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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Andre M. TESSIER
Postal Clerk Third Class (E-4), U.S. Navy

NMCCA 200201108 Decided 28 February 2005

Sentence adjudged 12 July 2001. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel
LCDR R.W. SARDEGENA, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of indecent acts and indecent exposure, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. A general court-martial consisting of officer and enlisted members sentenced the appellant to confinement for 120 days, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant contends that: (1) his acts were not indecent; (2) the military judge erred in allowing the members to consider the lesser included offense of indecent acts; and (3) the sentence is inappropriately severe. We have carefully considered the record of trial, the assignments of error and the Government's response. We conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Articles 59(a) and 66(c), UCMJ.

Background

On 5 February 2001, the appellant and Fireman Apprentice (FA) M were assigned to clean officer staterooms on board USS CARL VINSON (CVN 70). They had never met before. The ship was underway at sea that day. The appellant was a married petty officer completing his four-year enlistment. FA M had been in the Navy for about seven months. She had just reported aboard the ship about one month earlier.

While the appellant and FA M were cleaning a stateroom, the appellant unzipped her pants and placed his finger in her vagina. For this act, he was charged with indecent assault. However, the members acquitted the appellant of that charge and convicted him of the lesser included offense of indecent acts with another. Apparently, the members concluded that FA M consented to the appellant's actions.

Minutes after this indecent act, the appellant took his penis out of his pants, placed FA M's hand on his penis, then ejaculated into the sink in the stateroom. The charge and conviction of indecent exposure followed.

What is "Indecent?"

The appellant asserts that placing his finger in FA M's vagina was not indecent. Specifically, he contends that "private, heterosexual, foreplay not amounting to sodomy between two consenting adults is not an 'indecent act' where the ultimate act of sexual intercourse is not illegal." Appellant's Brief of 27 Jun 2003 at 4. Based on our review of this record, we reject the appellant's argument.

The appellant's argument stems from *United States v. Stocks*, 35 M.J. 366 (C.M.A. 1992). In that decision, our superior court held that consensual sexual touching that preceded private consensual sexual intercourse between two adults is not indecent. The court carefully limited its holding to that specific fact pattern, stating that "[t]his is logically and legally distinguishable from a situation in which two independent offenses are completed and in which one was not a mere prelude to the other, *e.g.*, sodomy and adultery." *Stocks*, 35 M.J. at 367. We also note that Stocks' acts occurred in his quarters and that he and his paramour were of the same pay grade.

The appellant also relies on *United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995). *Strode* followed *Stocks* in holding that the appellant's mistake of fact about the victim's age (he thought she was 16 when she was really 13) rendered his guilty plea to indecent acts improvident. Again, the court limited its holding to the facts of that case and emphasized that one must examine the elements of proof to see if there is an indecent act.

Tailored to the specification at issue, the elements of this alleged offense of indecent acts are:

(1) That, on or about 5 February 2001, on board USS CARL VINSON, at sea, the appellant committed a certain wrongful act with [FA M] by placing his hand on her crotch and putting his finger inside her vagina;

(2) That the act was indecent;

(3) That, under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Record at 395. The military judge correctly defined "indecent act" as "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." *Id.* at 395-96.

To determine whether conduct is indecent, we must consider all the facts and circumstances, including the alleged victim's consent. *United States v. Baker*, 57 M.J. 330, 336 (C.A.A.F. 2002). In this case, there was no intercourse. Moreover, the appellant's conduct was not private. It occurred on a warship at sea in another person's stateroom. While the occupant of the stateroom was not present during the appellant's acts, he or she easily could have come into the room. We also note that the appellant was a petty officer who instigated this misconduct during normal working hours with a young, inexperienced Sailor, who was junior to him and whom he had never met before. Moreover, we find that the appellant's fondling of FA M's vagina obviously excited his lust since ejaculation followed. Finally, as the defense proved during trial on the merits, the ship's commanding officer had issued an order prohibiting "all direct intimate physical contact" on the ship. Defense Exhibit A. Considering all the facts and circumstances, we conclude that the appellant's conduct was indecent.

Indecent Acts as Lesser Included Offense of Indecent Assault

The appellant asserts that the military judge erred by instructing the members that if they acquitted him of indecent assault, they could consider indecent acts as a lesser included offense. In support of this argument, the appellant relies on *United States v. Hickson,* 22 M.J. 146 (C.M.A. 1986) *and United States v. King*, 29 M.J. 901 (A.C.M.R. 1989). He argues that *Hickson* and *King* stand for the proposition that crimes involving voluntary sexual acts are not lesser included offenses of rape where the Government's theory of criminality does not involve lack of consent. By analogy, the appellant contends that the same rule should apply where the charge is indecent assault.

The appellant's reliance on these cases is misplaced. First, indecent acts is listed as a lesser included offense of indecent assault. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 63d. Second, our superior court has held that indecent acts is a lesser included offense of rape, then noted that, "[i]t is also well recognized that committing indecent acts is a lesser-included offense of indecent assault." *United States v. Schoolfield*, 40 M.J. 132, 137 n.7 (C.M.A. 1994).

We also note that, in his argument on findings, the trial defense counsel conceded that indecent acts is a lesser included offense of indecent assault. He also failed to object when the military judge so instructed the members.

The standard of review for the military judge's decision to give a lesser included offense instruction is reviewed *de novo. United States v. Smith,* 50 M.J. 451, 455 (C.A.A.F. 1999). Based on our review of the record, we conclude that the military judge did not err in allowing the members to consider indecent acts as a lesser included offense.

Conclusion

We have considered the remaining assignment of error and conclude that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). The findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court