



The United States Army Court of Criminal Appeals



United States v. Bodoh

September 12, 2017

ORDER OF EVENTS

Court Called to Order

Oral Argument

Court Adjourns

Question and Answer Session

HISTORY OF THE JAG CORPS

As Army lawyers, we proudly trace our lineage to the nation's founding. On July 29, 1775, the Continental Congress created the position of Judge Advocate of the Army and appointed William Tudor as the first Judge Advocate in order to provide legal advice to General George Washington. Following a post-war draw-down and abolition of the position, Congress reestablished the position in 1849 followed by 1862 legislation creating a Corps of Judge Advocates. In 1884, Congress created The Judge Advocate General's Department, the forerunner of today's JAG Corps. On its 211th birthday, July 29, 1986, the JAG Corps was placed under the U.S. Army regimental system.

The Judge Advocate General's Corps is comprised of lawyers, legal administrators, paralegals, and court reporters. The Corps' members are commissioned and warrant officers, enlisted Soldiers, and civilians and are members of the Active Component, Army Reserve, and National Guard. They are also members of two honorable professions: the profession of arms and the profession of law.

The Corps' primary mission is to support warfighters through a variety of activities. Judge Advocates assist commanders with Military Justice, Operational Law, and Civil Law. Army lawyers also provide legal services to Soldiers and their families, boosting morale and allowing Soldiers to stay focused on their mission. Most importantly, The Judge Advocate General's Corps provides the structure and support for maintaining discipline, the foundation of an effective fighting force.

Today, Army legal professionals are active on all fronts in our nation's battle against terrorism. Our Judge Advocates advise commanders on joint and coalition operations, Rule of Law, the exercise and administration of military justice in combat, and detention operations. They also provide legal support during complex tactical operations and strategic transitions.

From the fields of Lexington and Concord to the mountains and deserts of Afghanistan and Iraq, Judge Advocates, legal administrators, noncommissioned officer paralegals, and civilians can be proud of their outstanding history of support to the men and women of our armed forces.

THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

The Army's highest court traces its lineage to 1920, when the Articles of War were amended to add Article 50 ½. This article directed the Judge Advocate General to "constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department." While this board's jurisdiction was limited in scope, it provided the genesis of today's Army Court of Criminal Appeals.

In 1950, Congress replaced the Articles of War and the Articles for the Government of the Navy with the Uniform Code of Military Justice (UCMJ). In 1951, The Judge Advocate General of the Army established the U.S. Army Board of Review, pursuant to Article 66, UCMJ. The UCMJ empowered the Board to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." It also charged each Board with "affirm[ing] only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Finally, pursuant to the UCMJ, the decisions of the Army Board of Review were made binding on The Judge Advocate General and, by implication, binding on the Secretary of the Army and the President as well.

The Military Justice Act of 1968 redesignated the various Service Boards of Review as Courts of Military Review and provided each court with a chief judge, appointed by The Judge Advocate General, and enabled each court to either sit en banc or in panels, empowering the chief judge to designate the senior, or presiding, judge for each panel. The Military Justice Act of 1983 gave the court additional power to entertain interlocutory appeals by the Government from certain adverse trial rulings by the military judge. Congress also expanded the authority of The Judge Advocate General under Article 69(a), UCMJ, to refer to the court records of trial other than those automatically reviewed by that court under Article 66, UCMJ.

In 1994, the U.S. Army Court of Military Review was renamed the U.S. Army Court of Criminal Appeals. This coincided with the renaming of the U.S. Court of Military Appeals, our superior court, to the U.S. Court of Appeals for the Armed Forces. More recently, The Judge Advocate

General, by regulation, granted tenure to Army appellate and trial judges.

Currently, the U.S. Army Court of Criminal Appeals is composed of three judicial panels, each with three appellate judges (one of whom is the senior judge) and a commissioner (staff attorney). It is supplemented by military judges from the U.S. Army Reserve.

STATEMENT OF THE CASE

Appellant, Private (PV2, E-2) Anthony M. Bodoh, was convicted, contrary to his pleas, by a panel of officers, of one specification of sexual assault and one specification of assault consummated by a battery, in violation of Articles 120 and 128, UCMJ. The offenses occurred at Fort Hood, Texas, on or about June 22, 2014. The trial, a general court-martial, took place throughout parts of January through March 2015.

