In the United States Court of Federal Claims

No. 04-267C
Filed: March 31, 2005
NOT TO BE PUBLISHED

LAWRENCE R. RAGARD,	*	Jurisdiction;
	*	Motion to Dismiss;
Plaintiff,	*	RCFC 12(b)(1);
	*	RCFC 12(b)(6);
v.	*	Tucker Act, 28 U.S.C. § 1491(a)(1).
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	

David P. Sheldon, Law Offices of David P. Sheldon, for Plaintiff.

Lauren S. Moore, United States Department of Justice, Commercial Litigation Branch, for Defendant.

MEMORANDUM OPINION

BRADEN, *Judge*.

FACTUAL BACKGROUND[1]

On October 14, 1997, a United States Park Police Officer arrested Plaintiff, a Captain in the United States Army, in Rock Creek Park, located in the District of Columbia ("D.C."). *See* Compl. ¶ 5. Plaintiff was arrested for engaging in lewd acts, in violation of D.C. Code § 22-1312(a). *Id.*[2]

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[1] The relevant facts recited herein were derived from: the February 27, 2004 Complaint ("Compl.") and Exhibits thereto; May 11, 2004 Defendant's Motion to Dismiss ("Gov't Mot. to Dismiss") and Appendix; August 6, 2004 Plaintiff's Opposition ("Pl. Opp."); and September 22, 2004 Defendant's Reply ("Def. Reply").

[2] D.C. Code § 22-1312(a) provides: "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense."

Thereafter, an Assistant Corporation Counsel in the Office of the D.C. Corporation Counsel,[3] changed the charge to indecent exposure in violation of D.C. Code § 22-1312(a). *See* Gov't Mot. to Dismiss Appendix at 4. On October 30, 1997, Plaintiff was arraigned in the Superior Court in the District of Columbia on the indecent exposure charge. *See* Compl. ¶ 6.

On November 3, 1997, Plaintiff entered into an agreement with the D.C. Corporation Counsel to participate in a Pretrial Diversion Program and perform forty hours of community service in exchange for dismissal of the indecent exposure charges ("the Agreement"). *Id.* at ¶ 7. Thereafter, Plaintiff completed community service under the supervision of the D.C. Superior Court Social Services Division, Special Services Branch in December 1997. *Id.* at ¶¶ 8-9. On March 18, 1998, pursuant to the Agreement, the D.C. Corporation Counsel dismissed the indecent exposure charge by *nolle prosequi*.[4] *Id.* at ¶ 12; *see also United States* v. *Ragard*, 56 M.J. 852, 854 (C.C.A. 2002).

PROCEDURAL HISTORY

On December 19, 1997, the United States Army ("Army") initiated court-martial proceedings against Plaintiff. *See* Compl. ¶ 13; *see also Ragard*, 56 M.J. at 854. On March 2, 1998, the following charges were referred to the Army's Convening Authority[5]: sodomy (Article 125, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 925); conduct unbecoming an officer (Article 133, UCMJ, 10 U.S.C. § 933); and commission of an indecent act (Article 134, UCMJ, 10 U.S.C. § 934). *See* Compl. ¶ 13. The court-martial charges were based on Plaintiff's October 14, 1997 arrest in Rock Creek Park. *Id.*

Plaintiff moved to dismiss the court-martial charges on two grounds. First, on August 25, 1998, Plaintiff filed a Motion to Dismiss, claiming that he was placed in jeopardy for being charged

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[3] The D.C. Corporation Counsel is responsible for prosecuting violations of the D.C. Code, on behalf of the District of Columbia. *See* D.C. Code § 23-101(a) ("Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his assistants[.]").

[4] *Nolle prosequi* is a "formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further." BLACK'S LAW DICTIONARY 1070 (7th ed. 1999) (quoting 22A C.J.S. *Criminal Law* § 419 at 1 (1989)).

[5] A unique aspect of the military justice system is the post-trial review by the Convening Authority. In a general court-martial ruling, which includes a punitive discharge, the Convening Authority reviews the trial record and may "suspend all or part of the sentence, disapprove a finding or conviction or lower the sentence." *Military Courts-Martial: An Overview* at 5-6; *see also* RCM 1107.

