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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Michael E. BROWN
Electronics Technician Second Class (E-5), U.S. Navy

NMCCA 200201647 Decided 14 September 2005

Sentence adjudged 29 January 2002. Military Judge: P.L. Fagan. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, National Air Warfare Center Weapons Division, China Lake and Point Mugu, CA.

Capt J.D. VALENTINE, USMC, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of adultery, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was acquitted of the charge of rape. The appellant was sentenced to a bad-conduct discharge, confinement for 10 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged, but suspended and waived part of the adjudged and automatic forfeitures of pay, pursuant to the recommendation of the military judge.

The appellant claims that (1) the evidence is legally and factually insufficient, (2) the conviction of adultery violates the appellant's constitutional right to privacy, and (3) the sentence was inappropriately severe.

After carefully considering the record of trial, the appellant's 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 appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency
Adultery

In his first assignment of error, the appellant contends that the evidence is legally and factually insufficient because the Government failed to prove that the conduct was either prejudicial to good order and discipline or service discrediting. We disagree and decline to grant relief.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Conviction of adultery requires proof beyond a reasonable doubt:

> (1) That the accused wrongfully had sexual intercourse with a certain person;
>
> (2) That, at the time, the accused or the other person was married to someone else; and
>
> (3) That, under the circumstances, the conduct of the accused 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.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 62(b). Paragraph 60c(2)(a) further explains the element of prejudice to good order and discipline:

> "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. . . . It is confined to cases in which the prejudice is reasonably direct and palpable.

Paragraph 60c(3) defines service-discrediting conduct as:

> "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

After the date of the appellant's court-martial, paragraph 62 of the MCM was amended to include a lengthy explanation of the third element as it applies to adultery. The new discussion sets forth a list of various factors that should be considered in determining if the adultery was prejudicial to good order and discipline or service discrediting, including the following that appear to apply to the appellant's case: (a) the accused's marital status and grade; (b) the co-actor's military grade; (d) the impact, if any, of the adulterous relationship on the ability of the accused or co-actor to perform their duties; (f) the flagrancy of the conduct; and (h) whether the accused or co-actor were legally separated. MCM (2002 ed.), Part IV, ¶ 62c(2).

The appellant was a second class petty officer assigned to a remote island off the coast of California. He worked on the island during the week, but returned to the mainland on the weekends, living with his mother. At the time of the activity, the appellant was married, but estranged and physically separated from his wife who lived about 5 minutes' driving time from the appellant's mother.

While assigned to the island, the appellant met a third class petty officer (AJK) and began a sexual affair with her that lasted from about October of 2000 to about March of 2001. The appellant told AJK that he was married, but that he was getting a divorce. The appellant and AJK discussed a future together, including marriage and children. AJK wanted a daughter since the appellant already had two boys. Most of the

military personnel on the island knew of the affair and knew that the appellant was married. Some of the civilians assigned to the island were also aware of the affair, but most civilians were not aware of it.

Most of their sexual encounters occurred in the barracks on the island. On one occasion, another female petty officer was present in the barracks room and overheard AJK and the appellant engaging in sex.

In January, AJK broke up with the appellant, but he often pestered her to come back to him while she was working at the exchange. AJK eventually quit her moonlighting job because his actions were interfering with her work. They got back together in January. The appellant also frequently called her work center. In March, as it appeared that the authorities knew about their relationship, the appellant told AJK to keep her mouth shut about the affair.

The appellant never did file for divorce. After the affair ended, the appellant and his wife reconciled.

There is little doubt that the appellant, while married to another, had sexual intercourse on numerous occasions with a fellow Sailor, thus meeting the first two elements of adultery. The only question before us is whether the appellant's misconduct was prejudicial to good order and discipline or service discrediting. We find that there is ample evidence for the trier of fact and for us to conclude that the appellant's actions met the third element of adultery. In that regard, we find that the following facts are particularly relevant: the affair was between two Sailors, the appellant was senior to his paramour, most of the sexual encounters occurred in the barracks, the misconduct was open and notorious as most of the military personnel and some of the civilian employees were aware of it, on one occasion the sex was so close to a fellow Sailor that she overheard the moaning and groaning involved in the activity, the appellant's activities relating to the affair adversely affected the co-actor's ability to perform her off hour duties at the Navy Exchange, the appellant repeatedly called at the co-actor's work center, and the appellant told his co-actor not to reveal the activity to the authorities.

We are ourselves convinced beyond a reasonable doubt of the appellant's guilt of adultery.

Constitutional Right to Privacy
Adultery

In his second assignment of error, the appellant contends that his conviction for consensual adultery violates his constitutional right to privacy, relying upon *Lawrence v. Texas,* 539 U.S. 558 (2003), which held unconstitutional a Texas statute that criminalized consensual homosexual sodomy. We disagree.

The Supreme Court ruled that, with a few exceptions, criminalizing consensual sexual activity, whether homosexual or heterosexual, violated the right to liberty under the due process clause of the 5th and 14th Amendments to the Constitution. *Lawrence*, 539 U.S. at 578.

"Whether [the a]ppellant's conviction must be set aside in light of the Supreme Court's holding in *Lawrence* is a constitutional question reviewed de novo." *United States v. Marcum,* 60 M.J. 198, 202-03 (C.A.A.F. 2004)(citing *Jacobellis v. Ohio,* 378 U.S. 184, 190 (1964)). "[C]onstitutional challenges to Article 125 based on the Supreme Court's decision in *Lawrence* must be addressed on an as applied, case-by-case basis." *United States v. Stirewalt,* 60 M.J. 297, 304 (C.A.A.F. 2004)(citing *Marcum*, 60 M.J. at 206).

Our superior court concluded that we determine the constitutionality of the specification as it applies to the appellant by considering 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*? 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; *see also Stirewalt*, 60 M.J. at 304. Assuming arguendo that the adulterous activity is within the liberty interest and that the conduct does not meet any exception specifically listed in *Lawrence*, we nonetheless conclude that there are additional factors in this case that weigh against constitutional protection. As discussed above, we found that the appellant's conduct was both prejudicial to good order and discipline and service discrediting. That alone is sufficient to remove the conduct from the protection of the constitution. We also note that the military has a substantial interest in the determination and preservation of marriage. Adultery can and often does directly affect the sanctity of marriage. In particular, several pay and housing issues are directly affected by the status of the service member's dependents. In sum, all

these factors convince us that the appellant's misconduct is not constitutionally protected.

Sentence Severity

In his third assignment of error, the appellant asserts that the sentence is inappropriately severe and requests that we disapprove the bad-conduct discharge. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant points out that his wife testified on his behalf during sentencing and that he presented several character witnesses and letters attesting to his outstanding work performance and value. At the time of trial, the appellant was 27 years of age, married with three children, and had served 8 years on active duty. However, not all of his service had been honorable. In fact, he was convicted at a special court-martial in 1997 for assault, failure to obey a lawful order, and adultery. Further, during his unsworn statement, the appellant showed no remorse for his offense:

> On the adultery side of the house, I kind of feel the same as my wife feels. . . . But, you know, I'm aware that there's rules written down. Sometimes I think that even though we have rules, we should look at them again. . . . Even though I may not believe a certain aspect of that charge, the adultery charge you found me guilty of, I did commit the act of adultery, or what people consider adultery.

Record at 425-26. Clearly, the appellant was put on notice that adultery would not be tolerated. Yet, he committed the very same offense less than three years after the date of his first court-martial.

After reviewing the entire record, we find that the sentence is appropriate for this offender and his offense. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence

relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court