The panel sentenced PV2 Bodoh to a bad-conduct discharge, confinement for 5 years, forfeiture of \$1,546.80 per month for 60 months, and reduction to the grade of E-1. After reviewing PV2 Bodoh's post-trial clemency submissions, the convening authority approved the findings of guilty and sentence as adjudged.

Through his appellate defense counsel, PV2 Bodoh raised five assignments of error for this court's consideration, two of which will be heard at oral argument. Appellate counsel from the U.S. Army's Defense Appellate Division and Government Appellate Division will argue on behalf of appellant and the government, respectively. As the party asserting error, the defense will present argument first, with the government responding afterwards. Each side is allotted thirty minutes for argument; the defense, if they wish, may reserve a portion of that time for rebuttal.

FACTUAL BACKGROUND

On June 24, 2014, PV2 Bodoh was placed in pretrial confinement in advance of charges that were preferred against him one month later. The charges were referred to a general court-martial, and on November 24, 2014, PV2 Bodoh was arraigned. On January 7, 2015, the government withdrew the charges and transferred the case from the 1st Cavalry Division (Rear) (Provisional) to the 1st Cavalry Division. Two days later, the 1st Cavalry Division accepted the case and referred the charges to a new, general court-martial. On January 12, 2015, PV2 Bodoh was arraigned.

Before trial, PV2 Bodoh moved the court to dismiss the charges against him for violating his rights to a speedy trial under the Sixth Amendment to the Constitution, Article 10, UCMJ, and Rule for Courts-Martial (R.C.M.) 707. The military judge denied PV2 Bodoh's motion.

At the conclusion of the trial on the merits, before panel deliberations began, the military judge instructed the panel on the elements of the charged offenses and the applicable law. The military judge, however, failed to define the *mens rea* required for a sexual assault conviction.

Appellant argues on appeal, *inter alia*, the military judge erred by denying his motion to dismiss the case for violating his right to a speedy trial and failing to instruct the panel on the *mens rea* requirement.

ISSUE PRESENTED AND SUMMARY OF THE ARGUMENT

Issue: Whether the military judge abused his discretion by denying the defense motion to dismiss for violation of R.C.M. 707.

When considering whether an accused has received a speedy trial, appellate courts review this legal question de novo, but give substantial deference to the trial judge's findings of fact, which will be reversed only if they are clearly erroneous.

In military law, there are constitutional, statutory, and regulatory authorities that protect an accused's right to a speedy trial. The Sixth Amendment guarantees an accused in a criminal prosecution "shall enjoy the right to a speedy and public trial . . ." By statute, when any person subject to the UCMJ is placed under arrest or in confinement prior to trial, immediate steps shall be taken to try him or dismiss the charges and release him. Finally, as a regulatory matter, R.C.M. 707(a) requires an accused be brought to trial within 120 days of preferral of charges, imposition of restraint, or entry onto active duty for purposes of court-martial. An accused is "brought to trial" within the meaning of this rule by arraignment. If charges are dismissed or the accused is released from confinement, the clock stops and a new 120-day period begins upon re-preferral of charges.

Here, appellant argues the government violated R.C.M 707 when it failed to arraign him for previously withdrawn charges within 120 days from the original preferral. Appellant asserts this violation based on the distinction between "dismissing" and "withdrawing" criminal charges. Dismissing charges resets the 120-day requirement if new charges are preferred, unless the dismissal is a mere subterfuge to extend the government's time. In contrast, withdrawing charges does not reset the 120-day requirement if the charges are referred again for trial. Accordingly, appellant argues the military judge abused his discretion when denying his motion to dismiss the case. As a remedy, appellant argues his conviction should be set aside and all charges dismissed with prejudice.

In response, the government also cites to R.C.M. 707, which permits military judges and convening authorities to exclude periods of delay from the 120-day requirement as long as their actions do not amount to

an abuse of discretion. In this case, ninety-three days were excluded from calculation to account for a defense-requested delay and a docketing delay. The government argues the military judge did not abuse his discretion when denying appellant's motion because, after accounting for the excluded periods of delay, the case did not exceed the 120-day requirement.

Issue: Whether the military judge erred by instructing the panel that a negligent mens rea was sufficient to make appellant's otherwise lawful conduct criminal.

In general, questions concerning the substance of a military judge's instructions to a panel, as well as those involving statutory interpretation, are reviewed de novo. However, when a party fails to object to an instruction given or omitted at trial, the issue is forfeited on appeal absent plain error. To establish plain error, appellant must show: (1) the military judge erred, (2) the error was clear and obvious, and (3) the error resulted in material prejudice to his substantial rights. For claims of constitutional error, if an appellant meets the burden of establishing plain error, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. Conversely, an appellant's failure to establish any one of the prongs is fatal to a plain error claim.

