IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	**APPELLANT'S BRIEF**
v.	)	
	)	Crim.App. Dkt. No. 201100062
Michael IGNACIO	)	USCA Dkt. No. 12-0202/NA
Cryptologic	)	
Technician-Interpretive	)	
First Class (E-6)	)	
U.S. Navy,	)	
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

MICHAEL D. BERRY
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7713
Bar Number 34828

Table of Contents

Table of Authorities

Issue Presented

IN AN ARTICLE 120(h), UCMJ, CASE, THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS TO CONSIDER ALL OF THE EVIDENCE, INCLUDING THE EVIDENCE OF CONSENT, WHEN DETERMINING WHETHER THE GOVERNMENT PROVED GUILT BEYOND A REASONABLE DOUBT. IN LIGHT OF *UNITED STATES v. PRATHER*, AND *UNITED STATES V. CHEESEMAN*, DOES THE *APPLICATION* OF THE AFFIRMATIVE DEFENSES PROVIDED BY ARTICLE 120 WITHOUT THE AFOREMENTIONED INSTRUCTION VIOLATE APPELLANT'S RIGHT TO DUE PROCESS?

STATEMENT OF STATUTORY JURISDICTION

The lower court reviewed Appellant's case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ.[2]

STATEMENT OF THE CASE

On October 19-21, 2010, a General Court-Martial composed of officer members tried and convicted Appellant of one specification of abusive sexual contact under Article 120(h), UCMJ, and one specification of wrongful sexual contact under Article 120(m), UCMJ.[3]

After the findings, the Government moved to dismiss the wrongful sexual contact specification as multiplicious with the abusive sexual contact.[4] The members sentenced Appellant to confinement for three years, forfeiture of all pay and

---

[1] 10 U.S.C. § 866(b)(1).
[2] 10 U.S.C. § 867(a)(3).
[3] Joint Appendix (JA) at 38.
[4] JA at 39-40.

allowances, reduction to pay-grade E-1, and a bad-conduct discharge.[5] On January 26, 2011, the convening authority approved the sentence and, except for the punitive discharge, ordered it executed.[6] On November 8, 2011, the lower court affirmed the findings and the sentence.[7]

STATEMENT OF FACTS

In September 2009, Appellant was attached to the United States Coast Guard Cutter HAMILTON. The cutter had been performing counter-narcotics patrols off the Pacific coast of Mexico.[8] On September 23, 2009, the HAMILTON moored in Puerto Vallarta, Mexico. During the port call in Puerto Vallarta, Seaman (SN) JA, USCG, Appellant, and another shipmate, Food Serviceman First Class (FS1) AH, had been "out on the town" for an evening of heavy drinking. At some point, the three shipmates separated, but SN JA and Appellant eventually reunited for more drinking and socializing.[9]

As evening turned to early morning, the two decided to retire to their hotel room.[10] They arrived sometime between 0300-0330 and discovered that FS1 AH had already claimed one of

---

[5] JA at 41.
[6] JA at 10-12.
[7] JA at 1-7.
[8] JA at 14.
[9] JA at 15-16.
[10] JA at 16-17.

the room's two beds and was fast asleep.[11] SN JA and Appellant agreed to sleep on the other bed.[12] SN JA testified that he fell asleep while Appellant was taking a shower and awoke to Appellant orally sodomizing him.[13] SN JA testified that he then observed Appellant manually masturbate him briefly before Appellant resumed orally sodomizing him.[14] At some undetermined point, SN JA ejaculated.[15] Although he did neither prevented nor stopped Appellant's manual masturbation and performing fellatio on him, SN JA testified that he pushed Appellant away and yelled "get the fuck off."[16] Throughout the incident, FS1 AH appeared to remain asleep.[17] FS1 AH testified that he did not hear any commotion or yelling, but that he did hear the hotel room door open.[18]

During Appellant's court-martial, he requested that the military judge instruct the members during deliberations on findings that they must consider all of the evidence, including evidence of consent, when determining whether the Government

---

[11] JA at 19, 22.
[12] JA at 20.
[13] JA at 21.
[14] JA at 20-21.
[15] JA at 45.
[16] JA at 21.
[17] JA at 21.
[18] JA at 22.

proved the elements of Article 120(h), UCMJ.[19] The military judge denied Appellant's request.

