IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **C.L. CARVER** **K.K. THOMPSON**

UNITED STATES

v.

Scott R. MCCLELLAND
Captain (O-6), Medical Corps, U. S. Navy

NMCCA 200101300 Decided 24 January 2006

Sentence adjudged 13 September 2000. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
RICHARD T. MCNEIL, Civilian Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

RITTER, Senior Judge:

Pursuant to his pleas, the appellant was convicted by a military judge, sitting as a general court-martial, of violating a lawful general regulation on divers occasions, sodomy on divers occasions, two specifications of conduct unbecoming an officer, and adultery, in violation of Articles 92, 125, 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, 933, and 934. The appellant was sentenced to dismissal, confinement for 12 months, forfeiture of $500.00 pay per month for 24 months, and to be reprimanded. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 6 months for the period of confinement served plus 12 months thereafter, and suspended all adjudged forfeitures for 12 months from the date of his action. He also waived all automatic forfeitures for 6 months from the date of his action.

The appellant contends that: (1) the sentence was unduly severe, (2) the conviction for sodomy violates his constitutional right to privacy, and (3) the convening authority was not

impartial and was thus disqualified from evaluating the appellant's clemency petition and taking action in this case.

We have carefully reviewed the record of trial, the appellant's three assignments of error, and the Government's response, and conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.[1] *See* Arts. 59(a) and 66(c), UCMJ.

Sentence Severity

The appellant, a Navy captain, served as the director of clinical services and as a psychiatrist at the Naval Hospital at Marine Corps Base, Camp Lejeune, North Carolina. While treating a patient, Staff Sergeant (SSgt) R, for panic disorder and addictive sexual behavior, the appellant engaged in a sexual relationship with her, although both he and SSgt R were married to other people. Over a 21-month period, he engaged in sexual intercourse with SSgt R about 4 times, oral sodomy about 10 times, and anal sodomy twice. While all the incidents of sexual intercourse and anal sex occurred either at SSgt R's home or at an off-base hotel, some of the oral sex incidents occurred in the appellant's office during SSgt R's scheduled counseling appointments. He also called her frequently from his government telephone, and discussed sexual topics for his own sexual gratification.

During the last 5 months of this relationship, the appellant also attempted to enter into a sexual relationship with another of his patients, CJ. She was the newly married wife of a Marine sergeant, and the appellant had been treating her for bulimia, an eating disorder. First, the appellant arranged a special counseling session, during which he told CJ that he had developed personal feelings for her. He later conducted a "mirror imaging examination" in her home, without a medical assistant present, in which CJ was required to wear only underwear as the appellant examined her in front of a mirror. The appellant began making telephone calls to CJ, usually at night, and discussed sexual topics. In particular, he would tell CJ his sexual desires for her and about his past sexual experiences. On one occasion, the appellant asked CJ to join him for a weekend in New York City, where he hoped to engage in sexual intercourse with her.

Several years prior to these events, the appellant was stationed at the Navy base in Rota, Spain. During this time, while serving as a psychiatrist at the base mental health clinic, he developed a sexual relationship with his secretary, LD, the wife of a Navy enlisted man. The appellant began by giving LD informal counseling sessions relating to difficulties she was having in her marriage. The sessions eventually led to an intensely physical relationship involving kissing and hugging.

[1] The Motion for Oral Argument submitted by the appellant on 23 July 2004 is hereby denied.

After LD left her husband and returned to the United States, the appellant arranged to meet her one weekend at a hotel in New York City, where they engaged in sexual intercourse. He later broke off the relationship after being warned in a telephone call from LD's therapist.

During the presentencing hearing, the appellant produced 15 witnesses and extensive documentary evidence attesting to his good character, leadership in the community as a deacon of his church, and 30 years of military service. He also made an extensive unsworn statement, providing details of his career and family, and apologizing to the victims and their families.

We have considered the extensive evidence of the appellant's good character and service to this country. We also note the extremely serious nature of his offenses. An appropriate sentence results from an "individualized consideration" of the nature and seriousness of the offense and the character of the accused. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Taking all of these factors into consideration, we find the sentence, including the dismissal, fully appropriate for this offender and his offenses. To grant sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Application of *Lawrence v. Texas*

The appellant contends that his conviction for divers acts of sodomy with SSgt R should be set aside and dismissed as a violation of his constitutional right to privacy, pursuant to the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). We disagree.