It is a fundamental principle of criminal law that wrongdoing must be conscious to be criminal. Therefore, the general rule is that a *mens rea* (guilty mind) is a necessary element of every crime. The Supreme Court has held that even when the *mens rea* requirement is not explicitly included in a criminal statute, that does not necessarily mean that such a requirement does not apply. Rather, criminal statutes should generally be interpreted by courts as still including broadly applicable *mens rea* requirements, even where the statute does not contain them. However, in inferring a *mens rea* requirement in a statute that is otherwise silent, courts must only read into the statute the *mens rea* necessary to separate wrongful conduct from innocent conduct.

Because one of the statutes under which he was convicted does not explicitly state the *mens rea* required, appellant argues the military judge erred by failing to instruct the panel on the appropriate *mens rea* they should have read into the statute. Appellant contends the panel, in the absence of proper instruction, convicted him without finding a *mens rea* or based on an impermissibly low *mens rea* such as negligence. As a

remedy, appellant argues his sexual assault conviction and his sentence should be set aside.

The government argues sexual assault by bodily harm is a general intent crime, which only requires knowledge of the *actus reus* (guilty act) and not the resulting social harm criminalized by the statute. Essentially, the government claims it is enough for appellant to have intended the penetrative act with knowledge of the circumstances that indicated his victim did not consent. Therefore, the military judge was not required to define a higher *mens rea*, such as recklessness, to separate wrongful from innocent conduct. Instead, the instructions as a whole required the panel to determine whether appellant possessed the general intent to commit sexual assault by causing bodily harm. Furthermore, even assuming the panel instructions were deficient, the government argues appellant was not prejudiced by the error because the evidence of his specific intent to commit the offense was overwhelmingly demonstrated. Accordingly, the government argues appellant failed to meet the requirements for relief under the plain-error test.

APPELLATE JUDGE BIOGRAPHIES

Lieutenant Colonel (LTC) Paulette V. Burton assumed current duties as a Senior Judge with the U.S. Army Court of Criminal Appeals in September 2017. Her prior assignments include: Associate Judge, U.S. Army Court of Criminal Appeals (2015-2017); Staff Judge Advocate, U.S. Army Criminal Investigation Command (2013-2015); Associate Judge, U.S. Army Criminal Court of Appeals (2010-2013); Chief, U.S. Army Judge Advocate Recruiting Office (2008-2010); Deputy Staff Judge Advocate, U.S. Army Aviation and Warfighting Center (2006-2008); Senior Defense Counsel, National Capital Region (2004-2006); Chief of Claims, 25th Infantry Division (2002-2003); Chief of Legal Assistance, 25th Infantry Division (2000-2002); Trial Defense Counsel, Yongsan, Republic of Korea (1998-2000); Trial Counsel, Fort Belvoir, Virginia (1997-1998); Chief of Claims, Fort Belvoir, Virginia (1996-1997); Legal Assistance Attorney, Fort Belvoir, Virginia (1995-1996).

LTC Burton is a graduate of the U.S. Army Command and General Staff College (2006), the Judge Advocate Officer Graduate Course (LL.M., 2004), and the Combined Arms and Service Staff College (2000). Her civilian education includes South Carolina School of Law (J.D., 1993) and Spelman College (B.A., 1990), where she was a Reserve Officers Training Corps (ROTC) Distinguished Military Graduate. She is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, the U.S. Army Court of Criminal Appeals, the U.S. Bankruptcy Court of South Carolina, and the South Carolina Supreme Court.

Colonel (COL) Larss G. Celtnieks assumed current duties as an Associate Judge with the U.S. Army Court of Criminal Appeals in July 2014. After enlisting in 1984, COL Celtnieks completed recruit training at Parris Island, South Carolina, and served in the Marine Corps Reserve until his honorable discharge in 1990. He accepted a direct commission and entered the Army Judge Advocate General's Corps in 1991.

