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

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Nigel J. RAYMER
Engineman Second Class (E-5), U. S. Navy

NMCCA 200401858 Decided 30 March 2006

Sentence adjudged 25 June 2004. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Region Northwest, Silverdale, WA.

LCDR EVELIO RUBIELLA, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

STONE, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of failure to obey a lawful general order or regulation, willfully damaging non-military property, drunk on duty, larceny, and committing indecent acts with another, in violation of Articles 92, 109, 112, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 909, 912, 921, and 934. The military judge sentenced the appellant to confinement for 24 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, however, pursuant to a pretrial agreement, all confinement in excess of 18 months was suspended for a period of two years.

We have examined the record of trial, the appellant's two 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 accused has been committed. Arts. 59(a) and 66(c), UCMJ.

Indecent Acts

In his first assignment of error the appellant contends that his plea of guilty to committing an indecent act with another was improvident. We disagree.

The military judge, during his inquiry into the appellant's plea of guilty to the offense of committing an indecent act with another, ascertained that the appellant videotaped an act of consensual sexual intercourse with his wife, without her knowledge that she was being videotaped. The videotaping took place in the appellant's assigned room in the bachelor enlisted quarters. He had been assigned to the bachelor enlisted quarters pursuant to imposition of a restraining order requiring him to remain more than 1000 feet away from his wife at all times. The appellant claimed that he made the videotape for the purpose of proving that the restraining order was not necessary. He stated that he chose not to turn off the videotape recorder prior to having sexual intercourse with his wife.

The appellant now contends that his act of videotaping himself and his wife having sexual intercourse with him without her knowledge was not wrongful, and therefore, not indecent. He makes five arguments in support of this claim. First, he argues that the intercourse was private and that his videotaping of the acts was conducted only for the purpose of establishing that a restraining order then currently imposed upon him was not warranted. Second, he argues that the elements of the offense require that the appellant commit a wrongful act *with* another person and that because his wife did not knowingly participate in the videotaping, and because he alone did the taping, there was not "another person" with whom he committed the act of videotaping. Third, he claims that existing case law requires that something "inherent" in the recorded acts be indecent for the videotaping to be considered indecent and that because private consensual sexual intercourse between two married persons is not indecent, his videotaping could not be considered indecent. Fourth, he argues that he did not intend to videotape the sex act. Finally, he argues that Article 134, as applied to the act of videotaping a consensual sex act between the appellant and his wife, is void for vagueness, as most people would not understand that his conduct was "potentially non-protected activity." None of the five arguments are persuasive.

The standard of review to determine whether a guilty plea is provident is whether record reveals a substantial basis in law and fact to for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

We dispose of the first three of the appellant's arguments by making the following legal and factual findings based upon established case law and the record of trial. First, in response to the appellant's argument that he had a good reason for videotaping sexual intercourse with his wife without her consent, because he wanted to somehow thereby prove that the restraining order was unnecessary, we observe that the offense of indecent acts with another is a crime of general intent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 90. As it is a crime of general intent, the appellant's reasons for committing the crime are irrelevant unless they amount to an affirmative defense. No affirmative defense was raised by the appellant. Second, we find as a matter of law, that videotaping of an act of sexual intercourse with one's spouse, without the knowledge or consent of that spouse, is wrongful. It is wrongful because of the great potential harm that may befall the unknowing partner should the videotape be shown to other people. Third, we find that the appellant's act of videotaping his wife having sexual intercourse with him without her knowledge or consent, in addition to being wrongful, was indecent. Whether an act is labeled "indecent" depends on the facts and circumstances surrounding it. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993). Here, we find that the circumstance of the appellant's spouse not knowing she was being videotaped during the most private of marital moments renders the videotaping indecent. We also base our finding of indecency on our conclusion that the act of secretly videotaping the sex acts of a spouse is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite lust and deprave the morals with respect to sexual relations. MCM, Part IV, ¶ 90(c). Fourth, we find the indecent act of videotaping was done "with a certain person," specifically, his wife. We base our conclusion on *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994). In *McDaniel*, the appellant's plea of guilty to committing an indecent act by secretly videotaping female recruits in various stages of undress was affirmed even though it was clear that the recruits did not knowingly participate in the videotaping.

As for the appellant's argument that he did not intentionally film the act of sexual intercourse with his wife, we observe that the appellant told the military judge that he "chose not to" turn off the camera prior to the sexual

intercourse. Record at 56. Accordingly, we find that the act of deliberately choosing not to turn off the recorder while the sexual intercourse was occurring directly in front of the camera lens was the functional equivalent of actively choosing to tape record the sexual intercourse.

Regarding the appellant's void-for-vagueness argument that most people would not understand that his conduct of secretly taping his wife during sexual intercourse was "potentially non-protected activity," we easily find to the contrary that most people would understand that videotaping sexual intercourse with a spouse, without the consent of that spouse, is non-protected activity. This assignment of error is without merit.

Drunk on Duty

The appellant contends, in a summary assignment of error, that his plea to being drunk on duty was improvident because the military judge did not establish that the appellant was actually "found" drunk on duty by a person other than the accused and also because the appellant stated that he became drunk after he believed his working party was concluded. We disagree. This court addressed this very same issue in the context of Article 113, UCMJ, in *United States v. Wiggins,* 35 M.J. 597 (N.M.C.M.R. 1992). In *Wiggins,* the military judge accepted the plea of the accused to being found sleeping on post based solely upon his admission that he was sleeping on post. No other person was identified as having found the accused sleeping on post. This court held that the manner of discovery of the sleeping on post was not an element of the offense. *Id.* at 600. Applying the holding of *Wiggins* by analogy to the case at bar, we find that the manner of discovery of the appellant's being drunk on duty is not an element of the offense of being drunk on duty and therefore was not a matter requiring judicial inquiry at trial.

The appellant's second argument, that his plea of guilty should be set aside because he only became drunk after he believed that his working party had concluded, is entirely without merit. The appellant specifically admitted that he believed that he was still on duty even after the working party had concluded.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court