

Wednesday, 9 November 2011

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**United States v. Weller**

A military judge sitting as a general court-martial convicted the appellant, pursuant to his plea, of one specification of negligent discharge of a firearm, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge also convicted the appellant, contrary to his plea, of one specification of assault with a dangerous weapon (loaded firearm), in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was sentenced to eighteen months confinement, reduction to pay grade E-1, total forfeitures, 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 issues to be argued before the Court are the following:

- I. TO PROVE ASSAULT, THE GOVERNMENT NEEDED TO SHOW THAT APPELLANT ACTED WITH CULPABLE NEGLIGENCE RATHER THAN SIMPLY A LACK OF DUE CARE. WAS APPELLANT'S CONVICTION FOR ASSAULT WITH A DEADLY WEAPON FACTUALLY INSUFFICIENT, UNDER A CULPABLE NEGLIGENCE STANDARD?
  
- II. IN ARTICLE 128, UCMJ, CONGRESS CRIMINALIZED TWO TYPES OF ASSAULTS - OFFER AND ATTEMPT - "WHETHER OR NOT THE ATTEMPT OR OFFER IS CONSUMMATED." APPELLANT WAS CHARGED WITH ASSAULT BY BATTERY, OFFER OR ATTEMPT WAS NOT SPECIFIED. EVEN ASSUMING THE FACTS MOST FAVORABLE TO THE GOVERNMENT, WAS APPELLANT'S CONVICTION FOR ASSAULT WITH A DEADLY WEAPON LEGALLY INSUFFICIENT?

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**United States v. Tearman**

A panel of members sitting as a special court-martial convicted the appellant, contrary to his plea, of wrongful use of marijuana, in violation of Article 112A, UCMJ. The members sentenced the appellant to reduction in pay grade to E-1 and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged.

At trial, the Government introduced a report generated by the Navy Drug Screening Lab, San Diego, but did not introduce the cover sheet to the report. The appellant moved to exclude

the entire report and all chain-of-custody documents and report annotations that were not machine generated. The military judge denied the appellant's motion.

The assigned error before the Court is the following:

- I. IN LIGHT OF THE UNITED STATES SUPREME COURT'S RULING IN *MELENDEZ-DIAZ V. MASSACHUSETTS*, DO THE ADMISSION OF REPORTS AND THEIR ANNOTATIONS GENERATED BY ABSENT, UNTESTED NAVY DRUG LAB TECHNICIANS IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT CONFRONTATION RIGHT OF CONSTITUTE AN ABUSE OF DISCRETION.

Specifically, the parties are ordered to address this assignment of error in light of *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

Thursday, 17 November 2011

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**United States v. Stratton**

A panel of members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of sodomy in violation of Article 125, UCMJ, 10 U.S.C. § 925. The panel acquitted the appellant of one specification of aggravated sexual assault and one specification of abusive sexual contact under Article 120, UCMJ, 10 U.S.C. § 920. The appellant was sentenced to ninety days confinement, forfeiture of all pay for ninety days, 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 issues to be argued before the Court are the following:

- 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 INCLUDED 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 ALLEGED 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?
  
- 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 OF 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*?