His prior assignments include: Chief, Tort Claims Division, Fort Meade, Maryland (2011-2014); Deputy Staff Judge Advocate, Detachment South/Southwest, U.S. Forces-Afghanistan, Kandahar, Afghanistan (2010-2011); Regional Defense Counsel (Atlantic Region), U.S. Army Trial Defense Service, Fort Meade, Maryland (2008-2010); Staff Judge Advocate, Fort Meade, Maryland (2006-2008); Chief, Operational Law, Multi-National Force-Iraq, Baghdad, Iraq (2005-2006); Operational Law

Observer/Trainer, Battle Command Training Program, Fort Leavenworth, Kansas (2003-2005) (deploying to Iraq as Special Prosecutor for Crimes Against the Coalition, Combined Joint Task Force-7, from September to November 2003); Officer-in-Charge, Katterbach Law Center, 1st Infantry Division, Katterbach, Germany (2001-2003) (deploying to Turkey as Deputy Staff Judge Advocate, Army Forces-Turkey, from February to April 2003); Chief, Administrative and Civil Law, 1st Armored Division, Bad Kreuznach, Germany (1999-2001) (deploying to Kosovo as Command Judge Advocate, Task Force Falcon, from February to June 2001); Chief, Criminal Law, 2d Infantry Division, Uijongbu, Republic of Korea (1997-1998); Trial Counsel and Chief, Legal Assistance, 24th and 3d Infantry Divisions, Fort Stewart, Georgia (1994-1997) (deploying to Kuwait as Task Force Judge Advocate, Task Force 1-64, from April to August 1996); and Legal Assistance Attorney and Defense Counsel, Fort Meade, Maryland (1991-1994).

COL Celtnieks graduated from Towson State University in 1987, received a J.D. from the University of Baltimore School of Law in 1990, and an LL.M in Military Law from The Judge Advocate General's School in 1999. He is admitted to practice before the U.S. Court of Appeals for the Armed Forces, the U.S. Army Court of Criminal Appeals, the U.S. Navy-Marine Corps Court of Criminal Appeals, the U.S. Air Force Court of Criminal Appeals, and the Court of Appeals of Maryland.

COL Paula I. Schasberger assumed current duties as an Associate Judge with the U.S. Army Court of Criminal Appeals in July 2017. Prior to joining the Army Judge Advocate General's Corps in 1997, COL Schasberger was commissioned in 1990 as an officer in the Military Intelligence Branch.

Her prior assignments include: Staff Judge Advocate, 21st Theater Sustainment Command, Kaiserslautern, Germany (2015-2017); Deputy Judge Advocate, U.S. Army Europe, Wiesbaden, Germany (2014-2015); Staff Judge Advocate, 2nd Infantry Division, Camp Red Cloud, Republic of Korea (2011-2013); Rule of Law Military Liaison, U.S. Embassy, Kabul, Afghanistan (2010-2011); Deputy Staff Judge Advocate, Joint Readiness Training Center and Fort Polk, Louisiana (2008-2010); Chief International and Operational Law (deploying to Baghdad, Iraq, Camp Arifjan, Kuwait, and Bagram Airbase, Afghanistan), U.S. Army Central Command (2006-2008); Command and General Staff College, Fort Leavenworth, Kansas (2005-2006); Deputy Staff Judge Advocate, 2nd Infantry Division, Camp Red Cloud, Republic of Korea (2004-2005);

Litigation Attorney, Civilian Personnel Branch, Office of The Judge Advocate General (2002-2004); Trial Counsel, Administrative Law Attorney, and Legal Assistance Attorney, 1st Armor Division, Baumholder, Germany (1998-2001).

COL Schasberger received her B.S. in Engineering from the U.S. Military Academy at West Point in 1990, and her J.D. from the University of Virginia in 1997. Her other degrees include an LL.M from the Judge Advocate General's School in 2001 and a Master of Strategic Studies (M.S.S.) from the National War College in 2014. COL Schasberger is admitted to practice in Virginia and before the U.S. Court of Appeals for the Armed Forces, and the U.S. Army Court of Criminal Appeals.

COUNSEL AND COMMISSIONER BIOGRAPHIES

For the Appellant:

Captain (CPT) Joshua B. Fix joined the U.S. Army as a Judge Advocate in 2011 and currently serves as an Appellate Defense Counsel in the Defense Appellate Division. Prior assignments include: Trial Counsel, Fort Hood, Texas (2014-2016); Trial Counsel and Operational Law Attorney, 504th BFSB, Kosovo (2014); Trial Counsel and Brigade Judge Advocate, Fort Hood, Texas (2013-2014); Administrative Law Attorney, Fort Hood, Texas (2012-2013); Legal Assistance Attorney, III Corps, Fort Hood, Texas, 2011-2013. CPT Fix received his B.A. from the University of Virginia in 2003 and his J.D., magna cum laude, from Indiana University Maurer School of Law-Bloomington in 2010. Prior to joining the U.S. Army, CPT Fix was special counsel to BrownGreer, PLC, in Richmond, Virginia. CPT Fix is admitted to practice in Virginia and before the U.S. Army Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. CPT Fix is originally from Virginia.

