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U.S. Air Force Court of Criminal Appeals.

UNITED STATES
v.
Major James T. GOLDSMITH, FRXXX–XX–XXXX United States Air Force.

No. ACM 31172.
Nov. 20, 1995.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain J. Knight Champion, III.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, and Captain Timothy G. Buxton.

Before SCHREIER, STARR, and CREGAR, Appellate Military Judges.

CREGAR, Judge:

***1** Contrary to his pleas appellant was convicted of two specifications of willful disobedience of the order of a superior commissioned officer, two specifications of assault with a means likely to inflict death or grievous bodily harm, and one specification of assault consummated by a battery.[1] Articles 90 and 128, UCMJ, 10 U.S.C. §§ 890 and 928 (1988). A general court martial consisting of members sentenced him to confinement for six years and forfeiture of $2,500 pay per month for 72 months.

Appellant received an order by a superior commissioned officer to inform his sex partners that he was HIV (human immune deficiency virus) positive before engaging in sexual relations and to employ methods, including condoms, to prevent the transfer of body fluids during sexual relations. He was convicted of the assaults and of having violated this order by engaging in unprotected sexual intercourse with two women without first informing them that he was HIV positive. He assigns three errors: that the evidence was factually insufficient to establish that there was more than a remote possibility that HIV could be transmitted through unprotected vaginal intercourse without internal ejaculation; that the military judge erred in denying a defense motion for a new Article 32 investigation; and that the sentence is inappropriately severe. Finding no merit to these assignments of error, we affirm.

I. FACTUAL SUFFICIENCY

Appellant was diagnosed as having HIV in April 1988 and, on May 31, 1988, received the preventive medicine order described above from Colonel John P. Tagnesi, his superior commissioned officer. He also attended several counselling sessions concerning his responsibilities to inform any sex partners of his HIV status and to use protective measures if the partners consented to engage in sex with him. Persons with HIV eventually contract AIDS (Acquired Immune Deficiency Syndrome), a disease which is invariably deadly and for which there is no cure.

Appellant met Debora S in October 1988. They engaged in multiple instances of unprotected vaginal intercourse during November of 1988 and January of 1989. Appellant did not tell her that he was HIV positive. Instead, he told her that he was suffering from leukemia. The record does not establish whether appellant ever ejaculated in Ms S's vagina.

Appellant met First Lieutenant (1st Lt) S in October 1993. They engaged in both protected and unprotected vaginal intercourse approximately 10 times. On those occasions when the intercourse was unprotected, appellant withdrew before ejaculation. At no time did he tell her that he was HIV positive. Appellant told 1st Lt S that he was terminally ill with cancer of the lymph nodes and, in response to her direct question as to whether he was HIV positive,[2] denied that he was HIV positive. Rather, he said that "I told her I was 'false positive' once, but that's not the case anymore." 1st Lt S did not conclude from this response that he was HIV positive. Indeed, she testified that appellant claimed that the false positive test was the result of his cancer of the lymph nodes.

***2** There is no evidence that appellant's pre-ejaculate contained HIV. In subsequent tests neither Debora S nor 1st Lt S has tested positive for HIV.

Appellant asserts that the evidence is factually insufficient to support his conviction for aggravated assault based on the lack of direct

evidence that his pre-ejaculate fluid actually contained HIV. He relies on the expert testimony of Dr. (Major) Blatt to the effect that little is known of about the amount of HIV in pre-seminal as opposed to seminal fluid; that appellant's tests reveal that his low concentration of the virus make him less likely to have the virus in his seminal fluid; and that the risk of transmission from a male to female in vaginal intercourse is only one in one thousand. He further argues that neither Debora S nor 1st Lt S had a coexisting sexual disease which would have increased the risk of transmission, and that neither has tested positive for HIV. Based on this evidence appellant asserts that the prosecution has failed to establish that the likelihood of infecting these two women under these circumstances was "more than merely a fanciful, speculative, or remote possibility." *United States v. Johnson,* 30 M.J. 53, 57 (C.M.A.), *cert. denied,* 498 U.S. 919 (1990).

The test for factual sufficiency is whether, weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this court are themselves convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner,* 25 M.J. 324, 325 (C.M.A.1987); Article 66, UCMJ, 10 U.S.C. § 866. Affirming the conviction of an HIV positive sailor who engaged in protected vaginal intercourse without informing his partner that he was HIV positive, the former Court of Military Appeals stated:

> ... [W]e do not construe the word "likely," in the phrase, "likely to produce death or grievous bodily harm," as involving nice calculations of statistical probability. (footnote omitted) If we were considering a rifle bullet instead of HIV, the question would be whether the bullet is likely to inflict death or serious bodily harm *if* it hits the victim, not the statistical probability of the bullet hitting the victim. The statistical probability need only be "more than merely a fanciful, speculative, or remote possibility." *United States v. Johnson,* 30 M.J. 53, 57 (C.M.A.), *cert. denied,* 498 U.S. 919, 111 S.Ct. 294, 112 L.Ed.2d 248 (1990).
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> Likewise, in this case, the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body. The probability of infection need only be "more than merely a fanciful, speculative, or remote possibility." *Id.*

United States v. Joseph, 37 M.J. 392, 396–7 (C.M.A.1993)(emphasis in original).

