

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	BRIEF ON BEHALF
Appellee)	OF APPELLANT
)	
v.)	Crim. App. Dkt. No. 201600357
)	
)	USCA Dkt. No. 18-0304/NA
Lamar FORBES)	
AMA Second Class, (E-5))	
U.S. Navy,)	
)	
Appellant)	

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

ISSUE PRESENTED

**WHETHER THE NMCCA ERRED IN HOLDING
THAT APPELLANT WAS PROVIDENT TO
SEXUAL ASSAULT BY BODILY HARM DUE TO
HIS FAILURE TO INFORM HIS SEXUAL
PARTNERS OF HIS HIV STATUS.**

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)(2016).

Statement of the Case

On June 22 and 23, 2016, a military judge convicted AMA Second Class Lamar Forbes (Appellant), pursuant to his pleas, of false official statement, three specifications of sexual assault, assault consummated by battery, and infected sexual battery in violation of Articles 107, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 928, and 924 (2014). The military judge sentenced Appellant to eight years' confinement, reduction to E-1, and a dishonorable discharge. (JA 0250). The Military Judge granted Appellant 413 days of credit for a R.C.M. 315(k) violation.

On October 19, 2016, the convening authority, approved the findings and adjudged sentence, and recognized the 413 days' confinement credit. He ordered the sentence executed, except for the dishonorable discharge. (JA 0019).

On April 24, 2018, the NMCCA affirmed the findings and sentence. On May 24, 2018, Appellant moved the NMCCA to reconsider its decision and to grant leave to attach additional matters to the record. On June 5, 2018, the NMCCA denied Appellant's motion. (JA 0415).

On August 13, 2018, this honorable Court granted the Petition as to the specified issue above.

Statement of Facts

Appellant pled guilty to three specifications of sexual assault under the government's theory that Appellant engaged in sexual intercourse without informing three different alleged victims that he was HIV positive. (JA 0016).

During his providence inquiry and in the stipulation of facts, Appellant admitted to being HIV positive while having sexual intercourse on divers occasions with the three alleged victims. (JA 0250-252). Furthermore, Appellant admitted that he did not inform these individuals that he was HIV positive before he had sexual intercourse with them. (*Id.*). The three alleged victims did not contract HIV from Appellant. (*Id.*).

Anti-retroviral medication completely or almost completely suppresses the HIV virus in bodily fluids. (JA 0258, 264). Appellant, at the time of the charged offenses, had taken anti-retroviral drugs and had, for several periods, completely suppressed the HIV virus in his bodily fluids. (JA 0198-0199, 0238). The military judge did not question Appellant about whether he believed that his bodily fluids contained the HIV virus at the time of the alleged incidents.

Appellant requested that the NMCCA consider scientific publications confirming the information already contained in the record. Specifically, these articles discussed the scientific consensus that a person who takes anti-retroviral

drugs is not able to transmit the HIV virus once his viral load is undetectable. (JA 0378) The NMCCA declined to consider this information. (JA 0415).

Summary of Argument

Appellant's plea to sexual assault was improvident for two reasons. First, Appellant's HIV status did not cause any alleged victim to engage in any sex act. Second, the *Care* inquiry as to the battery element of sexual assault is inconsistent with other matters contained in the record of trial because the record indicated that his bodily fluids were free of the HIV virus. This Court should set aside and dismiss the findings for Charge II, Specifications 1, 3 and 4.

Argument

THE NMCCA ERRED IN HOLDING THAT APPELLANT WAS PROVIDENT TO SEXUAL ASSAULT BY BODILY HARM DUE TO HIS FAILURE TO INFORM HIS SEXUAL PARTNERS OF HIS HIV STATUS.

Standard of Review

This honorable court reviews legal questions that arise from the providence of pleas de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Analysis

The NMCCA erred in finding that Appellant was provident to sexual assault. A person is guilty of sexual assault when he commits a sexual act upon another person "by causing" bodily harm to that other person. MCM pt. IV, para.

