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.

Jason J. BETTS
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200300629 Decided 28 September 2005

Sentence adjudged 31 July 2001. Military Judge: J.S. Brady. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LT COLIN A. KISOR, JAGC, USNR, 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 failure to obey an order regarding the use of alcohol and rape, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The appellant was sentenced to a bad-conduct discharge, confinement for 18 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged, but waived forfeitures for 6 months as recommended by the military judge.[1]

The appellant claims that (1) the evidence of rape is factually insufficient and inconsistent with an acquittal of adultery and (2) the appellant was denied his right to a speedy review.

[1] The convening authority had previously deferred automatic forfeitures from their inception date until he took his action in this case.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief, 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.

Factual Insufficiency

In his first assignment of error, the appellant contends that the facts presented at trial were insufficient to convict him of rape. Further, the appellant claims that his conviction of rape, but acquittal of adultery, was erroneous as a matter of law since there is no obvious rational basis for the inconsistency. We disagree and decline to grant relief.

A. Factual Insufficiency

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. *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.

There are only two elements of rape: (1) that the appellant committed an act of sexual intercourse and (2) that the act was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 45b(1). There is no dispute that the appellant had sexual intercourse with the victim. But, as to the second element, the appellant argues that there is insufficient evidence that the act was without consent.

The appellant and the victim, Lance Corporal (LCpl) C, were part of a Marine Corps unit that deployed to Fort Bragg, North Carolina, for 2 weeks to guard ammunition. The victim was assigned to guard duty. The appellant was a 5-ton truck driver. They did not know each other prior to the deployment. One day during the deployment, LCpl C saw the appellant in the package store. He bought a bottle of gin and asked LCpl C to put it in his 5-ton for him so that he would not get caught with the gin. He knew that he was not supposed to drink alcohol in the field. A day or two later, the appellant offered LCpl C a drink of the

gin. She testified that was the first time she drank alcohol, although she had drunk beer before.

Another day or so later, LCpl C spent 4 hours on guard duty, then went to sleep in her gray-on-gray sweats. She woke up for a reaction drill. After the drill, she tried to return to sleep in her tent, but the appellant awakened her, and asked her to come to his tent. The appellant mentioned that he had just called his wife and offered the use of his cell phone to call her boyfriend. She declined. They listened to music. They drank some alcohol. LCpl C had two mouthfuls of gin. She testified that was only the second time she had drunk alcohol.

The appellant asked LCpl C if she objected if he took off his pants. She said no and he took down his pants. They continued to talk. At one point, the appellant leaned over close to her. She asked what he was doing and he apologized. A little later, the appellant leaned across her again and tried to kiss her. He lifted up her sweat shirt and kissed her on her stomach. He said that he did not want his wife or her boyfriend to find out. LCpl C told him that she did not want to have sex with him, that she was a virgin. He said she needed practice. She told him she did not want to have sex. He rubbed his groin area on her and pulled down her sweatpants. She was shocked. She tried to get up, but he moved so that he was more on top of her. She told him at least 3 times that she did not want to have sex with him. But, he did have sex with her and thrust at least twice in her vagina. She felt helpless. She said it hurt. She felt a sharp pain like something tearing. She pulled away from him, pulled up her pants, and returned to her tent. After the sex, she started having flashbacks of being molested as a child.

In her tent, LCpl C started crying and cleaned herself up with baby wipes. The next day, she did not want to talk to anyone about it. She went on guard duty that morning. One of the other Marine guards asked why her eyes were so red. She said that the appellant tried to do something to her, but she got away and nothing happened. The guard told her to report it to the chaplain or to the sergeant, but she did not. Later in the afternoon, she was assigned to a working party to fill sand bags. After that, she retired to her tent. Her non-commissioned officer (NCO) visited her. As he was leaving, she stopped him and started crying. She said that something happened when she was drinking with the appellant. The NCO called in the sergeant, but LCpl C would not initially tell them what happened. Eventually, she said she was raped. She went to

the hospital for a rape examination and then gave a statement to a criminal investigative division (CID) agent. Some time later, after the deployment ended, she had nightmares about the incident and tried to commit suicide by overdosing. She saw a psychiatrist and started counseling.

The chief of emergency medicine at Womack Army Medical Center at Fort Bragg examined LCpl C the day she reported the rape. He found no abrasions or contusions on the thighs or skin around the vagina. He saw fresh lacerations of LCpl C's hymen. These were non-bloody edges that were crisp in nature. The edges are rounded in a patient who is sexually active. The tears were fairly recent, less than 2 weeks old, and were consistent with her being a virgin prior to the incident.

