UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JEREMY O. WOOD
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 200900436
GENERAL COURT-MARTIAL

Sentence Adjudged: 06 August 2008.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol R.M. Miller, USMC; **Addendum**: Maj K.C. Harris, USMC.
For Appellant: Capt Jeffrey Liebenguth, USMC.
For Appellee: Capt Michael Aniton, USMC.

25 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PERLAK, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of violating a lawful general order and rape, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The military judge sentenced the appellant to two years confinement, reduction to pay grade E-1 and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

The appellant raises four assignments of error. First, he asserts that the evidence is factually insufficient to support a finding of guilty as to Charge II, rape. Second, the appellant asserts that his right to due process was violated where the Government advanced multiple inconsistent theories of guilt prior to and at trial. Third, the appellant asserts that his right to due process was violated where the prosecution suppressed photo and testimonial evidence favorable to the defense that was material to both guilt and punishment. Fourth, the appellant asserts that the Government's evidence was factually insufficient to sustain a conviction for wrongfully providing a person under the age of twenty-one an alcoholic beverage.

For the reasons set out below, we affirm only the finding of guilty for Charge I. We set aside the finding of guilty for Charge II, and authorize a rehearing on sentence.[1]

Sufficiency of the Evidence as to Rape

In his first assignment of error, the appellant contends that the evidence is factually insufficient to support his conviction for Charge II, rape. We agree.

Background

All facts pertinent to this case occurred in the appellant's barracks aboard the Marine Corps Base at 29 Palms, California during the early morning hours of 26 May 2007. Two college-aged women arrived from Palm Springs and joined a party in the barracks around midnight. The complainant, Ms. [T], testified that she consumed a moderate amount of alcohol, including a few sips of an alcoholic beverage that the appellant provided to her. Record at 92-93. At some point thereafter, Ms. [T] became ill. *Id*. at 93. Ms. [T] next remembers waking up in the appellant's bed with his penis inside her vagina. *Id*. Ms. [T] testified that she pushed the appellant away and that he left the room. *Id*. at 93-94. The allegation of rape surfaced the following Wednesday, 30 May 2007, when Ms. [T] presented at a pregnancy counseling center seeking, inter alia, communicable disease testing. *Id*. at 115. In two sworn statements given to the Naval Criminal Investigative Service following that allegation, the appellant admits to having consensual sexual intercourse with Ms. [T]. Additional facts necessary to this decision are included herein.

[1] We decide this case mindful of two orders issued 6 January 2010. One order, to which an enlargement of time was granted, compels production of photographs germane to an assignment of error rendered moot by this decision. The second order compelled a certificate of correction on the status of defense exhibits in the Record of Trial. The due date in that order passed with neither the action ordered completed nor an enlargement requested. The status of those exhibits no longer impacts this decision. Both orders are hereby rescinded.

Principles of Law

Article 66(c), UCMJ, requires this court to conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

At trial, the Government was required to prove: (1) that the accused committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45b(1). We look at the totality of the circumstances to determine whether the elements of force and lack of consent are established. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008)(citing *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996)). In determining whether the second element is proven, "Consent . . . may not be inferred . . . where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent . . . ." MCM, Part IV, ¶ 45c(1)(b).

Discussion

Only the second element, regarding force and lack of consent, is in issue. The Government's theory of the case was that Ms. [T] was incapacitated due to intoxication and therefore unable to give consent. In determining whether Ms. [T] consented or had the capacity to consent, we consider all of the surrounding circumstances. MCM, Part IV, ¶ 45c(1)(b). Ms. [T]'s level of intoxication is critical to addressing the second element. The evidence of her intoxication took the form of testimony from witness accounts, most of whom had also been drinking alcohol.

The most abundant and compelling witness testimony comes from Ms. [T] herself. She testified that she only drank about two to three alcoholic drinks of Red Bull mixed with vodka, and a shot of vodka. Record at 89-90. She also testified that she was sipping on the drinks and did not finish them. *Id*. at 91.

Ms. [T] also testified that while in another Marine's room, she drank a few sips of an alcoholic beverage the appellant brought her. *Id*. at 92. On a scale of 1-10 (with 10 being the most drunk a person or she has ever been), Ms. [T] testified that she was a "maybe a three or four." *Id*. at 108. She testified that she usually drinks on weekends and has several drinks, but has never blacked out from alcohol. *Id*. at 108-09. Ms. [T] stated again at the end of cross-examination that she was not drunk. *Id*. at 109. In response to a question from the military judge, Ms. [T] testified that she did not consider herself drunk. *Id*. at 113.

Lieutenant Colonel (LTC) Timothy Lyons, U.S. Army, was called as a witness and qualified as an expert in forensic toxicology. *Id*. at 139. LTC Lyons testified that getting sick, blacking out, and then passing out would not be consistent with Ms. [T]'s testimony of how much she drank. *Id.* at 154. He further testified to the toxicological effects of alcohol, assuming an even higher level of consumption than Ms. [T] reported, and calculated that the result would still not produce an inability to record memory (black out), much less cause someone to experience alcohol induced unconsciousness (pass out). *Id*. at 147-50. While testifying on the subject of memory black out, LTC Lyons indicated that while unable to record memory or exercise good judgment, a person in an alcohol-induced black out is nonetheless capable of various tasks, including consenting to sex. *Id*. at 154.