SUMMARY OF THE ARGUMENT

When evidence necessary to prove an affirmative defense also may raise a reasonable doubt as to an element of the offense, the members *must* be instructed on both uses of the evidence. The military judge failed to instruct the members that they should consider the evidence regarding the affirmative defense of consent in their determination of whether the government had proven the putative victim's incapacity beyond a reasonable doubt. Had the members been so instructed, there is reasonable doubt that the members would have reached the same conclusion. This failure violated Appellant's right to due process of law and prejudiced Appellant.

ARGUMENT

Standard of Review: The question of whether court-martial members were properly instructed is a question of law reviewed *de novo*.[20]

Discussion:

A. In Article 120(h), UCMJ, cases where evidence of consent is presented, the dual-use instruction is required.

Affirmative defenses are special defenses created by

---

[19] JA at 49.

[20] *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

Congress that, although not denying the commission of the objective acts constituting a crime, deny in part or whole criminal responsibility for those acts.[21] For prosecutions under Article 120(h), UCMJ, Congress provided consent as an affirmative defense.[22] Under the statutory scheme that existed at the time of Appellant's court-martial, Congress shifted the burden of proof with respect to consent to the accused.[23] This Court upheld the constitutionality of such a burden shift, but not without caveat.[24] Although Congress may create affirmative defenses wherein the accused bears the burden of proof, due process requires that if the

> evidence necessary to prove the defense also may raise a reasonable doubt about an element of the offense . . . the judge ***must*** ensure that the fact-finder is instructed to consider all of the evidence, including the evidence raised by the defendant that is pertinent to the affirmative defense, when determining whether the prosecution established guilt beyond a reasonable doubt.[25]

This Court recently reinforced this principle in *United States v. Prather*, holding that

> . . . where there is an overlap between the evidence pertinent to an affirmative defense and evidence negating the prosecution's case, there is no due process violation when instructions: "convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], ***must be*** considered

---

[21] 10 U.S.C. §920(t)(16).
[22] 10 U.S.C. §920(r).
[23] 10 U.S.C. §920t)(16).
[24] *United States v. Neal*, 68 M.J. 289, 304 (C.A.A.F. 2010).
[25] *Id.* at 304 (emphasis added).

> in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime."[26]

This "dual-use" instruction serves two distinct but vital purposes with respect to the evidence before the members during deliberations: (1) it may establish an affirmative defense; or (2) it may cast reasonable doubt upon the Government's case. Both purposes are vital because each provides a potential avenue to acquittal for an accused.

For example, if an accused is able to prove that a putative victim consented to the sexual conduct at issue, the members should acquit him based on the affirmative defense. In such cases, if one of the elements of the crime is substantial incapacity, then the members should again acquit him. This is because if one has the capacity to consent, then he is not substantially incapable of refusing consent.[27] Because there is overlap between consent evidence and substantial incapacity in Article 120(h), UCMJ, cases, the dual use instruction is required when evidence of consent is raised.

B. Consent evidence was presented in this case, requiring the dual-use instruction.

Appellant was charged under Article 120(h), UCMJ, for engaging in sexual contact with SN JA by placing SN JA's penis

---

[26] *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (citing *Neal*, 68 M.J. at 299 (brackets in original) (quoting *Martin v. Ohio*, 480 U.S. 228, 234 (1987))) (emphasis added).
[27] *See* 10 U.S.C. §920(t)(14).

into his mouth while SN JA was substantially incapable of declining participation.[28]

During the sexual conduct at issue in this case, SN JA observed Appellant performing oral sex on him and masturbating him. Although it is unknown precisely when, SN JA ejaculated. At the very least, these facts suggest that SN JA was a willing participant – that he consented to the sexual conduct. And although the members may have properly found that SN JA did not consent, the law requires more than this singular determination. The evidence of SN JA's consent should also have been considered by the members when they determined whether SN JA was substantially incapable of declining participation. If the evidence of SN JA's consent raised reasonable doubt regarding this element, the members should have acquitted Appellant. evidence necessary to prove the defense also may raise a reasonable doubt about an element of the offense.

In short, because the evidence necessary to prove the defense - consent - may also raise a reasonable doubt as to the element of capacity to decline participation, due process requires that Appellant receive the benefit of the dual-use instruction at his court-martial.

---

[28] JA at 8-9.

C. Although the lower court agreed that the military judge did not give the dual-use instruction, it incorrectly held that it was not required.

The lower court agreed that the military judge failed to give the dual-use instruction. But contrary to *Neal* and *Prather*, it held that the instruction was not required.[29] Specifically, it held that "the instructions given obviated any burden on the appellant and there was no instructional advantage or benefit which appellant was denied by the omission of the dual-use language."[30] This is incorrect.