LCpl C admitted that in her first statement to CID she did not say how the appellant's pants came off. She further admitted that she lied at the pretrial hearing when she testified that she did not know how the appellant got his pants off. She said she was embarrassed about it.

A Navy staff psychiatrist, who was qualified as an expert in rape trauma syndrome (RTS) and post traumatic stress disorder (PTSD), testified that he had examined LCpl C and diagnosed her with PTSD. He said that nightmares, flashbacks, and avoidance are common symptoms of RTS and PTSD. People with RTS and PTSD may have difficulty remembering certain aspects of a traumatic event. It is not uncommon for those suffering RTS and PTSD to delay reporting an offense. And when they do report the event, it is not uncommon for them to confuse the details of the assault. It is not uncommon for a victim to feel that she is to blame. The victim's suicide attempt and other symptoms are consistent with RTS and PTSD.

The appellant waived his rights and was interviewed by a CID agent on the night that the rape was reported. He was advised that he was suspected of raping LCpl C. The appellant said that LCpl C came to his tent to use his cell phone to call her boyfriend. After she used the phone, they talked for a while and listened to the radio and then she left. He said he never touched LCpl C. But, as the statement was being typed up, he admitted that he had not been truthful, that he and LCpl C "dry humped." She told him she was a virgin and was saving herself for her husband. The dry humping lasted about 13 minutes. He kept his boxer shorts on and she remained fully clothed. After dry humping, they talked for about 3 minutes and then she left. No sex occurred. The appellant was examined by

a doctor. He told the doctor that the abrasion on his penis came from his physical training (PT) shorts while he was running.

A forensic biologist testified that he found semen stains in the crotch area of LCpl C's sweatpants and in the vaginal swabs. He testified that his findings are consistent with ejaculation in the vagina, but are not consistent with ejaculation outside the vagina. The location of the stains on the clothing is consistent with ejaculation and drainage from the vaginal canal. He found discoloration on the sanitary napkins that might have been blood. Another forensic biologist testified that she examined the evidence and found that stains from the baby wipes, sweatpants, sanitary napkin, and underwear matched the appellant's DNA.

Another CID agent interviewed the appellant the day after the first interview. The appellant waived his rights. The agent told the appellant that the Government had physical evidence that did not support his story that no sex occurred. The agent said that the victim's hymen was torn and there was fluid in the vagina. The appellant continued to say that there was no sex. The agent said he did not believe the appellant. The appellant eventually admitted that he had lied in his first statement to CID. He said that LCpl C told him that she was a virgin and wanted to stay that way, but she said that some sexual contact including rubbing his penis against her crotch was okay. During the dry humping, his penis started hurting. So, he grabbed the base of his penis and stuck the tip toward her vagina. His penis slipped through the leg opening of her underwear into her vagina. LCpl C did not say no before then. But, at one point while he was thrusting inside her vagina, she told the appellant to stop because it hurt. He stopped thrusting, but did not pull out right away. He then pulled out and ejaculated on the sleeping bag.

There were witnesses who testified that LCpl C was truthful and witnesses who testified that she was not. The appellant presented witnesses who testified that he was previously of good character.

After a thorough review of all the evidence, we are convinced beyond a reasonable doubt that the appellant raped LCpl C on the night in question. In particular, the physical evidence corroborates much of LCpl C's testimony that she was a virgin before the incident. The testimony of the psychiatrist persuasively explains her initial reluctance to report the

incident, her confusion over some of the details, and her initial denial that she allowed the appellant to take off his pants. On the other hand, the appellant lied several times about his actions that night and only admitted that sexual intercourse occurred after he was advised that there was physical evidence that supported LCpl C.

B. Inconsistent Verdicts

The appellant contends that where there are inconsistent verdicts in a bench trial, we must review the record for any obvious rational basis for the inconsistency. If we do not find such a basis, we must either remand to the military judge for special findings and then review those findings or dismiss the inconsistent finding of guilty. We disagree.

The appellant asserts that the Court of Military Appeals, in *United States v. Snipes,* 18 M.J. 172 (C.M.A. 1984) adopted a rule requiring that apparently inconsistent findings in bench trials must be reviewed to determine if there is a rational basis for the different verdicts. In support, the appellant cites *United States v. Perry,* 22 M.J. 669, 671 (A.C.M.R. 1986). In that case, the Army Court of Military Review, relying upon *Snipes,* remanded a record of trial to the military judge to make special findings to explain apparently inconsistent results. The military judge had found the appellant guilty of assault by touching the private parts of the victim, but not guilty of rape or indecent assault. Upon review of the military judge's special findings, the Army court was dissatisfied with the military judge's rationale and dismissed the finding of guilty of assault.

