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.

Kevin R. TEAGUE
Corporal (E-4), U.S. Marine Corps

NMCCA 200202276 Decided 15 September 2005

Sentence adjudged 20 December 2001. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
Maj K.C. HARRIS, USMC, Appellate Governmnent Counsel
LT F.L. GATTO, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of dereliction of duty, violating a lawful order, destruction of military property, consensual sodomy, adultery, and obstruction of justice, in violation of Articles 92, 108, 125, and 134, Uniform Code of Military Justice, §§ 892, 908, 925, and 934. The appellant was sentenced to 9 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The appellant contends that (1) the military judge erred by refusing to order the Government to provide a criminal background report on the primary Government witness, (2) the evidence was legally and factually insufficient to support the convictions, and (3) the conviction of consensual sodomy should be set aside.

We have carefully considered 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 in fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Nondisclosure of Discovery

In the appellant's first assignment of error, he claims that the military judge erred in failing to order the Government to provide a National Crime Information Center (NCIC) report for a Government witness. We find no error, no prejudice, and decline to grant relief.

At trial, the detailed defense counsel (DC) requested that the Government provide an NCIC background criminal investigation report on the Government's key witness, MH. Record at 14. The military judge denied the request because neither the trial counsel nor the DC was aware of any derogatory information that might be disclosed in the requested NCIC report. Record at 25.

"If the Government fails to disclose discoverable evidence, the error is tested on appeal for prejudice, which is assessed `in light of the evidence in the entire record.'" *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004)(quoting *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)). As a general matter, when an appellant has demonstrated error with respect to nondisclosure, the appellant will be entitled to relief only if there is a reasonable probability that there would have been a different result at trial if the evidence had been disclosed. *Id*. When an appellant has demonstrated that the Government failed to disclose discoverable evidence with respect to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt. *Id*. (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004)).

On appeal, we ordered the Government to produce an NCIS report under seal for *in camera* review by our court. In response, the Government produced a report by the Federal Bureau of Investigation stating that their check of criminal records was negative. We find no error in the military judge's refusal to grant a defense "fishing expedition." Assuming arguendo that the military judge erred in refusing to order the NCIC report, we find that the error, if any, was harmless beyond a reasonable doubt.

Factual and Legal Sufficiency

In the appellant's second assignment of error, he contends that the evidence of guilt is factually and legally insufficient. We disagree.

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), UCMJ. In resolving these issues, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris,* 8 M.J. 52, 59 (C.M.A. 1979).

In this case, contrary to the appellant's contentions, we find MH's testimony supporting the charged offenses credible and consistent with the other evidence adduced at trial. We also have no doubt that a reasonable fact finder could have found all the essential elements of each charge beyond a reasonable doubt. In addition, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we decline to grant relief.

Lawrence v. Texas Challenge to Sodomy Conviction

In the appellant's third assignment of error, he contends that his conviction for consensual sodomy 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 sodomy. We decline to grant relief.

The Supreme Court ruled that, with a few exceptions, criminalizing consensual sodomy, 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 Article 125 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 (C.A.A.F. 2004).

We must answer the first question in the affirmative since the conduct consists of consensual sodomy. But, we find facts in this case that lead us to conclude that the conduct is not constitutionally protected under the second or third question. We find that the sodomy was not private, but was in fact public conduct, which is outside the analysis in *Lawrence.* Finally, as to the third question, we find that there are additional factors relevant solely in the military environment that allow us to conclude that the conduct is not protected by the due process clauses in the Constitution.

Most of the appellant's 50 instances of sodomy with MH occurred in his Military Police (MP) vehicle in various public locations in and around Camp Pendleton, California, while he was on duty and on patrol as a military policeman. Record at 74-75; 78-79. The negative impact of the appellant's conduct on military interests and order is readily apparent. By repeatedly committing sodomy while on duty and on patrol, the appellant breached the trust placed in him and jeopardized the safety and security of all those on Camp Pendleton.

Because appellant's conduct fell outside the protected liberty interest recognized in *Lawrence* and *Marcum*, we find no constitutional bar to the appellant's conviction to consensual sodomy under Article 125, UCMJ. We therefore decline to grant relief.

Conclusion

Accordingly, the findings and the sentence, as approved below, are affirmed.

Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court