twice for unlawful conduct that occurred once. *See Ragard*, 56 M.J. at 854; *see also* Compl. ¶ 14. Second, on September 18, 1998, Plaintiff filed a second Motion to Dismiss, claiming that the Army was bound by the terms of the Agreement once Plaintiff completed the required community service. On October 13, 1998, the military trial court denied Plaintiff's motions and ruled that the Fifth Amendment of the United States Constitution's proscription against double jeopardy did not apply, as a matter of law. *See Ragard*, 56 M.J. at 854. In addition, the military trial court held that the D.C. Corporation Counsel Office could not represent the United States and therefore the Agreement did not bind the Army. *Id.* Accordingly, Plaintiff's Motion to Dismiss was denied and subsequently Plaintiff pled guilty to sodomy. *Id.* at 854; *see also* Compl. ¶ 14.[6] The military trial court, however, recommended that the Convening Authority suspend dismissal from the Army because Plaintiff "suffered from several debilitating diseases, which were incurred while on active duty, relating to his HIV status." Compl. ¶ 15.

Notwithstanding this recommendation, the Convening Authority[7] approved the adjudged sentence of a dismissal from the Army, forfeiture of $1,000 pay per month for five months, and a reprimand. *See Ragard,* 56 M.J. at 853; *see also* Compl. ¶ 16.

On August 23, 2000, Plaintiff appealed the military trial court's October 13, 1998 decision to the United States Army Court of Criminal Appeals.[8] *See* Compl. ¶ 17. In that tribunal, Plaintiff again argued that he was placed in double jeopardy by the Army because the District of Columbia dismissed the charge of indecent exposure after Plaintiff fulfilled the terms of the Agreement. *See Ragard*, 56 M.J. at 853. Plaintiff also claimed that the Army breached the Agreement by conducting court-martial proceedings. *Id.* In addition, Plaintiff challenged the appropriateness of his dismissal from the Army. *Id.* Although the United States Army Court of Criminal Appeals held that the case raised questions of first impression, the conviction below was affirmed. *Id.* at 853-54.

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[6] The military trial court entered findings of not guilty regarding charges of conduct unbecoming an officer and indecent acts with another. *See Ragard*, 56 M.J. at 853 n.1.

[7] A Convening Authority generally consists of at least a Commissioned Officer in command of the accused's unit. *See* Rules for Courts-Martial ("RCM") 103(6); *see also* Estela I. Velez Pollack, *Military Courts-Martial: An Overview* 3, Congressional Research Service, May 26, 2004, *available at* http://www.fas.org/man/crs/RS21850.pdf.

[8] If a commissioned officer is sentenced to dismissal under a general court-martial that decision is subject to an automatic appeal to a service United States Court of Criminal Appeals. *See* RCM 1110; *see also* 10 U.S.C. § 866. If a military trial court affirms the conviction, plaintiff may request discretionary review first . . . by the United States Court of Appeals for the Armed Services and then by United States Supreme Court. *See* 10 U.S.C. § 867; 28 U.S.C. § 1259*; see also Military Courts-Martial: An Overview* at 6.

On October 28, 2002, Plaintiff appealed to the United States Court of Appeals for the Armed Forces ("CAAF"). *See* Compl. ¶ 19; *see also United States* v. *Ragard*, 57 M.J. 468 (CAAF 2002). The CAAF summarily denied the petition. *See Ragard*, 57 M.J. at 468. On January 7, 2003, Plaintiff filed a motion to reconsider that subsequently was denied. *See United States* v. *Ragard*, 58 M.J. 130 (CAAF 2003).

On February 27, 2004, Plaintiff filed a Complaint in the United States Court of Federal Claims to: set aside the Army court-martial conviction; restore Plaintiff to active duty, with all pay and allowances retroactive to the date of discharge; and request reasonable attorneys fees and other relief. *See* Compl. at Prayer.

DISCUSSION

A. Jurisdiction.

Judgments by courts-martial generally are not subject to direct review by federal civil courts. *See Matias* v. *United States*, 923 F.2d 821, 823 (Fed. Cir. 1990) ("[J]udgments by courts-martial [are] not subject to direct review by federal civil courts[.]"). *Id.* The United States Court of Federal Claims, however, may exercise jurisdiction to hear collateral attacks on court-martial convictions but only where a constitutional challenge is serious enough to warrant an exception to the rule of finality, *i.e.*, within the court-martial proceeding there was "such a deprivation of fundamental fairness as to impair due process." *Bowling* v. *United States*, 713 F.2d 1558, 1560, 1561 (Fed. Cir. 1983). Questions of fact, however, cannot be collaterally attacked. *See Matias*, 923 F.2d at 823 (quoting *Flute* v. *United States*, 535 F.2d 624, 626 (Ct. Cl. 1976)). Therefore, the United States Court of Federal Claims may only review whether the military gave "fair consideration" to each of Plaintiff's claims. *See Matias*, 923 F.2d at 826.