Although there was testimony that Ms. [T] was intoxicated and even ill at one point, Private First Class (PFC) [M] testified that she was able to get up and walk unassisted from the bathroom to a bed in his room. *Id*. at 176. Similarly, in the appellant's statement to NCIS, he states that Ms. [T] was sick earlier that evening, but that he saw her walk out of the bathroom without assistance. Prosecution Exhibit (PE) 2 at 2. Soon after, the appellant got onto the bed in PFC [M]'s room next to Ms. [T] and the two conversed. PFC [M] testified that they were flirtatious. Record at 187. PFC [M] maintained that Ms. [T] left his room with the appellant without any assistance. *Id*. at 183, 187-88. These events, as recounted by others, all occurred after Ms. [T] was ill, and during the period of time of which she has no recollection.

The appellant's two statements to NCIS are the only evidence of what may have occurred sexually between the appellant and Ms. [T] during the time period of her memory gap. PE 2, PE 6. While one of the statements does establish some

indeterminate level of intoxication by Ms. [T], including two brief periods of sleep during a lengthy sexual encounter, it does not constitute a confession to rape. PE 6 at 2-3. The appellant describes a consensual sexual encounter wherein Ms. [T] briefly fell asleep and he stopped having sex until Ms. [T] woke up, was responsive, and physically reciprocated. The appellant told NCIS that he stopped having sex with Ms. [T] when she pushed him away and asked him to stop. PE 2 at 4; PE 6 at 4. This is corroborated by Ms. [T]'s testimony that when she pushed the appellant away, he left the room. Record at 93-94.

We may only affirm such findings of guilty as we find correct in law and fact. After complete consideration of the record, the pleadings and oral arguments of the parties, and making allowances for and fully mindful of our statutory requirement that we recognize that the trial court saw and heard the witnesses, we conclude that the Government has failed to sustain its burden of proof, beyond a reasonable doubt, on the critical issue of incapacity and its nexus to consent. Art. 66(c), UCMJ. We take appropriate action in our decretal paragraph.

Assignments of Error II and III

Given our decision to set aside the finding of guilty on the Article 120 offense, we need not decide assignments of error II and III, which relate to the rape charge only.

Sufficiency of the Evidence as to the Orders Violation

In his fourth assignment of error, the appellant contends that the evidence is factually insufficient to support his conviction for Charge I, violation of a lawful general order. We disagree.

Marine Corps Order (MCO) 1700.22E paragraph (4)(a)(1)(g), dated March 21, 2006, a lawful general order, provides that knowingly selling or providing alcohol to anyone under the age of 21 is prohibited. Appellate Exhibit XI at 6. To prove a violation of MCO 1700.22E, paragraph (4)(a)(1)(g), the Government must prove that the order was in effect, that the appellant had a duty to obey it, and that that the appellant violated or failed to obey the order. MCM, Part IV, ¶ 16b. At trial, the military judge took judicial notice that MCO 1700.22E is a lawful general order that was in effect on 26 May 2007. Record at 171. The evidence establishes that the appellant was on active duty in the Marine Corps and subject to the order. PE

2, PE 6. Ms. [T] testified that she drank an alcoholic beverage that the appellant brought her. Id. at 92. In his statement to NCIS, the appellant stated that he brought Ms. [T] an alcoholic beverage. PE 2 at 2; PE 6 at 1. Ms. [T] testified that she told the appellant that she was 19 years old before he gave her the alcoholic beverage. Record at 97.

After taking into consideration that we did not see and hear the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt as to Charge I.

Sentence Rehearing

Due to our action on findings, we next consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)*(*quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). Based on the orders violation and rape together, the military judge imposed a sentence of two years confinement, a dishonorable discharge, and a reduction to pay grade E-1. All that remains is the orders violation. The maximum punishment for the Article 120 offense was any lawful punishment, short of death, as a court-martial may direct. MCM, Part IV, ¶ 45e(1). The maximum punishment for the orders violation was confinement for 2 years, forfeiture of all pay and allowances, and a dishonorable discharge. MCM, Part IV, ¶ 16e(1). Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the military judge would have imposed. *Buber,* 62 M.J. at 479-80. The "only fair course of action" is to have the accused resentenced at the trial level. *Id*. at 480.

Conclusion

We affirm the findings of guilty for Charge I and its specification. The findings of guilty for Charge II and its specification are set aside and Charge II and its specification are dismissed. The sentence is set aside and the appellant is ordered released from post-trial confinement. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing on sentence authorized. In the event that a rehearing on the sentence is

impracticable, a sentence of no punishment may be approved. Art. 66(d), UCMJ.

Senior Judge VINCENT and Judge PRICE concur.[2]

For the Court

R.H. TROIDL
Clerk of Court

[2] Senior Judge VINCENT participated in the decision of this case prior detaching from the court.