UNITED STATES v. Airman First Class DARRYL W. EDWARDS, United States Air Force

ACM 31634

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

1996 CCA LEXIS 224

July 22, 1996, Decided

PRIOR HISTORY: [*1] Sentence adjudged 24 April 1995 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Terence A. Curtin (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 24 months, and reduction to E-1.

DISPOSITION: AFFIRMED.

COUNSEL: Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain W. Craig Mullen.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Captain Libby A. Brown.

JUDGES: Before PEARSON, MORGAN, C.H. II, and MORGAN, J.H., Appellate Military Judges. Senior Judge PEARSON and Judge MORGAN concur.

OPINION BY: MORGAN, C.H. II

OPINION

OPINION OF THE COURT

MORGAN, C.H. II, Judge:

Appellant, who was HIV-positive, was convicted by a general court-martial of disobeying the "safe sex" order of a superior commissioned officer in violation of Article 90, UCMJ, *10 U.S.C. ß 890*; aggravated assault by having unprotected sex with a 17-year-old woman while knowing he was HIV-positive in violation of Article 128, UCMJ, *10 U.S.C. ß 928*; and adultery, in violation of Article 134, *10 U.S.C. ß 934*. He was sentenced to a bad-conduct discharge, confinement for 24 months, and reduction to the lowest enlisted grade.

Appellant and his wife [*2] were both HIV-positive. This was discovered in early 1993, whereupon appellant was given a "safe sex" order from his squadron commander, ordering him not to engage in unprotected sex and to advise prospective sexual partners that he was HIV-positive. This written order was given to appellant, signed by his commander, Major Johnson, and signed by appellant, acknowledging receipt. Appellant was reminded of this order in December of 1994 by the squadron first sergeant, and admitted that he was given such an order in his written confession of January 1995. Nevertheless, for reasons that are not entirely clear, the military judge refused to admit the written order itself, but instead relied upon the testimony of the squadron first sergeant, who recalled specifically that he had reminded appellant of that portion of the order having to do with unprotected sex, but could not remember if he had also reinforced that portion dealing with the duty to warn prospective sexual partners. Consequently, the military judge found appellant guilty of the Article 90 offense by exceptions and substitutions, omitting that portion dealing with the duty to inform prospective sexual partners.

On January 5, [*3] 1995, appellant's wife was admitted to the hospital with a form of pneumonia which indicated that her HIV status had developed into AIDS. That same day, appellant sought out and had consensual sexual intercourse with a 17-year-old girl whom he had met at a Wendy's, and whom he had been "courting" for several weeks. The record revealed that the two had sexual intercourse four or more times between 5 and 12 January. At no time did appellant use a condom or other form of protection, nor did he advise the young woman of his HIV status.

Appellant brings three assignments of error, none of which have merit. First, he argues that the specification alleging violation of the safe sex order is multiplicious with aggravated assault, or, alternatively, that the order was unlawful, because it merely admonished appellant to do that which he otherwise was obligated to do. Clearly, aggravated assault and disobedience of a lawful order of a commissioned officer are not multiplicious. *United States v. Teters, 37 M.J. 370 (C.M.A. 1993)*. Neither, as

appellant urges, is the order infirm under what used to be called the "Footnote 5" rule, which prohibits punishment for violation of an order "which [*4] is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, P 14c.(2)(a)(iii) (1984). *See also United States v. Battle, 27 M.J. 781 (A.F.C.M.R. 1988)*. Appellant's squadron commander personally and directly issued an order, imposing a duty precipitated by appellant's extraordinary medical condition. It was specifically purposed to prevent the further spread of AIDS, something which is well within the commander's purview. *United States v. Dumford, 30 M.J. 137* (C.M.A.), *cert. denied, 498 U.S. 854, 112 L. Ed. 2d 116, 111 S. Ct. 150 (1990)*. There can be no question whatsoever but that appellant's outright defiance of that order, on numerous occasions, corrupted the very heart of the superior-subordinate relationship Article 90 is designed to protect, and thus lifted it above the "common ruck" of a failure to perform a pre-existing duty. *United States v. Loos, 4 U.S.C.M.A. 478, 16 C.M.R. 52, 55 (C.M.A. 1953)*.

Our review of appellant's remaining assigned errors, *viz*., that the safe sex order expired with the reassignment of his commander, and that the military judge's findings of guilty of [*5] Article 90 by exceptions and substitutions rendered the order unlawful, persuades us that they are meritless.

Accordingly, the findings and sentence are correct in law and fact, the sentence is appropriate, and the same are hereby

AFFIRMED.

Senior Judge PEARSON and Judge MORGAN concur.