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

BEFORE

Charles Wm. DORMAN **W.L. RITTER** **M.J. SUSZAN**

UNITED STATES

v.

Michael T. SIRK
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200301084 Decided 27 September 2004

Sentence adjudged 4 April 2002. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

Pursuant to his pleas, the appellant was convicted by general court-martial of the following offenses: consensual sodomy, indecent acts, and indecent language -- all with the same 14-year-old female, and fraternization with the females' Marine boyfriend. The appellant's crimes violated Articles 92, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, and 934. The military judge sentenced the appellant to confinement for 48 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant has raised three assignments of error in his appeal before this court. He asserts that the military judge erred in advising that the appellant's mistaken belief as to the female's age was not a defense to sodomy, that the approved sentence is inappropriately severe, and that he has been denied a timely review of his conviction.

We have carefully considered the record of trial, the appellant's three 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.

Mistake of Fact

At trial the parties stipulated that the appellant did not know the real age of the female, and that she had told the appellant that she was 17 years old. In advising the appellant of the elements of sodomy, the military judge also informed the appellant: "It is no defense that you were ignorant or misinformed as to the true age of the child. It is the fact of the child's age and not your knowledge or belief that fixes criminal responsibility." Record at 33. The appellant argues that this advice was legally incorrect in light of *Lawrence v. Texas*, 539 U.S. 558 (2003).

The appellant also argues that, since mistake of fact as to the "victim's" age in carnal knowledge is an affirmative defense, an absurd result obtains when considering the maximum punishments that may be imposed for the two different crimes of carnal knowledge and sodomy. An honest and mistaken belief as to a female's age can negate criminality with respect to carnal knowledge, yet if the same accused and the same female were to engage in sodomy during the same tryst, the accused could be sentenced to 20 years of confinement. *See* Art 120(d), UCMJ, and MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 51.e(2). As reasonable and well-crafted as is the appellant's argument, and as absurd the result, that is the law. We must apply it. *See United States v. Nelson*, 53 M.J. 319, 323 (C.A.A.F. 2000)(noting that it is up to the legislative branch rather than the judicial branch of government to change the law in the area of public policy.)

We are also guided by decisions of our superior court, which we must also follow. In *United States v. Marcum*, __ M.J. __, No. 02-0944 (C.A.A.F. Aug. 23, 2004), the constitutionality of Article 125 was upheld. Applying *Marcum* to the facts of the case before us, there is no constitutional issue concerning the appellant's conviction for sodomy. Additionally, in *United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995) the court noted that the defense of mistake of fact concerning the victim's age "is not . . . available to . . . sodomy." *Id*. at 31. In our view however, an honest and reasonable belief as to the victim's age "may serve as a mitigating circumstance under the sentencing rules." *Id*. at 32.

Sentence Appropriateness

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 offense against the character of the offender. We have conducted that balancing in this case. We are cognizant of the appellant's honorable and lengthy service, as reflected by the evidence presented during the sentencing phase of his court-martial -- to include four separate awards of the Good-Conduct Medal, and noteworthy fitness reports. We are also cognizant of the criminal activities he engaged in, activities which were not only morally repugnant, but in which he also used his position as a Marine Staff Noncommissioned Officer to commit. Balancing all these factors, we conclude that the approved sentence is appropriate for this offender in light of his very serious offenses.

Speedy Review

In his third assignment of error, the appellant seeks relief based solely upon the length of time from the date of trial until review is completed before this court. Assuming the appellant is accurate with his count in days of delay as of 31 March 2004, as of 31 August 2004 it has been 890 days since the appellant's court-martial. Under the facts of this case, we decline to grant relief based upon this length of delay. We have been presented with no evidence that the appellant requested the convening authority to take a speedier action. Additionally, the appellant has made no attempt to demonstrate any prejudice as a result of this delay. *See generally United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). Furthermore, where we have thoroughly reviewed the appellant's conviction while he is still confined, and having found no errors materially prejudicial to his substantial rights, to grant relief on delay alone would be granting a windfall.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge RITTER and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court