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

BEFORE

C.L. CARVER **D.A. WAGNER** **G.A. COOK**

UNITED STATES

v.

David D. TATE
Hospital Corpsman Second Class (E-5), U.S. Navy

NMCCA 200201202 Decided 21 November 2005

Sentence adjudged 14 June 2000. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st FSSG, Camp Pendleton, CA.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

COOK, Judge:

Pursuant to his pleas, the appellant was convicted of conspiracy to obstruct justice, false official statement (three specifications), premeditated murder, sodomy, obstruction of justice (five specifications), and adultery in violation of Articles 81, 107, 118, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 881, 907, 918, 925, and 934.

A military judge sitting as a general court-martial sentenced the appellant to confinement for life without the possibility of parole, to forfeit all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence and, except for the dishonorable discharge, ordered it executed, but suspended all confinement in excess of 50 years for 12 months pursuant to a pretrial agreement. Additionally, the convening authority suspended adjudged forfeitures for 12 months from the date of trial for the benefit of the decedent’s and the appellant’s minor children.

The appellant now raises five assignments of error: (1) the military judge erred when he ruled that a sentence of life without eligibility for parole was an available sentence; (2) the provision of the pretrial agreement which required the appellant to waive his right to be considered for clemency and parole is void as against public policy and in conflict with SECNAVINST 5815.3H; (3) the conviction for consensual sodomy is unconstitutional; (4) the convening authority incorrectly stated the findings; and (5) the appellant was not provided a timely post-trial and appellate review.

Facts

The married appellant engaged in sodomy on divers occasions with Hospital Corpsman Third Class (HM3) Andrea Bart[1] at her on base residence between August 1998 and February 1999. The appellant was senior to HM3 Bart. She was in his direct chain of command. When the petty officer superior to both of them was not present, the appellant was in charge. Others became aware of their relationship, and it caused problems in the unit. It had begun to affect the appellant's and HM3 Bart's performance. The two went to their common superior, Petty Officer Thomas, to lie to her in an effort to convince her the rumors about their relationship were not true. The appellant killed his wife with a gun on February 13, 1999. He hid the body in a gully, in a pool of water, covering it with palm fronds. He cleaned the area of the killing and removed the gun from the home. He later made a number of false statements to military police and Naval Criminal Investigative Service agents in an effort to cover up the killing. The appellant, at HM3 Bart's request, also hid various cards, photographs and books that they had exchanged during the relationship. The appellant felt these documents showed a motive for the murder.

The appellant later entered into a pretrial agreement, waiving the right to be considered for clemency and parole until 2019, 20 years from the time he entered into the pretrial confinement. He further purported to agree to refuse clemency and parole if either were offered. (Appellate Exhibit III at 6-7).

Life Without Possibility of Parole as an Authorized Punishment

Congress created the punishment of life without eligibility for parole in 1997 through its enactment of Article 56a, UCMJ: "[f]or any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement of life without eligibility for parole." The President of the United States amended the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) to implement Article 56a on April 1, 2002

[1] HM3 Bart's court-martial is reported at 61 M.J. 578 (N.M.Ct.Crim.App. 2005).

(Exec. Order No. 13,262 Fed.Reg. 18,773)(entitled "2002 Amendments to the Manual for Courts-Martial, United States).

The appellant killed his wife on 13 February 1999. He was sentenced on 14 June 2000. The appellant argues that because the crime and sentencing occurred prior to the President's 2002 implementation of the amendment to Article 56a, the Military Judge was incorrect in advising that life without eligibility for parole was an available punishment.

The appellant recognizes that this court resolved the issue in a manner contrary to his position in *United States v. Wallace*, 58 M.J. 759 (N.M.Ct.Crim.App. 2003), *rev'd on other grounds,* 60 M.J. 348 (C.A.A.F. 2004). He invites us to review our decision in *Wallace,* citing *United States v. Lovett*, ACM 33947, 2002 CCA Lexis 230 (A.F.C.C.A., 9 Sep 2002), *rev. granted*, 61 M.J. 146 (C.A.A.F. 2005). However, in *Lovet*, the issue at bar was plead in the alternative, also arguing that there was insufficient evidence to prove that any of Lovett's alleged acts of rape occurred after the effective date of the Article 56a amendment, 19 November 1997.

We also addressed the effective date of the legislation in *United States v. Thomas*, 60 M.J. 521, 526 (N.M.Ct.Crim.App. 2004) as did our superior court in *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004), *cert. denied*, 125 S. Ct. 639 (2004), holding that the statute creating life without parole authorized that punishment for the offense of premeditated murder committed after November 18, 1997. The Court of Appeals for the Armed Forces cited *Rhongi* with approval in *United States v. Traum*, 60 M.J. 226, 237 (C.A.A.F. 2004). They further indicated in *United States v. Stebbins*, __ M.J. __, No. 03-0678, 2005 CAAF LEXIS 923 (C.A.A.F. Aug. 30, 2005), that the holding applied regardless of whether the death penalty was a possible punishment.