B. Standard Of Review.

The United States Supreme Court narrowly defined the scope of review regarding a court-martial in *Burns* v. *Wilson*, 346 U.S. 137 (1953):

> [I]t is not the duty of the civil courts simply to . . . reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations . . . It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.

Id. at 144.

C. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Claims.

1. Plaintiff Was Not Subjected To Double Jeopardy.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The purpose of prohibiting double jeopardy is to protect individuals from being subjected to trial and possible conviction for the same criminal offense on more than one occasion. *See, e.g., Brown* v. *Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) ("The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."); *Serfass* v. *United States*, 420 U.S. 377, 387-88 (1975) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense."). The United States Supreme Court has held that in a nonjury trial, "jeopardy attaches when the court begins to hear evidence." *Id.* at 388 (quoting *McCarthy* v. *Zerbst*, 85 F.2d 640, 642 (10th Cir. 1936)). The Court, therefore, consistently has held that "[J]eopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'" *Id.* (quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971).

The D.C. Corporation Counsel never prosecuted Plaintiff for the indecent exposure charge. Therefore, Plaintiff was never "put to trial before a trier of the facts." *Id.* The Agreement was not an acquittal because it was not an adjudication. Moreover, an entry of *nolle prosequi* does not bar prosecution for the same offense by the military because such terminations are not acquittals. *See Dortch* v. *United States*, 203 F.2d 709, 710 (6th Cir. 1953).

Assuming *arguendo*, that community service is considered punishment, double jeopardy does not apply because Plaintiff was punished for two separate offenses. A person may be punished twice for the same conduct only if two offenses arise out of the conduct and are sufficiently distinguishable. In *Blockburger* v. *United States*, 284 U.S. 299 (1932), the Court stated that:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. at 304.

The United States Supreme Court also has held that the Fifth Amendment forbids "successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown* v. *Ohio*, 432 U.S. 161, 169 (1977). Generally, a lesser offense requires no proof beyond which is required for the greater offense. *Id.* at 168. The elements of the offense of sodomy and indecent exposure

are not the same. The offense of indecent exposure requires a "disturbance of the public peace," thus the act must be done in public. *See* D.C. Code § 22-1312(a).[9] Sodomy requires that the offender engage in "unnatural carnal copulation with another person." Art. 125, UCMJ, 10 U.S.C. § 925.[10] Neither offense is a lesser included offense of the other. Since sodomy and indecent exposure are two separate offenses, punishment for each does not violate the double jeopardy clause. *See Blockburger*, 284 U.S. at 304.

2. The Interpretation Of The Agreement Is A Question Of Fact For The Military Court.

Plaintiff argues that the Agreement was a contract that the United States violated by subjecting Plaintiff to a court-martial conviction of sodomy. *See* Compl Count II; *see also* Pl. Opp. at 8-9.

The United States Army Court of Criminal Appeals analyzed the evidence surrounding the pretrial agreement and held:

> At no time during the negotiations between [Plaintiff] and the D.C. Corporation Counsel Office did any representative of that office indicate to the appellant any intention to bind any other agency but the D.C. Corporation Counsel Office . . . [Moreover, Plaintiff] states that it was his understanding that the agreement applied to all potential charges stemming from the incident. We find no evidence to support such an understanding. On the contrary, a reasonable reading and interpretation of the agreement under the facts of this case do not leave a reasonable person to conclude that successful completion of the District of Columbia's pretrial diversion program would forever bar prosecution under the UCMJ as a result of the incident.

Ragard, 56 M.J. at 856.

The United States Court of Federal Claims does not have jurisdiction to re-examine questions of fact resolved by military courts. *See Bowling*, 713 F.2d at 1561 ("[Q]uestions of fact resolved by military courts cannot be collaterally attacked."). Accordingly, the decision of the United States

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[9] "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense." D.C. Code § 22-1312(a).

[10] "Any person . . . who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy." 10 U.S.C. § 925.

Army Court of Criminal Appeals that the Agreement applied only to the District of Columbia is binding as a matter of law.

CONCLUSION

Plaintiff has failed to demonstrate the existence of a constitutional violation that impaired the court-martial and military appellate proceedings. The record evidences that the military trial court gave fair consideration to each of Plaintiff's arguments. Therefore, Plaintiff's claims in this court are dismissed for lack of subject matter jurisdiction. The Clerk is hereby directed to dismiss the February 27, 2004 Complaint.

IT IS SO ORDERED.

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SUSAN G. BRADEN
Judge