

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KERN, YOB, and ALDYKIEWICZ
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant JOHN RON
United States Army, Appellant

ARMY 20100599

Headquarters, U.S. Army Signal Center of Excellence and Fort Gordon
Tara Osborn, Military Judge (arraignment)
Gary Brockington, Military Judge (trial)
Colonel Michael W. Hoadley, Staff Judge Advocate

For Appellant: Captain Meghan M. Poirier, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Imogene M. Jamison, JA; Major Laura R. Kesler, JA; Captain Meghan M. Poirier, JA (on brief); Colonel Patricia A. Ham, JA; Lieutenant Colonel Imogene M. Jamison, JA; Major Richard E. Gorini, JA; Captain Meghan M. Poirier, JA (on supplemental brief).

For Appellee: Captain John D. Riesenbergs, JA (argued); Major Ellen S. Jennings, JA; Captain Chad M. Fisher, JA; Captain Ryan D. Pyles, JA (on brief); Major Amber J. Roach, JA; Captain Chad M. Fisher, JA; Captain John D. Riesenbergs, JA (on supplemental brief).

1 June 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent

YOB, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of abusive sexual contact, forcible sodomy, and assault with intent to commit sodomy, in violation of Articles 120(h), 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934 (2006 & Supp. III 2009) [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to the grade of Private E-1.

In this Article 66, UCMJ, appeal, appellant raises four assignments of error that merit discussion, but no relief.

BACKGROUND

This case involves appellant's actions in sexually assaulting a fellow service member after an evening of heavy drinking left the victim extremely intoxicated. Appellant and the victim, Specialist (SPC) JM, were on friendly terms prior to the incident. SPC JM spent the afternoon of 9 August 2009 playing video games with another service member and drinking beer. SPC JM wanted to go out that evening and continue drinking, but his friend declined and went back to his own quarters to sleep. He then called appellant, who agreed they should go out together to some local bars. After drinking together for several hours, appellant and SPC JM returned to appellant's barracks room. Appellant later admitted that at this point in time SPC JM's level of intoxication was nine or ten on a scale of one to ten.

Appellant convinced SPC JM to undress to avoid the chance of vomiting on his clothes. He then laid SPC JM down on a futon and performed oral sex on him. SPC JM told him to stop, but appellant continued. He also tried to push appellant away, but did not have the ability due to his high level of intoxication. Appellant turned SPC JM on his stomach, and forced his penis into SPC JM's anus. During the assault, SPC JM stated that it hurt and asked several times for appellant to stop, but was too weak and scared to do more. Appellant tried to insert SPC JM's penis into his own anus and also moved SPC JM's head to try to get him to perform oral sex on appellant, but the victim turned his head away to prevent this. When appellant stepped away from him, SPC JM pushed himself off the futon, picked up his underwear and left the room. SPC JM later reported the sexual assault and, as a result, appellant gave a statement to law enforcement agents admitting to removing SPC JM's clothes and forcing his penis into SPC JM's anus at a time when he was aware of SPC JM's extreme level of intoxication. Appellant also responded to a question by law enforcement agents about why he sexually assaulted SPC JM with the answer, "I don't know."

LAW AND DISCUSSION

In his first assignment of error, appellant challenges the legal and factual sufficiency of the findings of guilty for the abusive sexual contact and forcible sodomy charges. We resolve questions of legal and factual sufficiency under a *de novo* standard. *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531 (Army Ct. Crim. App. 2006).

Based on our review of the record and argument in this case, we are convinced of appellant's guilt for these offenses beyond a reasonable doubt and find the evidence presented at trial was factually and legally sufficient to sustain a

conviction. The record establishes that appellant engaged in acts of sodomy and sexual contact with the victim at a time when appellant was aware the victim was substantially incapacitated. In addition, the evidence presented in this case proves beyond a reasonable doubt that the victim did not consent to the sodomy or sexual contact and that appellant did not hold an honest or reasonable belief that the victim consented to the acts of sodomy or sexual contact.

