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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Mark L. STONE
Lieutenant Commander (O-4), U.S. Navy

NMCCA 200101890 Decided 16 November 2004

Sentence adjudged 18 April 2001. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast, Naval Submarine Base New London, Groton, CT.

Maj PHILLIP D. SANCHEZ, USMC, Appellate Defense Counsel
Maj RAYMOND E. BEAL II, USMC, Appellate Government Counsel

HEALEY, Judge:

Pursuant to his pleas, the appellant was convicted of sodomy with a child under the age of 12 years by force and without consent and indecent acts with a child under the age of 16 years and not his spouse, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. A general court-martial consisting of military judge sitting alone sentenced the appellant to 13 years confinement, forfeiture of all pay and allowances, and a dismissal. The convening authority (CA) approved the sentence as adjudged and, with the exception of the dismissal, ordered it executed. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 7 years for 12 months from the date of trial.

The appellant has assigned the following errors: (1) the military judge erred as a matter of law by not dismissing the indecent act which was enumerated as a lesser included offense of, and hence multiplicious with, the sodomy offense; (2) the

sentence of 13 years confinement and dismissal was inappropriately severe; and (3) the military judge erred when he denied defense counsel's motion to prevent closed-circuit television broadcast of the trial into an overflow room. We have carefully considered the record of trial, the assignments of error, and the Government's response. We conclude that the findings and the 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.

Multiplicious and Facially Duplicative

In the appellant's first assignment of error, he asserts the military judge erred by not dismissing the indecent act which was an enumerated lesser included offense of, and hence multiplicious with, the sodomy offense. We disagree.

An unconditional guilty plea waives a multiplicity issue unless the offenses are, "'facially duplicative,' that is factually the same." *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). Whether two offenses are facially duplicative is a question of law that we will review *de novo*. *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002)(issue of whether offenses are greater and lesser included offenses is question of law subject to *de novo* review). Two offenses are not facially duplicative if each "requires proof of a fact which the other does not." *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)(quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Our review of this issue focuses on the "factual conduct alleged in each specification" and the providence inquiry. *Id*.

In this case, the appellant entered unconditional pleas of guilty. Accordingly we will find multiplicity only if the specification of sodomy facially duplicates the specification of an indecent act. Based upon the providence inquiry and the stipulation of fact, we find that the appellant first kissed the victim on her mouth, and then removed her panties, touching her on her labia and clitoris with his fingers. Those actions constituted the indecent acts and would not satisfy the elements of sodomy. Sodomy, as correctly explained by the military judge, means, "unnatural carnal copulation," and, in this case, "occurs when you penetrate the female sex organ with your mouth or tongue." Record at 26. The appellant's final action was to place his tongue onto the victim's labia, clitoris, and the opening to her vaginal canal. The appellant's last action constituted forcible sodomy and was separate from his other

acts. Accordingly, after analyzing both the conduct alleged and the facts elicited during the providence inquiry, we conclude that, (1) the two specifications were not facially duplicative, and (2) the indecent act was not a lesser included offense of sodomy in this case.

Sentence Severity

In appellant's second assignment of error, he contends that the sentence was inappropriately severe given the nature of the offenses and his character. We disagree.

In determining the appropriateness of a sentence, we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "nature and seriousness of the offense and the 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)). Without question, this requires a balancing of the offenses against the character of the offender. The appellant's belief that his sentence was inappropriately severe is without merit. Despite his stellar performance for many years as an officer, and his service in various duties of importance to our nation, his misconduct involving a 7-year-old neighbor child was egregious. A sentence including dismissal and confinement for 13 years is appropriate for this offender and these offenses.

Conclusion

We have considered the remaining assignment of error and find it lacking in merit. The findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court