The case law is clear in holding that the amendment to Article 56a, UCMJ, was effective prior to the 1999 murder committed by appellant and life without parole was an authorized punishment. Accordingly, we decline to grant relief.

The Pretrial Agreement

The appellant argues that the provisions in his pretrial agreement that require him to waive reviews for clemency and parole are void because they violate public policy. This issue was also addressed in *Thomas*, in the context of an appellant who bargained away the right to request or accept clemency and parole in exchange for his life. 60 M.J. at 527. We also believe that the pretrial agreement in this case, in which the appellant successfully avoided a sentence of life without parole in return for waiving his right to be considered for clemency and parole for twenty years, is consistent with public policy and our own notions of fairness.

Though not argued by the appellant, the pretrial agreement also requires that if offered clemency or parole, the appellant agrees not to accept it. Appellate Exhibit III, pages 6, 7. We find that these terms of the agreement are unenforceable as a violation of public policy, because the convening authority would be usurping the service Secretary's authority and the President's authority to exercise their independent discretion in granting clemency. *Thomas*, 60 M.J. at 529. Having found this term of the agreement unenforceable, we must decide the appropriate relief. *Id*. While the instant pre-trial agreement does not contain a severability clause, *Id.,* we may strike the provision from the agreement if the parties concur. *United States v. Cassity*, 36 M.J. 759, 765 (N.M.C.M.R. 1992). This is precisely the relief requested by the appellant in attacking the pretrial agreement. The Government also invited our attention to this result in acknowledging our decision in *Thomas* to strike such a provision.

Therefore, the following language in paragraph 11(b) of Appellate Exhibit III, page 6, is unenforceable and stricken: "; and if offered clemency I agree to not accept clemency." The following language in paragraph 11(c) of Appellate Exhibit III, page 7, is unenforceable and therefore stricken: "and if offered parole I agree to not accept parole".

Having stricken the unenforceable language, we review the remainder of the pretrial agreement for enforceability. We find that it is enforceable, definite and certain.

Consensual Sodomy

The appellant argues that the prohibition of consensual, non-commercial sodomy imposed by Article 125, UCMJ, is in conflict with the decision of the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). We disagree. We find that as applied to the facts of this case, appellant's acts come within the exceptions outlined by the Supreme Court. *See Lawrence*, 539 U.S. at 578.

We address constitutional challenges to Article 125 under *Lawrence* on a case-by-case basis. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004); *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004). Three questions are to be considered:

> 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*? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest.

Marcum, 60 M.J. at 206-07.

Discussion

We have summarized pertinent facts at the outset of the opinion. We therefore turn to the questions posed by C.A.A.F. in *Marcum*.

1. The sexual conduct was a private relationship between two consenting adults.

2. We find that the relationship did encompass factors identified by the Supreme Court as outside their analysis. Specifically, we find that HM3 Bart was a person who was situated in a relationship where consent might not be easily refused. *Marcum*, 60 M.J. at 203 (citing *Lawrence*, 539 U.S. at 578). As noted by our superior court, "in relationships where consent might not easily be refused, the nuance of military life is significant." *Marcum*, 60 M.J. at 207. The appellant was senior in rank to HM3 Bart. She was also in his direct chain of command. When the petty officer superior to both of them was not present, the appellant was in charge. This superior-subordinate relationship based both on a supervisory role and military rank demonstrates that the relationship was one where consent might not be easily refused.

3. We also find there were additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest. We note the 2nd step of the analysis of the Air Force appeal in *Marcum*, 60 M.J. 207-08. Similarly, the Secretary of the Navy Instruction applicable at the time of the offense proscribed personal relationships between enlisted members that are unduly familiar and that fail to respect differences in grade or rank, when such relationships are prejudicial to good order or of a nature to bring discredit on the Naval service. U.S. Navy Regulations, Article 1165 (1990). To avoid preferential treatment, undermining good order and discipline, or diminished unit morale, the military has consistently regulated relationships between service members. *See United States v. McCreight*, 43 M.J. 483, 485, (C.A.A.F. 1996). In evaluating the appellant's claim, this court appropriately considers the "military interests of discipline and order." *Stirewalt*, 60 M.J. at 304. The appellant and HM3 Bart committed adultery and sodomy in HM3 Bart's on base apartment. Other members of the department became aware of the relationship, and it caused problems in the unit. It had begun to affect both the appellant's performance and that of HM3 Bart. The two went to their common superior, Petty Officer Thomas, and lied about the relationship. After the appellant killed his wife, HM3 Bart conspired with him to obstruct a murder investigation by hiding cards, photographs and books they had exchanged during the relationship. This court finds that the appellant's misconduct with HM3 Bart directly undermined good order and discipline and diminished unit morale. Accordingly, these facts place the appellant's sodomy outside the protected liberty interest recognized in *Lawrence*. It was also contrary to Article 125.