Here, the military judge convicted the appellant of rape, but acquitted him of adultery. As mentioned above, there are only two elements of rape, the act of sexual intercourse and that it was done by force and without consent. There are three elements of adultery: (1) that the appellant wrongfully had sexual intercourse with another, (2) that the accused or other person was married to someone else, and (3) that the conduct 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. MCM, Part IV, ¶ 62b.

At trial, the Government presented evidence that, at the time of the sexual intercourse, the appellant was married to another person. The defense did not contest that second element of adultery. Further, the Government concedes that adultery is

not multiplicious with rape. The appellant also states that he is not raising the issue of unreasonable multiplication of offenses.

Contrary to the Army court, we conclude that *Snipes* does not require a military judge or a court of appeals to determine if there is a rational basis for inconsistent verdicts. Our superior court specifically rejected the view of the 2d Circuit that remedial action was required where the judge rendered inconsistent verdicts in bench trials. "[We prefer], instead, to look at the specification upon which a guilty finding has been made to determine whether it may legally stand." *Snipes*, 18 M.J. at 175 (footnote omitted). Further, the court favorably quoted a prior case:

> Furthermore, "(a)n inconsistent verdict is not usually a cause for relief," since "the court-martial may merely have given the accused a 'a break.'" *United States v. Lyon,* 15 U.S.C.M.A. 307, 313, 35 C.M.R. 279, 285 (1965).

Snipes, 18 M.J. at 175, n.4. Admittedly, the court may have confused matters when it then conducted a review of the facts to conclude that there was a rational basis for the apparently inconsistent verdicts. Nonetheless, we are convinced that such a review is not required. We are supported in that conclusion by subsequent interpretations of *Snipes*. In *United States v. Riddle*, 44 M.J. 282, 287 (C.A.A.F. 1996), our superior court cited *Snipes* in concluding that the judge's finding of guilty of attempted conspiracy was not fatally undermined by his acquittal of attempted larceny of the same items. One of our sister courts arrived at a similar conclusion: "Moreover, inconsistent verdicts, whether from judge or jury, provide no grounds for reversal of a conviction. *See, e.g.*, *United States v. Snipes*, ..." *United States v. Barrow*, 42 M.J. 655, 664 (A.F.Ct.Crim.App. 1995).

We agree with the Air Force Court of Criminal Appeals. Inconsistent verdicts provide no grounds for reversal. Assuming arguendo, however, that such a review is required, we find a rational explanation in the record. The maximum confinement for adultery is one year, while the maximum confinement for rape is life imprisonment. Thus, it is entirely rational that a military judge, having convicted the appellant of rape, might dismiss adultery as a minor offense.

Post-Trial Delay

In his second assignment of error, the appellant contends that the appellant's statutory and constitutional rights to speedy appellate review were denied and that we, therefore, should set aside the findings of guilty and the sentence. We decline to do so.

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 just over 20 months from the date of sentence to the date that the record of trial was docketed at our court. Although the delay is unexplained, the lengthy 1113-page record of trial obviously justified additional time at every stage in the review process.

There was an additional delay of nearly 18 months from the date of docketing until the appellant's brief was filed with this court. During this time period, the appellate defense counsel filed some 12 motions for enlargement of the time period. All such motions were virtually identical, stating that due to other caseload commitments, counsel had not begun or had not yet completed review of the record. The appellant now claims that all of this time should be attributable to the Government because "Appellate counsel caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government." Appellant's Brief of 22 Sep 2004 at 10 (quoting *Diaz v. Judge Advocate General of the Navy,* 59 M.J. 34, 38 (C.A.A.F. 2003)). However, the appellate counsel's motions are the only evidence in the record that supports this proposition. We are reluctant to find, on the basis of the enlargement requests alone, that the Government is responsible for that delay. Finally, there was additional delay of about 9 months before the Government's answer and the appellant's reply brief were filed.

Regardless of whether we consider the Government responsible for delay in preparing the appellant's brief, we nonetheless conclude that the overall delay is facially unreasonable, triggering a due process review.

We next look to the third and fourth factors. We find no assertion of the right to a timely appeal until the date of the appellant's brief. Nor do we find any evidence of prejudice. The appellant claims that he suffered prejudice because he had a meritorious claim that the evidence supporting rape was insufficient and the finding of guilty to rape should be set aside, and the delay in the review of his case meant he unnecessarily served his entire sentence to confinement. However, since we found that the evidence did support the conviction, we conclude that the delay alone does not support a finding of prejudice. We therefore hold that there has been no due process violation due to the post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice, but we decline to do so. *Jones,* 61 M.J. at 83; *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz*, 59 M.J. at 37; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

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

Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court