CPT Heather M. Martin joined the U.S. Army as a Judge Advocate in 2011 and currently serves as an Appellate Defense Counsel in the Defense Appellate Division. Prior assignments include: Special Victim Prosecutor, Fort Leonard Wood, Missouri and Fort Polk, Louisiana (2015-2017); Trial Counsel, Fort Lee, Virginia (2014-2015); Defense Counsel, Fort Bragg, North Carolina (2012-2014); Legal Assistance Attorney, Fort Bragg, North Carolina (2011-2012). CPT Martin received her B.A. from the University of St. Thomas in 2007 and her J.D. from William Mitchell College of Law in 2010. CPT Martin is admitted to practice in Minnesota and before the U.S. Army Court of Criminal Appeals. CPT Martin is originally from Minnesota.

For the Appellee:

CPT Cassandra M. Resposo joined the U.S. Army as a Judge Advocate in October 2011 and currently serves as an Appellate Attorney in the Government Appellate Division. Prior assignments include: Trial Defense Counsel, Fort Bragg, North Carolina and Monrovia, Liberia (2014-2016); Trial Counsel, Fort Campbell, Kentucky (2013-2014); Legal Assistance Attorney and Contracts/Fiscal Law Attorney, Fort Campbell,

Kentucky and Forward Operating Base Salerno (2012-2013). Originally from New Jersey, CPT Resposo received a B.A. from the University of Delaware in 2006 and a J.D. from Chicago-Kent College of Law in 2010. CPT Resposo is admitted to practice in Illinois, and before the U.S. Court of Appeals for the Armed Forces and the U.S. Army Court of Criminal Appeals.

Major (MAJ) Cormac M. Smith was commissioned in the U.S. Army Signal Corps in May 2003, and joined the U.S. Army Judge Advocate General's Corps in 2009. He currently serves as a Branch Chief at the Government Appellate Division. Prior assignments include: Chief of Contract and Fiscal Law, NATO Office of the Legal Advisor, Kabul, Afghanistan (2015-2016); Brigade Judge Advocate, 16th Military Police Brigade, Fort Bragg, North Carolina (2012-2014); Chief of Legal Assistance and Trial Counsel, Fort Leonard Wood, Missouri (2009-2012). MAJ Smith received a B.S. in Physics from Truman State University in 2003, a J.D., cum laude, from the University of Wisconsin-Madison in 2009, and a LL.M. in Military Law from The U.S. Army Judge Advocate General's School in 2015. MAJ Smith is admitted to practice in Wisconsin, and before the U.S. Supreme Court, the U.S. Patent and Trademark Office, the U.S. Court of Appeals for the Armed Forces, and the U.S. Army Court of Criminal Appeals. He is originally from Missouri.

Court Commissioner:

CPT Vincent S. Scalfani joined the U.S. Army as a Judge Advocate in February 2010 and currently serves as a Commissioner for the U.S. Army Court of Criminal Appeals. Prior assignments include: Government Appellate Attorney, Fort Belvoir, Virginia (2016); Group Judge Advocate and NATO Legal Advisor, Afghan National Army Special Operations Command-Special Operations Advisory Group, Camp Morehead, Afghanistan (2015); Administrative Law Attorney and Trial Counsel, Fort McNair, District of Columbia (2013-2014); Brigade Judge Advocate and Trial Counsel, 3rd Infantry Division, Fort Benning, Georgia (2012-2013); Trial Counsel and Legal Assistance Attorney, Fort Benning, Georgia (2010-2012). CPT Scalfani received his B.A. from Wheaton College in 2006 and his J.D. from The George Washington University Law School in 2009. Originally from California, CPT Scalfani is admitted to practice in Massachusetts and before the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, and the U.S. Army Court of Criminal Appeals.



Established in 1775, the Army Judge Advocate General's (JAG) Corps is the oldest law firm in the nation.

The branch insignia was created in 1890 and includes a sword and pen, crossed and wreathed. Today, the insignia worn by all uniformed members of the Corps reflects the many components of the Corps' mission: the pen denotes the recording of testimony; the sword, the military character of the Corps' mission; and the wreath, the traditional symbol of accomplishment.