

FILED

United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

April 25, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

ANTHONY V. SANTUCCI,

Petitioner - Appellant,

v.

No. 20-3149

COMMANDANT, United States
Disciplinary Barracks, Fort Leavenworth,
Kansas,

Respondent - Appellee.

**Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:19-CV-03116-JWL)**

John N. Maher (Kevin J. Mikolashek with him on the opening brief), Maher Legal Services PC, Geneva, Illinois, for Petitioner-Appellant.

Jared S. Maag, Assistant United States Attorney (Kate E. Brubacher, United States Attorney, and James A. Brown, Assistant United States Attorney with him on the brief), Office of the United States Attorney, District of Kansas, Topeka, Kansas, for Respondent-Appellee.

Before **HOLMES**, Chief Judge, **EBEL**, and **EID**, Circuit Judges.

HOLMES, Chief Judge.

Petitioner-Appellant Anthony Santucci appeals from the denial of his 28 U.S.C. §§ 2241 and 2243 petition for a writ of habeas corpus. In 2014, a military

jury convicted Mr. Santucci of rape, forcible sodomy, battery, and adultery. He asserts that a court-martial trial judge deprived him of his Fifth Amendment right to due process by failing to instruct the jury on an affirmative defense and issuing unconstitutional propensity instructions at his trial. The U.S. Army Court of Criminal Appeals (the “ACCA”) agreed with Mr. Santucci that the court-martial tribunal erred on both issues; nevertheless, it affirmed Mr. Santucci’s convictions on the basis that these errors were harmless.

In his habeas petition, Mr. Santucci argued, in relevant part, that the ACCA misapplied the harmless error standard by failing to review the cumulative impact of the erroneous instructions. Because, in his view, the military tribunals deprived him of his constitutional right to a fair trial, Mr. Santucci contended that the district court was authorized to review the merits of his claims. On habeas review, the U.S. District Court for the District of Kansas denied Mr. Santucci’s petition, finding that the ACCA had fully and fairly considered his claims. Mr. Santucci appeals, arguing that the federal district court should have adjudicated his constitutional claims on the merits. Had the court done so, says Mr. Santucci, habeas corpus relief would have been appropriate because the erroneous instructions, viewed cumulatively, prejudiced him beyond a reasonable doubt.

Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court’s judgment.

I

A

Military officials charged Mr. Santucci, then an Army private stationed in Fort Polk, Louisiana, with violating Articles 120, 125, 128, and 134 of the Uniform Code of Military Justice (“UCMJ”), following allegations that he raped a woman, TW, in July of 2013. *See* 10 U.S.C. §§ 920, 925, 928, 934.¹ In 2014, a jury sitting as a general court-martial convicted Mr. Santucci on one count each of rape, sexual assault, forcible sodomy, and battery, as well as two counts of adultery.² Relevant to this appeal, the charges against Mr. Santucci regarding TW were tried together with other charges for sexual assault and adultery involving a second alleged victim, JM.

¹ Military court-martial procedures are governed by the UCMJ, 10 U.S.C. §§ 801–946a. A general court-martial has jurisdiction to try military personnel for serious offenses, including rape and sexual assault. *See id.* §§ 818(c), 920. In noncapital cases, a general court-martial is tried before a military judge and eight panel members. *See id.* § 816(b)(1). As a unit, the members operate in a manner roughly similar to a jury in a civilian proceeding. *See Mendrano v. Smith*, 797 F.2d 1538, 1540–41 (10th Cir. 1986) (describing differences between trial before “panel members” and a civilian jury but noting that “the modern military court-martial proceeding bears a considerable resemblance to a civilian jury trial”); *cf.* 6 WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 6474, Westlaw (database updated July 2022) (“The accused has the option of requesting trial . . . with ‘members’ (*the equivalent of a jury trial*).” (emphasis added)). Accordingly, for convenience, we frequently use the term “jury” in this opinion to refer to the panel members who heard the evidence and received the instructions in Mr. Santucci’s trial, while remaining cognizant that military panels are not precise equivalents of civilian juries.

² Mr. Santucci also pleaded guilty to making a false statement to investigators. *See* Aplt.’s App. at 55 n.1 (Army Ct. of Crim. Appeals Decision, dated Sept. 30, 2016). That conviction is not at issue in this appeal.

At trial, the evidence indicated that Mr. Santucci met TW—who was married—at a bar, where the two had drinks and danced together. The government and Mr. Santucci introduced competing narratives of what happened next. Mr. Santucci testified that he went home with TW and engaged in what he believed to be consensual sexual activity, including “rough” anal and vaginal sex. Aplt.’s Opening Br. at 7. In his closing statement, Mr. Santucci’s defense counsel argued that TW’s statements to Mr. Santucci, along with her actions following their encounter, indicated that she had consented to the sexual activity—even though she had later regretted that decision.

In contrast, the prosecution urged that TW had been too intoxicated to consent, and that Mr. Santucci raped her. The prosecution elicited testimony from TW that “she remembered little” after coming home from the bar with Mr. Santucci. Aplt.’s App. at 56 (Army Ct. of Crim. Appeals Decision, dated Sept. 30, 2016).

Nevertheless, she testified that Mr. Santucci took her to his barracks and raped her while choking and slapping her. Recalling the rape, TW testified that Mr. Santucci penetrated her vaginally with his penis before penetrating her anus, the latter of which caused her to bleed. More generally, TW testified that Mr. Santucci’s assault left her with bruises on her arms and legs, a swollen face, a sore head, and scratches on her back. To corroborate TW’s testimony, the prosecution introduced medical evidence of physical injuries, including evidence of bruises and scratches on her arms, neck, and legs, as well as teeth marks on her face and redness on her rectum.

Additionally, the prosecution played the jury a recording of a 9-1-1 call that TW

made, and elicited testimony from medical staff who treated TW for her injuries the day after the incident.

At the close of trial, the military judge made two decisions regarding the jury instructions related to this appeal. First, Mr. Santucci's counsel requested that the military judge provide an instruction to the jury that Mr. Santucci's mistake of fact would be a defense to his actions towards TW and JM. The Military Judges' Benchbook summarizes the mistake of fact instruction as follows:

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the alleged victim) consented to sexual intercourse in relation to the offense of rape.

If the accused had an honest and mistaken belief that (state the name of the alleged victim) consented to the act of sexual intercourse, he is not guilty of rape if the accused's belief was reasonable.

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was consenting to the sexual intercourse. In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) consented, you should consider the probability or improbability of the evidence presented on the matter.

You should also consider the accused's (age) (education) (experience) (prior contact with (state the name of the alleged victim)) (the nature of any conversations between the accused and (state the name of the alleged victim)) along with the other evidence on this issue (including but not limited to (here the military judge may summarize other evidence that may bear on the accused's mistake of fact)).

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