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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.O. VOLLENWEIDER**

UNITED STATES

v.

Donnell D. TAYLOR
Fireman (E-3), U. S. Navy

NMCCA 200300876 Decided 28 February 2006

Sentence adjudged 31 January 2002. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of conspiring to commit indecent acts, wrongful use of marijuana, committing consensual sodomy, and committing an indecent act. The appellant's crimes violated Articles 81, 112a, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 912a, 925, and 934. The adjudged and approved sentence consists of confinement for nine months and a bad-conduct discharge.

The appellant presents three assignments of error for our consideration. He argues that the military judge abused his discretion when he permitted the Government to make a major change to Charge III, Specification 2, by changing the date of the offense. The appellant also argues that his sentence is disparate from his co-defendant.[1] Lastly, the appellant argues that the finding of guilty with respect to sodomy should be set aside and dismissed.

[1] The appellant was tried jointly with Fireman Apprentice Degrant, NMCCA case number 200300875. Degrant was convicted of conspiracy to commit an indecent act, committing consensual sodomy, and committing an indecent act. Degrant was sentenced to six months confinement and a bad-conduct discharge.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, and the record of trial. Upon completion of review and consideration of these materials, we conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Modifying the Date of an Offense

The appellant was initially charged with the wrongful use of marijuana "on or about 20 July 2001." Charge Sheet, Charge III, Specification 2. After arraignment, the military judge allowed the Government to amend the specification to reflect the wrongful use of marijuana to have occurred "from 1 July 2001 to about 20 July 2001." Record at 645. In the appellant's first assignment error, he asserts that the military judge abused his discretion when he allowed the Government to amend the specification. While we find no abuse of discretion, we also note that the appellant has not asserted the correct standard of review. The Government does not address a standard of review at all.

RULE FOR COURTS-MARTIAL 603(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), allows a military judge to permit the Government to make minor amendments to a specification, after arraignment and prior to findings, so long as the accused is not prejudiced. R.C.M. 603(d) prohibits major amendments to specifications where the accused objects to the amendment. The question before us then is whether the amendment to Specification 2 of Charge III was a major or minor change. This is a question of law that is reviewed *de novo*. *See United States v. Sullivan*, 42 M.J. 360, 364-66 (C.A.A.F. 1995); *United States v. Loving*, 41 M.J. 213, 287 (C.A.A.F. 1994).

R.C.M 603(a) defines minor changes as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to offenses charged." In deciding whether the change is major or minor, a two-part test is applied. First, does the change result in an additional or different offense. Second, does the change prejudice a substantial right of the appellant? *Sullivan*, 42 M.J. at 365. Both parts of the test must result in an affirmative answer before an appellant is entitled to relief. *See United States v. Smith*, 49 M.J. 269, 271 (C.A.A.F. 1998).

We conclude that neither prong of the *Sullivan* Test is answered in the appellant's favor. Here the appellant was initially charged with the wrongful use of marijuana on 20 July 2001. During the course of the trial, the Government realized that the appellant submitted the urine sample on 10 July 2001. It then moved to amend the specification. This change did not create a new charge or a different offense. Indeed, in drug

cases, the Government is afforded some latitude in alleging the date and location of the offense. *See United States v. Esslinger*, 26 M.J. 659 (N.M.C.M.R. 1988); *United States v. Miller*, 34 M.J. 598 (A.C.M.R. 1992). In expanding the date of the appellant's drug offense from on or about 20 July 2001 to, from 10 July 2001 to about 20 July 2001, the amendment did not elevate the exact date of the offense to being its essence. *Miller,* 34 M.J. at 600. Furthermore, under the facts of this case, there is no possible prejudice. By his ruling on this issue, the military judge made clear, that the appellant was protected against double jeopardy. Record at 646. Furthermore, when specifically asked if the appellant had any evidence of prejudice, his counsel informed the military judge that they were "not proceeding on a prejudice grounds [sic]. . . . *Id*. at 636. Accordingly, we decline to grant relief.

Sentence Disparity

In his second assignment of error the appellant asserts that his sentence is highly disparate from that of his co-accused, because his sentence to confinement is three months longer than that of his co-accused. The appellant is correct in his assertion that sentence comparison is required in closely related cases involving highly disparate sentences. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001); *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). To be closely related, "cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Where this court finds sentences to be highly disparate in closely related cases, it must determine whether there is a rational basis for the differences between the sentences. *United State v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). A disparity between the sentences in closely related cases will warrant relief when it is so great as to exceed "'relative uniformity,'" or when it rises to the level of an "'obvious miscarriage of justice or an abuse of discretion.'" *United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995)(quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

Without question, the appellant’s case is closely related to that of his co-accused. We do not find, however, the sentences to be highly disparate. The sentences are relatively uniform, and reflect neither a miscarriage of justice nor an abuse of discretion. Finally, even if we were to find the sentences to be "highly disparate," we would not grant relief. The appellant's additional conviction for the use of marijuana and the stronger sentencing evidence presented by the co-accused, both provide a rational basis for the disparity.

Constitutionality of Sodomy Conviction

In his last assignment of error the appellant asserts that his conviction for private, consensual, heterosexual sodomy violates his Constitutional right to privacy. Appellant's Brief of 31 Mar 2005 at 6-8. Specifically, he relies on the decision of the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas statute that criminalized same sex sodomy. The appellant also recognizes that our superior court has rejected a generalized constitutional attack on Article 125, UCMJ. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Thus, the question that must be answered in this appeal is "whether Article 125 is constitutional as applied to [a]ppellant's conduct." *Id*. at 206.

> To decide that issue we are to focus on 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 (citation omitted); *see also United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

In this case we answer the first question in the negative. We note that the appellant's consensual sodomy was not a private affair. The evidence before the court, and admitted to by the appellant was that while he was receiving fellatio from his female shipmate, his co-accused was engaging in sexual intercourse with her. Furthermore, although these events took place in a secluded area of the appellant's ship, it did not occur in an area where he had any expectation of privacy. In fact, the co-accused had been caught in the room with the female Sailor on an earlier occasion.

We answer the second question in the affirmative. While all the participants were adults, the conditions involved suggest that the female Sailor may not have been in a position to readily resist. The appellant was, after all, convicted of conspiring to engage in indecent acts and sodomy with her. To that end, the appellant and his co-accused coaxed her to a secluded room on the ship where they both engaged in sexual acts with her. Both the appellant and the co-accused, however, testified that they did not have any ongoing personal relationship with their female shipmate. The relationship was purely sexual.

When addressing the third question, we are cognizant of the fact that due to concern for the "military mission . . . servicemembers, as a general matter, do not share the same

autonomy as civilians." *Marcum*, 60 M.J. at 206 (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974)). It is thus appropriate to consider the "military interests of discipline and order" in evaluating the appellant's claim. *Stirewalt*, 60 M.J. at 304.

We thus answer the third *Marcum* question in the affirmative. The appellant's crime was committed in public spaces of a U.S. warship. It was also committed with and in the presence of two other members of the ship's crew. The co-accused and the female had in fact appeared at Captain's Mast for being alone in the same spaces where the sodomy occurred, less than a month before the appellant's crime. Further, the appellant was aware of the fact that they had both appeared at Captain's Mast for the earlier misconduct. In our view, the appellant's misconduct had a detrimental impact on military interests and good order on board his ship. Accordingly, the appellant's sodomy "was outside the protected liberty interest recognized in *Lawrence*; it is also contrary to Article 125. As a result, Article 125 is constitutional as applied to [a]ppellant." *Markum*, 60 M.J. at 208.

Conclusion

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

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court