

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

BEFORE

Charles Wm. DORMAN

M.J. SUSZAN

C.P. NICHOLS

UNITED STATES

v.

**Brandy N. DUNN
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200200020

Decided 14 January 2005

Sentence adjudged 30 April 2001. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, MAG 11, 3d MAW, MarForPac, MCAS Miramar, San Diego, CA.

Capt E.V. TIPON, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

NICHOLS, Judge:

A special court-martial composed of a military judge alone tried appellant on 30 April 2001. In accordance with her pleas, the appellant stands convicted of conspiracy to possess LSD, conspiracy to possess ecstasy, wrongful use of ecstasy, wrongful use of LSD, wrongful use of marijuana, wrongful distribution of LSD, and indecent acts in violation of Articles 81, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The military judge sentenced the appellant to be confined for six months, to forfeit \$695.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence and, except for the bad-conduct discharge, ordered it executed. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 150 days.

The appellant raises two assignments of error. First, the appellant argues that indecent acts with another, charged under Article 134, UCMJ, is unconstitutionally void for vagueness because it fails to give notice to a person of ordinary intelligence what conduct is forbidden by the statute and permits

arbitrary and discriminatory enforcement. Appellant's Brief of 31 Mar 2004 at 3. Second, the appellant asserts that her pleas to Specifications 1, 5, and 6 under Article 134 are improvident because the plea inquiry failed to establish a factual basis that her conduct satisfied the definition of "indecent." *Id.* at 11.

We have examined the record of trial, the appellant's two assignments of error, and the Government's reply. Following that examination, 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. Arts. 59(a) and 66(c), UCMJ.

Void for Vagueness Challenge

The appellant argues in her first assignment of error that indicated acts under Article 134, UCMJ, is void for vagueness. We disagree. We hold that indecent acts charged under Article 134, UCMJ, is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Sexual intercourse in the presence of a third person is an indecent act. *United States v. Tollinchi*, 54 M.J. 80, 83 (C.A.A.F. 2000).

In *Tollinchi*, the accused, a Marine Corps recruiter, persuaded a high school student to enlist in the Marine Corps. *Id.* at 81. He convinced the recruit to allow him to have sexual relations with the recruit's 17-year-old girlfriend while the recruit watched. The court held that the evidence produced at trial was insufficient to sustain a charge of rape. However, the court found that the evidence established that the accused had sexual intercourse with the recruit's girlfriend in his presence. The court held that sexual intercourse under those circumstances was an indecent act. *Id.* at 83.

Tollinchi is analogous to the case at bar because in both cases, the accused had sexual relations in the presence of another. The appellant admitted at trial that she had oral sex performed on her in the presence of a third person. The military judge conducted the following inquiry with the appellant regarding the indecent act offenses:

MJ: Regarding the indecent act offenses let's start with Specification 1 under Charge IV. Did this occur on the same day as these sodomy offenses we just discussed?

ACC: Yes, sir.

MJ: And on this occasion, did you - well, you already described for me that [GW] performed oral sex on you. Is that right?

ACC: Yes, sir.

MJ: Now, the distinction between this offense and the prior offense that we have already discussed seems to be that . . . [Cpl D] was watching?

ACC: Yes, sir.

MJ: So, he saw what was happening with you and [GW]. Is that fair to say?

ACC: Yes, sir.

Record at 39-40. The military judge continued to question the appellant about the remaining specifications under the charge and why her actions constituted indecent acts.

MJ: Let's talk about Specification 5, [Cpl D]. We already talked about sodomy regarding [Cpl D]. Now, why do you think this was an indecent act in this particular circumstance?

ACC: Sir, because I did it while there were other people watching.

MJ: Who were those people?

ACC: [Cpl R] and [GW] and [LCpl W].

MJ: Do you remember the definition of indecent that I gave you?

ACC: Yes, sir.

MJ: Do you think that the fact that these acts were committed in the presence of other people caused the acts to be indecent?

ACC: Yes, sir.

MJ: Were they there or were they watching you commit these acts?

ACC: Yes, sir.

MJ: Any doubt in your mind that they actually were sitting there and observing?

ACC: No, sir.

MJ: I take it regarding Specification 6 after you and [Cpl D] engaged in oral sex you had sexual intercourse?

ACC: Yes, sir.

MJ: Now, sexual intercourse is not a crime. So, what makes you think that this was indecent?

ACC: Because there were people watching. [LCpl W] and [GW] were both watching us.

MJ: You are sure that they were watching?

ACC: Yes, sir.

MJ: Did they, in your mind, see you having intercourse?

ACC: Yes, sir.

MJ: Do you believe that that makes the intercourse indecent in this particular circumstance?

ACC: Yes, sir.

Id. at 41-42. Further, appellant stipulated that she committed an indecent act by having sexual relations in the presence of others. In the Stipulation of Fact, the appellant stated, "[o]n or about 5 Aug 00, I wrongfully committed an indecent act with [GW] by receiving oral sex from her while [Cpl D] watched." Prosecution Exhibit 1 at 3. The appellant goes on to stipulate that she performed oral sex on [Cpl D] and had sexual intercourse with him while others watched. *Id.* at 4.

Tollinchi is significant to the case at bar because it held unambiguously that sexual intercourse in the presence of a third person constitutes an indecent act. Appellant's admissions during the providence inquiry and her stipulations in this case demonstrate that she engaged in sexual intercourse in the presence of a third person. They also establish that she was aware that this type of activity constituted an indecent act. The holding in *Tollinchi* also discourages arbitrary and discriminatory enforcement of Article 134 by providing a bright line interpretation of "indecent." Therefore, indecent acts charged under Article 134, UCMJ, is not void for vagueness because it is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Improvident Pleas

Appellant argues in her second assignment of error that the plea inquiry failed to establish a factual basis that her conduct satisfied the definition of "indecent." Appellant's Brief at 11. The plea inquiry established a factual basis that appellant's conduct satisfied the definition of indecent because it established that the appellant engaged in sexual intercourse and acts of sodomy in the presence of third persons. Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for each element exists. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). A plea of guilty should not be overturned as improvident unless the record reveals a substantial basis in law and fact to question the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). "'Indecent' signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part

IV, ¶ 90c. Sexual intercourse in the presence of a third person constitutes an indecent act. *Tollinchi*, 54 M.J. at 83.

The providence inquiry and the stipulation of fact establish that the appellant received oral sex from GW while Cpl D watched; performed oral sex on Cpl D while LCpl W, Cpl R, and GW watched; and had sexual intercourse with Cpl D while LCpl W and GW watched. Record at 39-42; Prosecution Exhibit 1 at 3-4. Therefore, the plea inquiry established a factual basis that the appellant's conduct satisfied the definition of indecent because it demonstrated that the appellant engaged in acts of sexual intercourse and sodomy in the presence of observers. Given the content of the inquiry into the factual basis for the appellant's plea, we find the plea to be provident.

Conclusion

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

Chief Judge DORMAN and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court