Whether the appellant's conviction for consensual sodomy must be set aside in light of *Lawrence* is a constitutional question we review de novo. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004)(citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)).

In *Lawrence*, the United States Supreme Court found a constitutionally protected liberty interest in consensual sodomy between adults, under some circumstances. In *Marcum*, our superior Court found that *Lawrence* applies to the military and adopted a three-part framework for determining whether Article 125, UCMJ, is constitutional as applied to the facts of a given case. The test requires three questions:

> 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? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside

> the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07 (internal citations omitted).

As to the first question, we will assume that the appellant's sexual acts at issue were both private and consensual.[2]

Regarding the second question, however, we find the appellant's conduct is specifically excepted from the liberty interest articulated in *Lawrence*. That is, the appellant engaged in divers acts of sodomy with a patient who was dependent on the appellant for critical psychiatric treatment for a diagnosed panic disorder. The Supreme Court specifically excepted from the *Lawrence* liberty interest "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." 539 U.S. at 578. We are convinced that SSgt R's dependence on the appellant for treatment for her panic disorder created just such a situation.

Our view is bolstered by the Government's expert witness, Dr. T. Gutheil, who testified that the therapist-patient relationship creates a powerful bond that can easily be exploited. He testified: "Anyone who offers help with a panic disorder really holds that patient hostage, because it's so unpleasant and so uncomfortable and so frightening that anyone who offers you that you're going to help with this, really has an amazing grip on you because of how distressing it is." Record at 191. Moreover, the appellant stipulated that he "diagnosed her as a sex addict," and testified that she "displayed behaviors of a sexual nature that were addictive in quality." Prosecution Exhibit 1 at 1; Record at 56. Dr. Gutheil testified that, while there is no formal diagnosis for sexual addiction, "individuals can engage compulsively in sexual behavior." *Id.* at 191. Because the therapist-patient relationship in this case created a situation in which "consent might not easily be refused," we find that Article 125, UCMJ, is not unconstitutional as applied to the appellant's case.

Finally, as to the third question in the *Marcum* analysis, it is clear that this case involves factors that affect the nature and reach of the *Lawrence* liberty interest. Specifically, the appellant's repeated acts of sodomy with SSgt R served as part of the factual predicate for his conviction for fraternization with a married enlisted person. The appellant admitted during the providence inquiry that, under the circumstances, this conduct was prejudicial to good order and discipline and of a nature to discredit the armed forces. We agree with his assessment, and note the appellant's predatory conduct as a Navy captain and

[2] We need not decide today whether sexual activity that occurs in an individual office in a military hospital is "private."

director of clinical services at the Naval Hospital against the interests of both a married enlisted patient and her spouse would inevitably undermine both good order and discipline, as well as the reputation of the armed forces in the surrounding community.

We conclude that the appellant's repeated acts of sodomy constituted conduct of a type specifically excepted from the *Lawrence* liberty interest. They also implicated military-specific interests that warranted his prosecution by court-martial. *See United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 1682 (2005); *United States v. Christian*, 61 M.J. 560, 563-64 (N.M.Ct.Crim.App. 2005).

Conclusion

We have considered but find without merit the appellant's third assignment of error, essentially contending that the wording of the adjudged letter of reprimand calls into question the convening authority's impartiality in the conduct of his post-trial duties. Although not assigned as error, we also note that enclosure (9) of the appellant's clemency request of 30 May 2001 is missing from the record. This attachment to the post-trial submission was not evidence admitted at court-martial, and the appellant raises no issues as a result of its omission. We find that the missing attachment to the post-trial submission in this case is not a "substantial" omission from the record of trial and does not render the record incomplete within the meaning of Article 54, UCMJ. *See United States v. Henry*, 53 M.J. 108 (C.A.A.F. 2000); *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

We therefore affirm the findings and the sentence, as approved by the convening authority.

Senior Judge CARVER and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court