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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Jakarri D. AVERY
Aviation Boatswain's Mate (Fuels) Third Class (E-4), U.S. Navy

NMCCA 200400665 Decided 28 February 2005

Sentence adjudged 13 May 2003. Military Judge: C.J. Gaasch. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, U.S. Naval Air Facility, Atsugi Japan.

Maj EDWARD DURANT, USMCR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of use (two specifications), distribution (three specifications), and introduction of marijuana; possession of percocet; sodomy (two specifications); adultery (two specifications); and indecent acts, in violation of Articles 112a, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 925,and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 9 months, forfeiture of $500.00 pay per month for 9 months, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 6 months and all adjudged forfeitures.

We have examined the record of trial, the assignments of error alleging that the military judge erred in accepting the appellant's pleas to sodomy and that there is no evidence that the staff judge advocate's recommendation (SJAR) was served on trial defense counsel, 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.

Facts

The appellant was living on base while seeking a divorce from his wife, a Japanese national residing off-base with their child. The appellant committed oral sodomy with a female civilian in his on-base barracks room on multiple occasions and committed oral and anal sodomy with another female civilian in his on-base barracks room on multiple occasions. Both females were Japanese nationals. The appellant's subordinates were aware of his extra-marital activities, as were the local civilians employed at the barracks, local civilians employed at the on-base hotel, and local civilians associated with the appellant's wife. In fact, the appellant's wife had employed a local attorney to file suit in Japanese court for redress of injuries she alleged as a result of the extra-marital affairs. On one occasion, there was a confrontation between the appellant's wife and one of the two females at the on-base hotel that had to be resolved by military police. The appellant's leading chief petty officer was called in by the military police regarding the incident.

Sodomy

The appellant asserts that the military judge erred by accepting his pleas of guilty to private, consensual, heterosexual sodomy because such activity is constitutionally protected. *Lawrence v. Texas,* 539 U.S. 558 (2003).

The appellant cites our superior court's decision in *United States v. Marcum,* 60 M.J. 198 (C.A.A.F. 2004) in support of his position. In order to determine whether the sodomy charges under Article 125, UCMJ, are constitutional as applied to this appellant's conduct, we must answer 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*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-207 (citation omitted); *see also United States v. Stirewalt,* 60 M.J. 297, 304 (C.A.A.F. 2004).

The Government concedes that the conduct in question does fall within the liberty interest identified by the Supreme Court in *Lawrence* and also concedes that the conduct does not encompass

any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*. Government Answer of 19 Jan 2005 at 3.

We are left only to answer the third question posed by our superior court in *Marcum*; whether there are additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest. We find that there are such factors in this case. The appellant engaged in his activities in an open and notorious fashion on board a military installation. His subordinates knew about the extra-marital activities, and local Japanese nationals also knew about the activities. In this case, we find direct and obvious impacts on both the command structure and the armed forces reputation in the local foreign community resulting from the acts of sodomy committed by the appellant. The facts demonstrate that the appellant's conduct in violating Article 125, UCMJ, was "outside the protected liberty interest recognized in *Lawrence,*" and thus, not constitutionally protected as a privacy interest. *Marcum,* 60 M.J. at 208.

Evidence of Service of SJAR

In his second assignment of error, the appellant asserts that there is no evidence that the SJAR was served on the trial defense counsel and that there is no evidence that the trial defense counsel affirmatively declined to submit clemency matters on behalf of the appellant. The former is factually incorrect and the letter is a misapplication of law.

The convening authority's action, dated 7 August 2003, states that a copy of the SJAR was "submitted to the accused's defense counsel on 6 August 2003." This statement is uncontroverted evidence that the trial defense counsel was served with the SJAR.

RULE FOR COURTS-MARTIAL 1106(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) requires that the SJAR be served on the trial defense counsel. It also allows trial defense counsel to submit matters in writing in response to the SJAR. It does not require an affirmative waiver of the right to submit such matters. On the contrary, failure of trial defense counsel to submit matters in a timely manner acts as a waiver in the absence of plain error. *Id.*

CONCLUSION

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

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court