¶45.b.(3)(b)(i). Courts routinely construe phrases such as “by causing” or “results from” as requiring actual causation. *Burrage v. United States*, 134 S. Ct. 881, 888 (2014). Here, Appellant’s alleged offensive touching was not a cause precedent to the sexual act. Therefore, he did not commit a sexual act “by causing” bodily harm because the alleged touching with the HIV virus did not cause the sexual act.

Appellant was not provident because he did not explain how any alleged touching with the HIV virus caused the sexual acts at issue. To be provident, an accused must explain how his conduct met each element of the offense with which he is charged. *United States v. Caldwell*, 72 M.J. 137, 144 (C.A.A.F. 2013). The elements that the President sets for offenses limit the jurisdiction of a court-martial. *United States v. Allen*, 31 M.J. 572, 588, n.9 (N-M. Ct. Crim. App. 1990). Here, the President requires that an accused’s offensive touching cause the sexual act at issue. MCM pt. IV, para. ¶45.b.(3)(b)(i). Appellant did not explain how touching any victim with the HIV virus could cause that victim to engage in a sexual act. It is inconceivable how anyone could ever explain such a causation. Although the government claimed that an offensive touching with the HIV virus occurred simultaneously with the sexual acts at issue, such coincidence is insufficient to constitute the offense. Both the text of the statute and the elements of the offense require that the alleged offensive touching *cause* the sex act. Appellant did not explain, nor did the government allege, how the sex act’s occurrence was

dependent upon HIV allegedly present in his body fluids. Indeed, it is impossible to fathom how one could cause the other. Therefore, Appellant was not provident to Charge II, Specifications 1, 3 and 4 because he did not explain how the supposedly present in his bodily fluids HIV caused a sex act to occur.

The NMCCA held that the alleged victims did not know of their alleged touching with the HIV virus. *Id.* at *5-6. Such a holding is inconsistent with causation because an alleged offensive touching cannot force an alleged victim to engage in a sexual act while she is unaware of that touching because if an alleged victim is unaware of the touching, she is not therefore in fear or under duress from it. The NMCCA therefore erred in finding Appellant provident to Charge II, Specifications 1, 3 and 4 because it did analyze how Appellant's elocution satisfied the causation element of the charge.

The NMCCA further erred because the record indicates that no offensive touching of any alleged victim occurred. In order to be provident to charges to which he pleads guilty, an accused must admit every element of the offense. *See* R.C.M. 910(e) discussion. If any ambiguity in the record "sets up [a] matter raising a possible defense, then the military judge is obligated to make further inquiry to resolve any apparent ambiguity or inconsistency." *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006).

The record of trial indicates that Appellant had no viral load and therefore no

HIV virus present in his bodily fluids. He therefore could not commit assault consummated by battery with the virus as a means of assault. The Military Judge erred in failing to resolve this inconsistency with Appellant's pleas.

An offensive touching must occur in order for an appellant to be guilty of assault consummated by battery. MCM pt. IV, para. 54.c.(1)(a). In cases where an HIV-positive servicemember engages in consensual sexual contact with another person who is uninformed of his HIV-positive status, that servicemember commits simple assault by placing some amount of the HIV virus inside of that other person. *Gutierrez*, 74 M.J. at 68. The record establishes that a person who takes anti-retroviral medication for his HIV infection completely suppresses the HIV virus in his bodily fluids. (JA 0258, 0264). HIV testing of appellant's bodily fluids confirmed that, at various times, there was no detectable HIV in his bodily fluids. (JA 0179). The record therefore sets up an unexplored defense because it indicates that Appellant had no viral load before the alleged acts occurred and potentially no HIV virus in his bodily fluids with which to commit an offensive touching. The military judge did not question Appellant concerning whether he believed that his bodily fluids contained any amount of the HIV virus.

Appellant's plea stands for the proposition that he touched his alleged victims with the HIV virus. The record reveals that this was impossible. The record therefore contains a matter inconsistent with Appellant's plea. This Court

should set aside and dismiss the findings as to Charge II because of the inconsistency in Appellant's plea, and order a rehearing as to sentence.

//s//

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