden-shifting scheme that has been called into question by recent case law. We disagree.

There is no evidence within the trial record of the military judge requiring the defense to bear the burden of proof for the affirmative defense of consent under a preponderance of the evidence or any other standard. To the contrary, there are significant aspects of this case that support the presumption that the military judge required the prosecution to prove beyond a reasonable doubt that there was a lack of consent by the victim.

⁴ Trial defense counsel also argued that appellant's denial of having had a sexual relationship was not false because there had never been any sexual activity between PFC MVB and appellant.

⁵ The military judge also found appellant guilty of making a false statement to CID regarding the incident with PFC MVB.

At the time of trial, our superior court had already issued its opinion in *United States v. Neal*, providing the constitutionally correct method for applying the burden of proof for affirmative defenses related to consent in cases involving sexual assault charges under Article 120, UCMJ. *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). The Army Trial Judiciary was well aware of the potential burden-shifting issue and had previously amended Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook [hereinafter Benchbook] (1 Jan. 2010), in order to ensure that Army judges did not run afoul of the Constitution when dealing with a consent defense in an Article 120, UCMJ, case. As noted in the Benchbook, "[t]he Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise members that the prosecution has the burden of proving beyond a reasonable doubt that consent does not exist." Benchbook, para. 3-45-3, note 10.

We must presume, in the absence of clear evidence to the contrary, that the military trial judge knew the law and applied it in a constitutionally correct manner. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (per curiam); *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996). We can thus presume the military judge did not apply the burden-shifting scheme as described in Article 120(t)(16), UCMJ. Instead, the military judge correctly applied the burden to the government to disprove consent beyond a reasonable doubt, and his consideration of evidence of consent in determining whether the government met the burden of proof for the elements of Article 120(h), UCMJ, was consistent with the holding of *Neal*.

The military judge freely allowed the trial defense counsel to argue in closing both that PFC REK consented to the sexual acts and that appellant had a reasonable belief that PFC REK had consented to those acts. Finally, the court's guilty finding regarding the forcible sodomy charge pertaining to PFC REK indicates the military judge applied the burden as to consent in a constitutional manner. The forcible sodomy charge arose out of the same course of conduct for which appellant was charged with abusive sexual contact. Under the elements of the Article 125, UCMJ, forcible sodomy charge, the military judge was required to hold the government to the burden of proving lack of consent and lack of mistake of fact as to consent by a beyond-a-reasonable-doubt standard. Accordingly, it is reasonable to infer the military judge found beyond a reasonable doubt a lack of consent by PFC REK for both the forcible sodomy charge and the abusive sexual contact charge.

Abusive Sexual Contact as a Lesser-Included Offense of Forcible Sodomy

Appellant also alleges that he was improperly convicted in Specification 1 of Charge III of the offense of abusive sexual contact under Article 120, UCMJ, because that offense was not a lesser-included offense of forcible sodomy under Article 125, UCMJ. We need not decide that issue because we find that under the facts as adduced at trial, the finding of guilty to Specification 1 of Charge III constitutes an unreasonable multiplication of charges with the finding of guilty to

Specification 1 of Charge II. *See generally, United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Accordingly, we will take remedial action in our decretal paragraph.

The setting aside of a serious offense such as abusive sexual contact would, in many cases, change the sentencing landscape. Under the unique facts of this case, however, it does not because appellant remains convicted of at least one offense which carries the possibility of a life sentence and the most aggravating circumstances are captured by the remaining charges.⁶ Accordingly, we are confident that we can conduct a sentence reassessment in this case.

CONCLUSION

The finding of guilty of Specification 1 of Charge III is set aside. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion, the court affirms the sentence.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court

⁶ Additionally, we note that prior to taking action on appellant's sentence, the convening authority approved the staff judge advocate's written recommendation that Specification 1 of Charge III be considered multiplicitous for sentencing with Specification 1 of Charge II.