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

BEFORE

W.L. RITTER **K.K. THOMPSON** **C.P. NICHOLS**

UNITED STATES

v.

Paul S. BARRERA
Private (E-1), U. S. Marine Corps

NMCCA 200400371 Decided 28 August 2006

Sentence adjudged 28 August 2003. Military Judge: J.G. Baker. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Air Control Group 18, 1st Marine Aircraft Wing, Okinawa, Japan.

Maj J.ED. CHRISTIANSEN, USMC, Appellate Defense Counsel
CAPT STEPHEN WHITE, JAGC, USNR, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

RITTER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of sodomy on two separate occasions, assault, and communicating a threat, in violation of Articles 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928, and 934. The appellant was sentenced to confinement for 6 months and a bad-conduct discharge. The convening authority approved the sentence but suspended all confinement in excess of 60 days.

After carefully considering the record of trial, the appellant's sole assignment of error, and the Government's response, we 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. *See* Arts. 59(a) and 66(c), UCMJ.

Application of *Lawrence v. Texas*

The appellant contends that his conviction for two acts of consensual sodomy should be set aside and dismissed as a violation of his constitutional right to privacy. He argues that our superior court's decision framework announced in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), supports his position that the two acts of consensual sodomy were within the protected liberty interest identified in *Lawrence v. Texas*, 539 U.S. 558 (2003). We disagree.

On two separate occasions, the appellant and another Marine from his unit, Private First Class (PFC) HernandezDiaz, engaged in consensual anal sodomy in the latter's first floor barracks room aboard Marine Corps Air Station Futenma in Okinawa, Japan. PFC HernandezDiaz shared his room with another Marine, but his roommate was not present during either incident. Both sodomy incidents occurred either late in the evening or early in the morning, and each time the doors to the room were locked. The room shared a common restroom with another barracks room, and there were approximately 100 other Marines living on that floor. A written standing order prohibited sexual activity of any kind in the barracks.

Several months later, the appellant angrily confronted PFC HernandezDiaz over the fact that the latter had told other Marines about their sexual encounters. The appellant at first threatened and then assaulted PFC HernandezDiaz.

Whether the appellant's conviction for consensual sodomy must be set aside in light of *Lawrence* is a constitutional question we review de novo. *Marcum*, 60 M.J. at 202. 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 poses three questions for analysis:

> 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?
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> *Id*. at 206-07 (internal citations omitted).

Marcum's first prong

To determine whether the appellant's sodomy offenses were within the liberty interest identified in *Lawrence*, we must determine whether the appellant's conduct was "private, consensual sexual activity between adults." *Id*. at 207. While there is no question that the conduct was consensual and that the participants were adults, the Government contends that the acts were not private, because the appellant had a limited expectation of privacy in PFC HernandezDiaz' barracks room. We agree that there is less of an expectation of privacy in a military barracks room than in a private civilian residence, as was the situation in *Lawrence*, but find that this point is not dispositive on the issue of whether conduct is private in nature. While a reasonable expectation of privacy is a fundamental factor in determining whether a search and seizure is properly conducted under the Fourth Amendment to the United States Constitution, we are not aware of any controlling authority that utilizes that legal concept to categorize conduct as either public or private in nature.

We find no evidence in the record to suggest that the consensual sexual conduct at issue was observed by anyone other than the two participants, nor that the circumstances in this case suggest that the acts were performed in an "open and notorious manner;" that is, under circumstances that make it reasonably likely a third person would have observed them. *See United States v. Sims*, 57 M.J. 419, 421-22 (C.A.A.F. 2002). Here, the acts of sodomy occurred late at night or early in the morning, with the doors locked, no one present, and with no one aware of what the participants were doing. We thus conclude that the conduct must reasonably be construed as private in nature unless a barracks room can legally be construed a public place.

In deciding whether a barracks room is a public place, we look to our superior court's guidance in *United States v. Graham*, 56 M.J. 266 (C.A.A.F. 2002). *Graham* involved a charge of indecent exposure, and discussed the differences between what is a "public place" and "public view." The court defined a public place as one that is "accessible or visible to the general public." *Id*. at 269. The inside of an on-base military barracks room is restricted in the interest of military security, and is generally not accessible or visible to the public. We thus conclude, unlike our concurring colleague, that the appellant's acts of consensual sodomy, occurring in a barracks room and unseen by anyone other than the participants, constituted private conduct. To hold otherwise would arguably render every service member's act of changing clothes in a barracks room an act of indecent exposure.

Marcum's second prong

Regarding the second question, we find the appellant's conduct was not specifically excepted from the liberty interest

articulated in *Lawrence*. That is, the appellant's acts of consensual sodomy did not involve minors, persons in situations in which consent might not easily be refused, public conduct, or prostitution. Neither evidence nor argument was presented to suggest that the appellant felt coerced to consent to consensual sex with PFC HernandezDiaz, despite the fact that he was assigned to the same unit and junior by one pay grade. Indeed, the evidence indicates that the appellant in no way felt intimidated by PFC HernandezDiaz, and later became the aggressor in offenses of assault and communicating a threat.

Marcum's third prong

Finally, as to the third question in the *Marcum* analysis, we conclude that this case involves factors that affect the nature and reach of the *Lawrence* liberty interest. First, the appellant admitted that his acts of sodomy were prejudicial to good order and discipline. Record at 32, 34. We agree with that assessment, and note that the danger to unit cohesion and morale posed by such sexual activity between members of the same unit in a military barracks is arguably even more pronounced where the unit is stationed overseas in a foreign country, away from families and friends and in relative isolation. Moreover, the danger to good order and discipline was borne out in this case by the rumors that circulated within the unit, and the tension leading up to the appellant's later offenses of assault and communication of a threat.

