U.S. Navy–Marine Corps Court of Criminal Appeals.
UNITED STATES
v.
Christopher C. ELLIOTT, Lance Corporal (E–3), U.S. Marine Corps.

NMCCA 200500591.
Sentence Adjudged 13 Dec. 2004.
Decided 24 Oct. 2006.

Sentence adjudged 13 December 2004. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of General Court–Martial convened by Commander, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

LT Anthony Yim, JAGC, USNR, Appellate Defense Counsel.

LCDR Brian Bouffard, JAGC, USNR, Appellate Defense Counsel.

Capt Roger Mattioli, USMC, Appellate Government Counsel.

Before RITTER, Senior Judge, WHITE and FELTHAM, Appellate Military Judges.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge:

***1** A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of conspiracy to commit larceny, two specifications of damaging nonmilitary property, three specifications of larceny of automobile parts and tools, three specifications of housebreaking, two specifications of adultery, and two specifications of indecent acts with another, in violation of Articles 81, 109, 121, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 909, 921, 930, and 934. The convening authority approved the adjudged sentence of confinement for 36 months, forfeiture of all pay and allowances, reduction to pay grade E–1, and a bad-conduct discharge, but suspended all confinement in excess of 30 months pursuant to a pretrial agreement.

The appellant now raises the following assignments of error: (I) that his plea of guilty to Specification 2 of Charge VI (housebreaking) is improvident because Article 130, UCMJ, requires an unlawful entry into a building or structure, and, although the appellant admitted during the providence inquiry that he unlawfully entered a fenced area, he did not enter an actual building or structure; (II) that his pleas of guilty to two specifications of indecent acts with another are improvident because the acts charged consisted solely of consensual sexual intercourse between adults, and were not otherwise indecent; (III) that the two specifications of adultery and the two specifications of indecent acts with another constitute an unreasonable multiplication of charges where the same two acts of sexual intercourse were charged both as adultery and as indecent acts with another; and (IV) that the military judge erred by considering the testimony of Mrs. B. during presentencing, because the appellant pled guilty to offenses involving consensual intercourse between himself and Mrs. B., and Mrs. B. consistently described facts amounting to rape, an offense not before the court.

We have carefully considered the record of trial, the appellant's assignments 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.

Improvident Plea to Housebreaking

During the providence inquiry into his plea of guilty to Specification 2 of Charge VI, the appellant testified that he entered the property of a construction company through a hole, cut for that purpose in a perimeter fence, with the intent to commit larceny therein, but that he did not enter any sort of structure. He now claims his plea to housebreaking is improvident because he did not enter a building or structure. We disagree. Entering a storage area by climbing over a fence has previously been held by our superior court to be the subject of housebreaking. United

States v. Wickersham, 14 M.J. 404 (C.M.A.1983). We reject this assignment of error.

Indecent Acts With Another

***2** During the providence inquiry into his pleas of guilty to the two specifications of indecent acts with another, the appellant testified that the indecent acts consisted of his twice having consensual sexual intercourse with the same woman, Mrs. B, on beaches at Myrtle Beach, South Carolina, and Marine Corps Base Camp Lejeune, North Carolina.

The appellant testified that the first act of intercourse took place at night, against a seawall next to a hotel in Myrtle Beach. Although the appellant and Mrs. B were in the shadows, he testified that the area around them was illuminated by a spotlight and that passersby could have observed them.

The second act of intercourse also took place at night, but this time in a cabana on Onslow Beach at Camp Lejeune. The appellant testified that the cabana was open on two sides, giving passersby two different directions from which they could have observed his sexual activity. He also testified that people were driving on the beach at the time, and that he and Mrs. B stopped having sex when a vehicle pulled up and stopped nearby.

The appellant now claims his guilty pleas to committing indecent acts were improvident, arguing that private sexual intercourse is not inherently indecent, that consensual sexual intercourse on a deserted beach in the middle of the night is not open and notorious, and that consensual sex between two people impaired by alcohol is not *per se* indecent. He cites this court's decision in *United States v. Carr*, 28 M.J. 661 (N.M.C.M.R.1989) in support of his argument. His reliance on *Carr* is misplaced.

In *Carr*, a case which, like the one before us, also involved unobserved nighttime sex on the beach, we noted that: "Article 134, UCMJ, prohibits acts of sexual intercourse which are 'open and notorious.' " *Carr*, 28 M.J. at 665 (citing *United States v. Berry*, 20 C.M.R. 325, 1956 WL 4521 (C.M.A.1956)). "In our view, an act is 'open and notorious' (and hence criminal) when it is performed in such a place and under such circumstances that it is reasonably likely to be seen by others. Such an analysis must, of necessity, be undertaken on a case-by-case basis, and must look not only to the locus of the act itself, but also to the attendant circumstances surrounding its commission." *Carr*, 28 M.J. at 665.

Our superior court expressed a similar view in *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F.1999), noting that the following was a proper instruction by the military judge in that case on the elements of the offense of indecent acts:

> Sexual acts are considered to be committed openly and notoriously when such acts are performed in such a place and under such circumstances that it is reasonably likely to be seen by others even though others actually do not view the acts. In determining if sexual acts are performed openly and notoriously, you must look not only to the location of the act itself, but also to the attendant circumstances surrounding their commission.

Id. at 423. Here, the first act of sexual intercourse took place in an area in which the appellant testified that he and Mrs. B could have been observed by passersby. The second occurred on a beach while vehicles were driving nearby. We find that these two acts of sexual intercourse were "open and notorious," and reject the appellant's second assignment of error.

