

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DAVID A. ACOSTA
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200700375
GENERAL COURT-MARTIAL**

Sentence Adjudged: 24 June 2005.

Military Judge: Col Steven Day, USMC.

Convening Authority: Commanding General, 2d MAW, Cherry Point, NC.

Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC.

For Appellant: LT Kathleen Kadlec, JAGC, USN.

For Appellee: CDR Karen Gibbs, JAGC, USN; LT J.E. Dunlap, JAGC, USN.

14 November 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of eight specifications of conspiracy, six specifications of wrongful use, distribution, and introduction of a controlled substance onto a military installation, six specifications of larceny, 34 specifications of forgery of prescriptions, and wrongful solicitation, in violation of Articles 81, 112a, 121, 123, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, 921, 923, and 934. The appellant was sentenced to confinement for seven years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening

authority (CA) approved the findings and the sentence, which was not affected by the terms of his pretrial agreement.

Background

The appellant was a Navy corpsman who recalled the effects of certain pain-killing drugs previously prescribed to him for an injury and decided to abuse those drugs.¹ He stole a prescription pad from the pharmacy to which he had official access and he forged prescriptions for himself for Schedule II controlled medications, including Percocet and OxyContin. When the appellant could not obtain enough drugs by himself due to dispensing restrictions, he enticed other service members to join him. The appellant wrote prescriptions for his co-conspirators, who filled the scripts at various pharmacies. Then they would split the drugs, bring them on board the military installation, and use them, generally by crushing and inhaling them. Over the course of more than five months, the appellant repeated this pattern, ultimately adding ten co-conspirators, forging more than two dozen prescriptions, and engaging in multiple instances of, *inter alia*, use of controlled substances.

Consolidation of Charges for Sentencing

The appellant first contends the military judge erred when he declined to consolidate the forgery specifications as multiplicitous for sentencing under RULE FOR COURTS-MARTIAL 906 (b)(12), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).² "The basis of the concept of multiplicity in sentencing is that an accused may not be punished twice for what is, in effect, one offense." R.C.M. 1003(c)(1)(C), Discussion. The appellant argues that his repeated forgeries represent such a unity of time, and a chain of events so connected, that they are but a single offense. The determination of this issue depends on all the facts and circumstances of the case. There is no single test or formula. *Id.* Indeed, "the problem involves such a complex of constitutional, statutory, and judicial policy ramifications that no single judicial approach to it has received universal

¹ At trial and in the appellant's pleading on appeal, he refers to suffering from "PTSD" and to being addicted to narcotics. Despite this, at trial before the military judge, he specifically denied a defense of lack of mental responsibility. Appellant's Brief of 16 Jul 2007 at 4.

² The first assigned error on appeal addresses only the consolidation of the forgery offenses. Appellant's Brief at 2. The appellant thereafter muddles the basis of the specified error, referring in his argument to the trial defense counsel's request that the military judge also consolidate the conspiracy specifications. *Id.* at 6. We remind counsel to take the utmost care in crafting pleadings to clearly articulate the basis of any alleged error or any relief requested. Though not explicitly requested, we have considered whether the conspiracy specifications constituted separate offenses. As more fully discussed, *infra*, we conclude that the conspiracies were undertaken on different days, with different co-conspirators, and for the purpose of meeting the contingencies of each day on which the appellant sought to obtain narcotics. As such, they are separate and distinct offenses for purposes of findings and sentencing.

approbation." *United States v. Harrison*, 4 M.J. 332, 334 (C.M.A. 1978)(quoting *United States v. Washington*, 1 M.J. 473, 474 (C.M.A. 1976)(internal citations omitted)). Each case must be analyzed within its own factual context. *Id.* (citing *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977) and *United States v. Smith*, 1 M.J. 260 (C.M.A. 1976)). In determining whether these charges are multiplicitous for sentencing, we will conduct a *de novo* review. Compare *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997) (rules of multiplicity for sentencing the same as those for multiplicity for findings) with *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004)(reviewing claims of multiplicity requires a *de novo* review).

Of the 34 forgery specifications, 29 address prescriptions written on 29 different dates, each separated by at least a day and on some occasions by more than a week. On each of these days, the appellant consciously wrote the technical and other information required on a pad of prescription forms he had stolen. He was mindful each time to use the format a pharmacist would recognize as legitimate, and he mimicked the signature of a physician whose signature he knew, creating unique, apparently viable documents each time.³ He varied the name of the person for whom the prescription was written and he varied the product, so as not to be detected by review of pharmacy records. Other than being prompted by the appellant's desire to obtain and abuse prescription drugs, these repeated forgeries were not factually or temporally connected. They do not represent a single criminal episode, but repeated criminal behavior. Granted, the appellant employed similar means on each day that he fraudulently obtained drugs. However, "a *modus operandi* does not integrate a series of crimes into one punishable offense." *Harrison*, 4 M.J. at 334. Under these facts, we agree with the military judge that each of these 29 prescriptions constitutes a separate offense of forgery.