Appellant's second assignment of error alleges that the military judge violated his right to due process under the Fifth Amendment of the Constitution by placing the burden on appellant to prove consent for the Article 120(h), UCMJ, abusive sexual contact offense by a preponderance of the evidence, before the burden would shift to the prosecution to prove lack of consent beyond a reasonable doubt.

Consent is not an element of an Article 120(h), UCMJ, charge for abusive sexual contact. Article 120(r), UCMJ, notes that consent and mistake of fact as to consent are affirmative defenses to an abusive sexual contact charge. Article 120(t)(16) provides a definition of affirmative defenses that places the burden on the accused to prove an affirmative defense by a preponderance of evidence before the burden would shift to the prosecution to prove beyond a reasonable doubt that the affirmative defense did not exist.

The Court of Appeals for the Armed Forces (CAAF) has never upheld a facial challenge to the constitutionality of Article 120, UCMJ, due to this burden-shifting scheme. *See United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010); *see also United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). In *Neal*, CAAF held that the military judge erred in treating lack of consent as an element of aggravated sexual contact under Article 120, UCMJ, and that the judge also erred in concluding that Congress established an unconstitutional element-based affirmative defense in enacting Article 120, UCMJ, the same version that was in effect at the time of this offense. *Neal*, 68 M.J. at 303. In that case, where the charge alleged abusive sexual contact, CAAF recognized that consent is not an element of this charge as well as most of the Article 120, UCMJ, enumerated offenses. *Id.* at 300. CAAF explained that Article 120, UCMJ, while not making consent an element of most sexual assault offenses, did not preclude a court-martial from considering evidence of consent in determining whether the prosecution had proven the elements of a sexual assault offense beyond a reasonable doubt and that the statute permits consideration of such evidence with respect to the affirmative defense of consent. *Id.* at 303. The court stated, "if such evidence [pertaining to consent] is presented, the judge must ensure that the factfinder is instructed to consider all of the evidence, including the evidence raised by the defendant that is pertinent to the affirmative defense [of consent], when determining whether the prosecution established guilt beyond a reasonable doubt." *Id.* at 304 (citing *United States v. Martin*, 480 U.S. 228, 232–236 (1987)).

In *Prather*, a case decided after *Neal* involving a charge of aggravated sexual assault under Article 120, UCMJ, CAAF found that the military judge erred in the manner in which he instructed members. The instructions in *Prather* to the members did not require the government to disprove the affirmative defense of consent unless and until the panel members found the accused had proven by a preponderance of the evidence that the victim in that case consented. *Prather*, 69 M.J. at 343. CAAF held this instruction improper as it did not “‘convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], *must be considered* in deciding whether there was a reasonable doubt of the State’s proof of the elements of the crime.’” *Id.* at 344 (quoting *Neal*, 68 M.J. at 299) (emphasis in original). Thus, CAAF held that proper instructions could be fashioned that allow members to consider the affirmative defense of consent in an Article 120, UCMJ, case, but that instructions which adhere to the precise wording of the burden-shifting provision within Article 120(t)(16), UCMJ would create an impermissible burden shift onto the defendant.

Medina, decided shortly after *Prather*, involved a conviction for aggravated sexual assault under Article 120(c), UCMJ, where the victim was substantially incapacitated at the time of the offense and the accused raised the issue of consent as a defense. The military judge in *Medina* did not instruct the members on the burden-shifting processes outlined in Article 120(t)(16), but merely instructed the members that the defense had raised the issue of consent and that the prosecution had the burden to prove beyond a reasonable doubt that the victim did not express or communicate any consent by words or acts. CAAF affirmed the findings, ruling that the instruction given was inconsistent with the statute but nonetheless correctly conveyed to the members the government’s burden of proof on the issue of consent. *Medina*, 69 M.J. at 465.