Therefore, Article 125 is constitutional as applied to the appellant. *See Marcum*, 60 M.J. at 208; *see also Bart,* 61 M.J. at 582.

The Convening Authority's Action

Appellant plead guilty to Specification 1 of Additional Charge II, including the allegation "that the accused's wife, Mrs. Cynthia L. Tate, was missing and the accused did not know her whereabouts." The military judge found that language multiplicious for findings with Specification 3 of Additional Charge II. He therefore struck the quoted language. Unfortunately, this ruling was not reflected in either the staff judge advocate's recommendation or the court-martial order. The appropriate remedy is to order corrective action through the supplemental court-martial order, as the accused is entitled to have his official records accurately reflect the results of the court-martial. *See United States v. Crumpley*, 49 M.J. 538 (N.M.Ct.Crim.App. 1998). We agree, and direct that this error be corrected in the supplemental court-martial order.

Post-Trial and Appellate Delay

The appellant contends that unconscionable post-trial delay (including appellate delay) of over 1,900 days prejudiced his right to effective post-trial review. Based on our review of the 349-page record and allied papers, we disagree.

We summarize the post-trial processing of this case as follows:

14 Jun 2000	Sentence adjudged.
13 Dec 2000	Record of trial authenticated by trial counsel
28 Dec 2000	Record authenticated by military judge
08 Mar 2001	Receipt of record of trial by defense counsel.
25 Apr 2001	Proceedings in revision ordered.
09 May 2001	Proceedings in revision held.
13 May 2001	Record of proceedings in revision authenticated by military judge.
12 Jun 2001	Staff Judge Advocate's Recommendation (SJAR) completed, with no explanation for post-trial delay (approximately one year after sentencing).
12 Jun 2001	SJAR served on DC

02 Jul 2001	DC acknowledges receipt of SJAR, indicating comments or corrections to be submitted in ten days.
16 Jul 2001	Clemency petition submitted.
18 Jul 2001	CA Action, with no explanation for post-trial delay (13 months after sentencing).
26 Jun 2002	Record received at Navy-Marine Corps Appellate Review Activity.
17 Jul 2002	Case to appellate counsel.
01 Oct 2003	Appellate defense counsel’s eleventh motion for enlargement of time.
03 Nov 2003	Appellant’s brief filed.
08 Jul 2004	Appellee’s sixth motion for enlargement of time.
26 Jul 2004	Government’s answer filed.
10 Aug 2004	To Panel 2 of the Court

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey,* 60 M.J. at 102).

Here, there was delay of about 13 months from the date of sentencing to the date of the CA's action. More troublesome, however, is the delay of 11 months from the CA’s action until docketing at this court. We find that this second delay by itself is facially unreasonable, triggering a due process review.

While the record's transcript is 349 pages, it took six months for it to be transcribed and authenticated. It then took over 60 days to get the authenticated record to defense counsel. No explanation appears for this delay. Additionally, there is no explanation in the record for the 11-month delay from the CA's action to the docketing at this court. The Government has failed to explain the delay of over three years while the case was at this Court. We therefore look to the third and fourth factors.

At no time did the appellant complain about the delay. Indeed, appellate defense counsel filed eleven motions for enlargement of time. Further, the appellant did not object to any Government's six motions for enlargements of time.

The appellant does not allege any prejudice, nor can we see any. Appellant is serving a 50-year sentence, with little likelihood of parole or clemency for 20 years. He has not been successful on any alleged error that changed the trial court's findings or sentence.

Balancing the four factors, we hold that the post-trial delay did not violate the appellant's due process rights. We again urge appellate counsel to apprise their supervisory attorneys of their backlog in any case where they feel they cannot undertake effective representation in a timely fashion.

Finally, while we are aware of our authority to grant relief under Article 66, Uniform Code of Military Justice, 10 U.S.C. §866, we decline to do so in this case.

Conclusion

We affirm the findings of guilty and the sentence as approved by the convening authority. The supplemental court-martial order will reflect that in Specification 1 of Additional Charge II, the language: "that the accused's wife, Mrs. Cynthia L. Tate, was missing and the accused did not know her whereabouts" was dismissed

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court