Unreasonable Multiplication of Charges

***3** In his third assignment of error, the appellant claims the adultery charge and its specifications and the indecent acts charge and its specifications constitute an unreasonable multiplication of charges because they involve the same acts of consensual sexual intercourse. We reject this assignment of error. *See United States v. Wheeler*, 40 M.J. 242, 247 (C.M.A.1994)(holding that indecent acts and adultery are not multiplicious for findings).

Sentencing Evidence

In his fourth assignment of error, the appellant claims the military judge erred by considering the testimony of Mrs. B during presentencing, because the appellant pled guilty to offenses comprised of consensual sexual

intercourse, and Mrs. B consistently described facts amounting to rape, an offense not before the court.

The appellant's guilty pleas were supported, in part, by a stipulation of fact in which he agreed that Mrs. B would have objected to having sexual intercourse with him at Myrtle Beach and Camp Lejeune if her mental capacity to reason effectively had not been impaired by her being under the influence of a combination of prescription drugs and alcohol. Prosecution Exhibit 1. The appellant stipulated that, at Myrtle Beach, Mrs. B leaned against a wall, that he observed her to be under the combined influence of alcohol and a prescription medication, and that he then inserted his penis into her vagina and had sexual intercourse with her. Id. He stipulated that, at Camp Lejeune, Mrs. B leaned against a picnic table, that he again observed her to be under the influence of (and impaired by) her combined use of alcohol and her prescription medication, and that he then inserted his penis into her vagina and had sexual intercourse with her. Id.

The gist of Mrs. B's sentencing testimony was that the appellant's penetration of her was a surprise on both occasions, that the appellant restrained her, that the intercourse was painful, and that she told the appellant to stop. The appellant's counsel did not object to this testimony, but the appellant now claims it was plain error for the military judge to admit it. We disagree.

The standard of review on appeal for the admission or exclusion of evidence on sentencing is whether the " 'judge clearly abused his discretion.' " *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F.1999)(quoting *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F.1995) and *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A.1993)). RULE FOR COURTS–MARTIAL 1001(b)(4), MANUAL FOR COURTS–MARTIAL, UNITED STATESS (2002 ed.), sets forth the rule as to what evidence the prosecution can present in aggravation, stating that "[t]he trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Evidence in aggravation includes, but is not limited to, evidence of social, psychological, and medical impact or cost to any person who was the victim of an offense committed by the accused. Id. "Whether a circumstance is 'directly related to or results from the offenses' calls for considered judgment by the military judge, and [an appellate court] will not overturn that judgment lightly." *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F.1997)(citing *United States v. Jones*, 44 M.J. 103, 104–05 (C.A.A.F.1996)).

Even if Mrs. B's sentencing testimony could have led one to conclude that the appellant may actually have been more culpable than indicated by the charges of which he was convicted, it does not follow that it was error for the military judge to admit her testimony in aggravation. Circumstances surrounding the commission of charged offenses that have not previously been introduced before the findings may be introduced at the pre-sentencing stage, regardless of whether the accused pled guilty or not guilty, provided they meet the requirements of R.C.M. 1001(b)(4). *See* United States v. Vickers, 13 M.J. 403, 406 (C.M.A.1982); United States v. Wingart, 27 M.J. 128, 134–35 (C.M.A.1988). "[U]ncharged misconduct may be admitted because it is preparatory to the crime of which the accused has been convicted—e.g., an uncharged housebreaking that occurred prior to a larceny or rape. It may accompany the offense of which the accused has been convicted—e.g., an uncharged aggravated assault, robbery, or sodomy incident to a rape." *Wingart*, 27 M.J. at 135.

***4** Because of the stipulation of fact in this case, Mrs. B's sentencing testimony is analogous to that of the assault victim in *United States v. Terlep*, 57 M.J. 344 (C.A.A.F.2002). In *Terlep*, the appellant was charged with burglary and rape, but pleaded guilty to the lesser charges of unlawful entry of a dwelling and assault consummated by a battery. Id. He and the Government stipulated that he unlawfully touched the victim's body with his hands without permission. Id. During sentencing, the victim testified that she fell asleep naked, and awoke sometime later to find Staff Sergeant Terlep on top of her, with his penis inside her. Id. Finding that the victim's sentencing testimony did not contradict, expressly or implicitly, the stipulation of fact, our superior court held that it was not error to admit it. Id. at 348.

In the instant case, the stipulation of fact did not expressly state that a rape did not occur on either of the two occasions when the appellant had sexual intercourse with Mrs. B. However, it did state that, on both occasions, the appellant knew Mrs. B. would have objected to having intercourse with him, had her mental capacity not been impaired by a combination of prescription drugs and alcohol. Furthermore, it is not necessarily inferable from the adultery and indecent acts offenses stipulated to that one or more rapes did not also occur. Applying *Terlep*, we find that Mrs. B's sentencing testimony did not contradict the stipulation of fact, expressly or implicitly, and also find

that the military judge did not err by admitting the testimony. Mrs. B's testimony was evidence of circumstances directly relating to or resulting from the offenses of which the appellant was found guilty, and we reject the appellant's fourth assignment of error.

Conclusion

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

Senior Judge RITTER and Judge WHITE concur.

N.M.Ct.Crim.App.,2006.
U.S. v. Elliott
Not Reported in M.J., 2006 WL 4572871 (N.M.Ct.Crim.App.)