Second, the record demonstrates that all sexual activity was specifically prohibited in the barracks, and that fact underscores the harm to good order and discipline posed by the conduct at issue. *See United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004), *cert. denied*, 544 U.S. 923 (2005); *United States v. Christian*, 61 M.J. 560, 563-64 (N.M.Ct.Crim.App. 2005), *rev. denied*, 62 M.J. 451 (C.A.A.F. 2006). We thus conclude that the appellant's acts of sodomy implicated military-specific interests that brought his conduct outside the constitutionally-protected liberty interest announced in *Lawrence*. His acts therefore warranted prosecution by court-martial.

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Judge THOMPSON concurs.

NICHOLS, Judge (concurring in part and in the result):

I concur in part with my colleagues and concur in the result. In the case at bar, the appellant contends that consensual private sodomy with a Marine is a constitutionally protected activity and that his conviction is inconsistent with the holding of *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

The primary liberty interest identified in *Lawrence v. Texas* was privacy from government intervention into its citizens' homes. 539 U.S. 558, 562 (2003). The military is, by necessity, a specialized society "and constitutional rights may apply differently to members of the armed forces than they do to civilians." *Marcum*, 60 M.J. at 205 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)). "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. 758. Although service members "do not leave constitutional safeguards and judicial protection behind when they enter military service," they do join a specialized society that often requires a loss of autonomy and privacy. *Marcum*, 60 M.J. at 205-06 (quoting *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994)). "In the military setting, as this case demonstrates, an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life." *Id.* at 206.

In *Marcum*, the U.S. Court of Appeals for the Armed Forces established a three-part test to determine the constitutionality of the appellant's conduct:

> 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 affects the nature and reach of the *Lawrence* liberty interest?

60 M.J. at 206-07 (citations omitted).

I believe the appellant's conduct implicates the second prong of the *Marcum* framework. Under the facts and circumstances in this case, I would find that the appellant did not have a sufficient expectation of privacy to equate consensual sexual activity in a military barracks to the identified behavior in a private home, as was the subject of *Lawrence*. At the time the incidents took place, the appellant resided in a barracks room at Marine Corps Air Station Futenma in Okinawa, Japan. The room was located on the first floor of the barracks. The first floor housed approximately 100 Marines. The appellant shared his room with another Marine, and their

room joined another Marine's room through a mutual bathroom. On the night the acts were committed, the appellant did not know if anyone was in the connecting barracks room, or if any person in his chain of command would enter his barracks room. Record at 27-30.

Unlike *Marcum*, where the sodomy occurred off base in the service member's apartment, here the incident occurred on board a U.S. Marine Corps base in the barracks. Marine Air Control Group Order 11000.5 clearly stated, "Sexual activity is strictly prohibited in all MACG-18 BEQs." Appellate Exhibit I at 17; *see* Group Order 11000.5, Standing Operating Procedures for Marine Air Control Group 18 Bachelor Enlisted Quarters (MACG-18 BEQ).

I do not believe that you have the same privacy expectation in a military barracks that you would in a private home, a motel room, or even a remote beach. My colleagues assert, "that there is less of an expectation of privacy in a military barracks room than in a private civilian residence," yet argue that prohibited sexual conduct in a military barracks is private conduct. A service member has a reduced expectation of privacy because the Government retains a legitimate interest in regulating its public property. *See United States v. Linnear*, 16 M.J. 628, 629 (A.F.C.M.R. 1983)(holding consensual sodomy between adults was not in "private" where it occurred in a closed, base exchange snack bar, behind a closed door); *see also People v. Williams*, 613 N.W.2d 721 (Mich. 2000)(county jail's interview room held a public place where attorney exposed his penis to a client); *George v. Lane*, 1987 WL 10573 (N.D. Ill. 1987)(holding a prison cell was a public place within the meaning of an indecency statute). In the broad spectrum of what constitutes a private place versus a public place, a military barracks is not at either end of that spectrum, nor is there a "bright line" rule to guide us.

The appellant's conduct also squarely implicates the third prong of the Marcum framework because "there were additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *See United States v. Bart*, 61 M.J. 578, 582 (N.M.Ct.Crim.App. 2005) (noting the military has consistently regulated relationships between service members to avoid preferential treatment, undermine good order and discipline, or diminish unit morale). The U.S. Court of Appeals for the Armed Forces has noted that regulations prohibiting sexual activity between members of the same unit sustain cohesion and morale. *See United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004)(upholding an

enlisted Coast Guardsman's conviction for consensual sodomy with an officer based on the military's interest in discipline), *cert. denied*, 544 U.S. 923 (2005).

The record indicates that the appellant confronted Private First Class (PFC) HernandezDiaz and threatened to "burn him" for disclosing their relationship to others. Record at 22. Appellant then apologized to PFC HernandezDiaz, at which point he attempted to kiss him. *Id.* at 25. Out of rage, appellant then slapped and choked PFC HernandezDiaz. *Id.* at 25-26. "While service members clearly retain a liberty interest to engage in certain intimate sexual conduct, 'this right must be tempered in a military need for obedience of orders, and civilian supremacy.'" *Marcum*, 60 M.J. at 208 (quoting *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)). The appellant admitted on the record that he physically assaulted PFC HernandezDiaz. The assault directly resulted from the sexual relationship between the appellant and PFC HernandezDiaz. As I stated, he struck PFC HernandezDiaz out of rage for disclosing their relationship to third parties. The Government retains an interest in preventing disruptions within the ranks. Therefore, I concur that the appellant could be convicted of sodomy consistent with the holding of *Marcum*.

For the Court

R.H. TROIDL
Clerk of Court