In a footnote to the *Joseph* opinion the Court stated:

> ***3** We have held that the natural and probable consequence of having *unprotected* sexual contact with someone who tests positive for HIV is death or serious bodily harm. (citations omitted) Thus, deliberately exposing another to seminal fluid containing HIV is clearly a means likely to produce death or grievous bodily harm and, therefore, can be an aggravated assault.

Id. at 396, n. 6 (emphasis in orginal).

Appellant argues that, unlike the instant case, there was expert testimony in *Joseph* that it was more than mere speculation that HIV could be transmitted through vaginal intercourse, and that Joseph knew that condoms did not provide absolute protection. He claims that he did not know nor, based on the expert testimony, was there reason to believe that his pre-ejaculate contained the virus. We disagree.

Dr. Blatt acknowledged a "probability" that not all men may have HIV in their pre-seminal fluid, and that the risk of transmission from a male to a female in unprotected intercourse is one in a thousand per encounter. However, he also stated that there is very little known about the *amount* of virus in pre-seminal fluid versus seminal fluid and that "*it is thought that the pre-seminal fluid potentially may be infectious.*" Another expert witness, Dr. (Major) Hendrix, testified that it would be reckless for the withdrawal method to be used in preference to protected sex and that the risk of heterosexual, penile-vaginal transmission of HIV is a very real threat.[3]

Because appellant's arguments are ultimately based upon the amounts of any HIV in his pre-ejaculate and the likelihood of transmission once penetration has occurred, they in fact address the statistical probability of the transmission of the virus rather than the likelihood of death or serious bodily harm once the virus has been transmitted. These

arguments are foreclosed by the holding in *Joseph.* We conclude that the "very real threat" of heterosexual HIV transmission arose when unprotected penile-vaginal penetration occurred. Accordingly, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the accused's guilt of assault with a means likely to inflict grievous bodily harm on Debora S and 1st Lt S.

II. DENIAL OF A NEW ARTICLE 32 INVESTIGATION

Prior to the Article 32 investigation, appellant requested the presence of Debora S. The investigating officer denied the request having determined that she was unavailable because she was physically more than 100 miles away. Her testimony was, however, obtained over the telephone and the defense had the opportunity to cross-examine her. At trial the military judge denied a defense motion for a new Article 32 investigation based upon the Investigating Officer's determination. Debora S testified at the trial and was cross examined.

At no time prior to the trial did the defense request to take Debora S's deposition. Accordingly, we conclude that appellant waived this asserted error on the part of the Investigating Officer. *United States v. Chuculate,* 5 M.J. 143, 145–46 (C.M.A.1978); *United States v. Marrie,* 39 M.J. 993, 998 (A.F.C.M.R.1994), *aff'd,* 43 M.J. 35 (1995).

III. SENTENCE APPROPRIATENESS

***4** Appellant is unlikely to outlive his sentence to confinement for six years with the result that he will be deprived of an opportunity to spend any portion of the brief remainder of his life with his two children in a conventional setting.

We recognize and regret the ordeal which appellant and his family face. However, the offenses for which appellant was convicted evidence a total disregard for his responsibilities as an officer and evidence a callous disregard for the lives of his sexual partners. For these offenses he could have been sentenced to a dismissal, total forfeitures, and confinement for 10 years.[4] We have also given individualized consideration to evidence of the impact of his conduct upon his sexual partners, appellant's character of service, and those matters submitted by appellant during sentencing and clemency. After consideration of these matters, we find that the sentence is not inappropriately severe. *United States v. Healy,* 26 M.J. 394 (C.M.A.1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A.1982).

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantive rights of the appellant occurred. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

SCHREIER, Senior Judge, and STARR, J., concur.

Footnotes

1 Appellant had been charged with a specification of assault on a superior commissioned officer. The members acquitted him of the greater offense and convicted him of the lesser included offense of assault consummated by a battery.

2 1st Lt S had learned that appellant was unable to deploy world wide. Thus, it occurred to her to ask him if this was because he had AIDS.

3 Indeed, there was no evidence of internal ejaculation in the single sexual encounter involved in the *Joseph* case, yet Joseph's sexual partner contracted the HIV, evidently from this single encounter. Although Joseph used a condom, it tore while he was engaging in vaginal intercourse.

4 The military judge determined that the Article 90 and Article 128 specifications were multiplicious for sentencing purposes.