In these decisions, our superior court demonstrated how, in cases involving sexual assault offenses charged under Article 120, UCMJ, factfinders can apply the burden of proof requirements in a manner that protects the constitutional due process rights of the accused who raise consent as an issue or as an affirmative defense. CAAF recently reaffirmed this principle in *United States v. Ignacio*, 71 M.J. 125 (C.A.A.F. 2012) (per curiam), a case involving a charge under Article 120(h), UCMJ. In that case, CAAF held that the military trial judge did not err in applying the Military Judges’ Benchbook instruction after the appellant in that case raised evidence of consent during the trial. *Ignacio*, 71 M.J. at ____.¹

¹ Paragraph 3-45-6 (note 6) of Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook [hereinafter Benchbook] (1 Jan. 2010), in effect at the time of trial in *Ignacio* and during appellant’s trial in this case, states:

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Appellant argues that we must presume the military judge in the current case applied the burden-shifting requirements of Article 120, UCMJ, mechanically as they are set forth in Article 120(t)(16), UCMJ. We disagree and hold that in this case 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 holdings of *Neal* and *Medina*.

In this case, there is no evidence within the record that the military judge required 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. At the time of trial, CAAF had already issued its opinion in *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. In addition, as noted above, the Benchbook provided the military judge with an instruction for affirmative defenses related to consent defenses in Article 120, UCMJ, that our superior court has affirmed when used to instruct members.

Finally, the court's guilty finding regarding the forcible sodomy charge in violation of Article 125, UCMJ, indicates the military judge applied the burden as to

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The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The 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 the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist.

consent in a constitutional manner. The forcible sodomy charge applied to 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. Therefore, it is reasonable to infer the military judge found beyond a reasonable doubt a lack of consent by the victim for both the forcible sodomy charge and the abusive sexual contact charge.

Appellant's third assignment of error alleges the military judge committed plain error when he failed to dismiss the abusive sexual contact charge after he determined it was multiplicitious for sentencing purposes with the forcible sodomy and assault with intent to commit sodomy offenses. In *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012), a case decided by our superior court after the conclusion of this case, CAAF explained, "there is only one form of multiplicity, that which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis." *Id.* at 23 (citing *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993)). The court also held that, as a matter of logic and law, if an offense is multiplicitious for sentencing it must necessarily be multiplicitious for findings as well. *Id.*

In this case, it is apparent that the military judge did not apply the elements test required by *Blockburger* and *Teters* in his determination that the charges were multiplicitious. When we apply this test, we find the three charges in this case contain distinct elements from one another, which precludes a finding of multiplicity. While the military judge erred in finding the charges multiplicitious for sentencing purposes, the error did not prejudice appellant in any way, as he received the benefit of a reduction in his possible maximum punishment in the eyes of the trial judge who acted as the sentencing authority.

As for whether these charges constituted an unreasonable multiplication of charges, *see United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), there is no indication the military judge conducted any such analysis. Our application of the *Quiroz* factors leads us to the conclusion that there was no unreasonable multiplication of charges, either for sentencing purposes or for trial on the merits.

Appellant's final assignment of error claims the Specification of Charge II, alleging an offense under Article 134, UCMJ, assault with the intent to commit sodomy, failed to state an offense in that the charge did not allege the terminal

element of Article 134, UCMJ.² Appellant contested this offense at trial but did not object to the form of the Article 134, UCMJ, charge prior to appeal. After reviewing this case in light of *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011); *United States v. Fox*, 34 M.J. 99 (C.M.A. 1992); *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); and *United States v. Berner*, 32 M.J. 570 (A.C.M.R. 1991), we find no prejudice to appellant.

CONCLUSION

After considering the record of trial, the briefs submitted by the parties, oral arguments by both parties, and the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we hold the findings of guilty and sentence adjudged and as approved by the convening authority to be correct in law and fact. Accordingly, those findings of guilty and the sentence are **AFFIRMED**.

Senior Judge KERN and Judge ALDYKIEWICZ concur.



FOR THE COURT:

A handwritten signature in black ink, reading "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court

² The terminal element for this Article 134, UCMJ, offense would have alleged that appellant's conduct was either of a nature to bring discredit upon the armed forces, or prejudicial to good order and discipline in the armed forces, or both.