The military judge may have correctly instructed the members that "evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt."[31] But informing the members that consent is "relevant" falls well short of the requirement to instruct them that they *must* consider consent for both the affirmative defense and the elements of the offense. And in so instructing them, the military judge also "must be mindful of both the content and the sequential structure of the instructions."[32] Indeed, as one federal circuit put it:

> [T]he constitutional problem is not eliminated by including an instruction in the charge that the state has the ultimate burden of proving every element of the offense beyond a reasonable doubt. When such a

---

[29] JA at 6.
[30] JA at 5-6.
[31] JA at 30.
[32] *Neal*, 68 M.J. at 303.

> standard instruction is coupled with one placing a burden on the defendant to prove his defense by a preponderance of the evidence, the predictable result is more than merely confusion. In order to attribute some significance to the defendants' burden, a rational juror's only option is to conclude that the defendants' evidence concerning the subject matter of the "affirmative defense" is to be considered only if the jury finds it persuasive, i.e., finds that the facts sought to be proved are more likely true than not true. It is clear from *Martin* that this is constitutionally impermissible.[33]

Therefore, it is not enough that the military judge's piecemeal instructions conveyed to the members that consent was "relevant" and that the Government bore the burden to prove consent. The military judge had a duty to instruct the members in a precise manner and his failure to do so violated due process.

D. The military judge deprived Appellant of due process by failing to give the required dual-use instruction and this failure prejudiced Appellant.

Appellant requested that the military judge give the dual use instruction.[34] But the military judge denied the request thereby failing to instruct the members properly. Without this instruction on the record, there is a real risk that the members compartmentalized the two inquiries. That is, they may have artificially and impermissibly separated the evidence regarding SN JA's incapability to decline participation and evidence of his consent. As a result, the military judge's failure to give

---

[33] *Humanik v. Beyer*, 871 F.2d 432, 440-41 (3d Cir. N.J. 1989).
[34] JA at 49.

the dual-use instruction prevented the proper use of this evidence and deprived Appellant of due process.

Because the error in this case is constitutional, the government must prove it is harmless beyond a reasonable doubt.[35] SN JA testified that he observed Appellant manually masturbate him and then orally sodomize him.[36] There is a possibility that the members could have found that the evidence of consent, which came from the putative victim, raised a reasonable doubt as to the statutory elements. But without the dual-use instruction, they were unaware that they could use the evidence in this manner and Appellant lost an opportunity for acquittal. As a result, this Court cannot conclude beyond a reasonable that the members would have reached the same verdict had they been given the dual-use instruction.

Following *United States v. Cheeseman*, this Court should set aside Appellant's conviction for the offense at issue.[37] In *Cheeseman*, this Court, citing *Neal* and *Prather*, set aside a guilty finding under Article 120(c)(2).[38] Here, the application of *Neal* and *Prather* to Article 120(h) should result in the same relief.

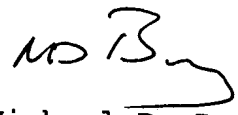
---

[35] *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).
[36] JA at 20-21.
[37] *United States v. Cheeseman*, 2011 CAAF LEXIS 552 (C.A.A.F. May 5, 2011) (summary decision).
[38] *Id.*

Conclusion

Appellant's right to due process of law was violated when the military judge failed to give instructions that would ensure that the members consider the evidence regarding the affirmative defense when determining whether the government had proved its case beyond a reasonable doubt. Had the military judge given the required dual-use instruction, the members may have acquitted Appellant of the sole Specification under Charge I.

WHEREFORE, Appellant prays that this Court grant his requested relief and set aside his conviction.



Michael D. Berry
Captain, USMC
Appellate Defense Counsel
NAMARA, Bldg 58, Ste 100
1254 Charles Morris Street, SE
Washington Navy Yard, DC 20374
(202) 685-7713
Bar Number 34828
michael.d.berry1@navy.mil

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(d) because this brief contains 1993 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in mono-spaced typeface using Microsoft Word 2007, with 10 characters per inch and Courier New, 12-point font.

Michael D. Berry
Captain, USMC
NAMARA, Bldg 58, Ste 100
1254 Charles Morris Street, SE
Washington, DC 20374
(202) 685-7713
Bar Number 34828
michael.d.berry1@navy.mil

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court, Appellate Government Division and to Code 40 on March 8, 2012.

Michael D. Berry
Captain, USMC
NAMARA, Bldg 58, Ste 100
1254 Charles Morris Street, SE
Washington, DC 20374
(202) 685-7713
Bar Number 34828
michael.d.berry1@navy.mil