In addition to the 29 specifications already discussed, there are two occasions on which the appellant wrote more than one prescription: 11 June and 30 September 2004.⁴ On the former date, he wrote one for OxyContin and one for Endocet. The first script was completed in his own name; the second in the name of his wife. In so doing, the appellant created two viable documents for two different products and conducted two separate pharmaceutical and financial transactions at the pharmacy. In filling the scripts, he potentially exposed his wife to liability for one of the illegal transactions. *Pauling*, 60 M.J. at 95 (false indorsement that could lead law enforcement authorities to suspect an innocent person sufficient to support charge of forgery). Under these circumstances, we have no difficulty whatever in concluding, as did the military judge, that these two

³ We note that a drug prescription may be the subject of a forgery, provided the script appears valid on its face. *United States v. Benjamin*, 45 C.M.R. 799, 800 (N.C.M.R. 1972)(citations omitted).

⁴ Charge IV, specifications 5 and 6; and 31, 32 and 33, respectively.

forgeries were separate transactions and, though occurring on the same day, they constituted separate offenses.

On September 30th, the accused wrote three prescriptions. He then departed in company with two of his co-conspirators to obtain and divide the drugs. While this scenario also lends some support to a "unity of time, unity of action" rationale, upon closer examination, we conclude that the prescriptions were separate forgeries. The three prescriptions were written for three different co-conspirators. One prescription was for a different trade name of drug than were the other two. The conspirators visited two pharmacies, filling two scripts at one, and the third at another. Each of the three prescriptions required a specific *mens rea* and an *actus reus* by the appellant in order to generate three unique and independently viable documents. Each was also the subject of a separate pharmaceutical and financial transaction at the respective pharmacies. Considering all the facts and circumstances, we conclude that the three prescriptions written on September 30th constituted three separate forgeries.

Unreasonable Multiplication of Charges

In his first assignment of error, the appellant also contends that his multiple convictions reflect an unreasonable multiplication of charges.⁵

The doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). "Unreasonable multiplication of charges is reviewed for an abuse of discretion." *Pauling*, 60 M.J. at 95 (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (Army Ct.Crim.App. 1999)). In evaluating the appellant's claim of an unreasonable multiplication of charges, we applied the five factors that have become known as the "*Quiroz* factors." See *Quiroz*, 55 M.J. at 338 (approving with modification test established by *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000)(en banc)). Having applied these factors, we find no unreasonable multiplication of charges.

First, it must be acknowledged that the appellant did object at trial and this factor is in his favor. Nevertheless, no single factor controls. Rather, all factors must be balanced in determining whether charges are unreasonably multiplied. *Id.*

⁵ The first assigned error actually includes two different errors: failure of the military judge to consolidate offenses for sentencing and "[a]dditionally, the charges in this case were unreasonably multiplied." Appellant's Brief at 2. Counsel are reminded that assignments of error shall set forth a concise statement of each issue; not multiple issues in one assignment of error. N.M.CT.CRIM.APP. RULE 4-3; CCA RULE 15.

Proceeding then with our analysis, we find that the conspiracy and forgery charges were directed at separate and distinct criminal acts. The record shows that this was not a single conspiracy, agreed to among the actors, conspiring together. Here, the appellant first abused drugs that he obtained by forging prescriptions for himself. When he could not obtain enough of a drug himself due to dispensing restrictions, or when he grew concerned that he would be detected by routine reviews of pharmacy patient records, he enlisted other service members to present and fill prescriptions that he forged for them. When a co-conspirator had filled enough fake prescriptions to be at risk of discovery, the appellant enlisted additional co-conspirators, writing still more fake prescriptions and distributing controlled drugs as an enticement for their participation. We find that the conspiracy specifications are directed at the unique facts of this case as a progressive, expanding series of individual conspiracies between the appellant and one or more co-conspirators, who joined at different times and participated in similar, but individual ways, depending on the circumstances of the day. Each charged conspiracy was, therefore, a separate crime. For the reasons already discussed above, each forgery specification was also directed at a legally distinct criminal act.

Third, the charges do not misrepresent or exaggerate the appellant's criminality. The charges in this case, though many, accurately reflect the drug abuse, the serial conspiracies, and the repeated forgeries committed by the appellant over the course of more than five months.

Fourth, the charges of forgery do increase the appellant's punitive exposure. However, in this case, the increase in punitive exposure is the result of the gravity and the number of repeated criminal acts committed by the appellant. As such, it is not unreasonable to expose him to it.

Finally, the charging strategy in this case reflects a reasoned approach. The multiple instances of introduction of drugs on board a military installation, distribution, and use of controlled substances, for which the Government could not determine a precise date, were charged as having occurred on "divers occasions" within a supportable time frame. The conspiracy charges, which related to each new co-conspirator, rationally related to the appellant's adding of companions-in-crime as cover for his fraudulent obtaining of controlled drugs. As already discussed, each forgery specification addressed a separately viable, but fraudulent prescription. On these facts, we do not find prosecutorial overreaching. Weighing all of the foregoing factors together, we find no unreasonable multiplication of charges.

Sentence Appropriateness

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant points to the sentences in the cases of his numerous co-conspirators and he maintains that his sentence is unduly severe by comparison. We disagree.

Though each of his co-conspirators participated with the appellant in one or more instances of obtaining and using controlled drugs on a military installation, none of them were similarly situated to the appellant. He was the central character in these conspiracies, into which he drew ten other military personnel. He alone generated all of the fake prescriptions. The maximum sentence the appellant faced for his numerous thefts, forgeries, and drug offenses, within the parameters of the expanding number of conspiracies, included a dishonorable discharge and more than 200 years of confinement. We independently find the sentence, including seven years confinement and a dishonorable discharge, to be appropriate for this offender and his offenses. Articles 59(a) and 66(c), UCMJ.

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge FELTHAM and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court