

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Joe E. NEVELS  
Staff Sergeant (E-6), U. S. Marine Corps**

NMCCA 200401161

Decided 15 February 2007

Sentence adjudged 15 August 2002. Military Judge: W.J. Gallo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 8th Marine Corps District, Naval Support Activity, New Orleans, LA.

Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel  
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel  
Maj KEVIN HARRIS, JAGC, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a special court-martial of two specifications of disobeying the order of a noncommissioned officer, two specifications of failure to obey a lawful order, nine specifications of failure to obey a lawful regulation, two specifications of forgery, endeavoring to impede an investigation, adultery, two specifications of service discrediting sexual relations with a recruit applicant, service discrediting interstate transport of a 17-year old recruit applicant, and four specifications of wrongfully providing alcohol to persons under the legal drinking age, in violation of Articles 91, 92, 123, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 923, and 934. The appellant was sentenced by officer members to a bad-conduct discharge, confinement for six months, forfeiture of \$736.00 pay per month for a period of six months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First, he asserts that the military judge committed plain error when he failed to instruct the members to give the appellant credit for a prior nonjudicial punishment (NJP) relating to the same misconduct reflected in Specification 4 of Charge II and Specification 6 of Charge IV. Second, the appellant avers that the military judge committed plain error when he failed to dismiss Specifications 1 and 2 of Charge II and Additional Charge I after having found each to be multiplicious for findings purposes with Specifications 1-3 of Charge II. Third, the appellant argues that Specifications 4 and 6 of Charge II and Specifications 6 and 7 of Charge IV constitute an unreasonable multiplication of charges because they arise from a single course of conduct. He further asserts that the two specifications under Additional Charge II are unreasonably multiplicious with each other. Finally, the appellant asserts that Specification 3 of Charge II and Specification 2 of Charge IV are multiplicious for sentencing because they arise from a single course of conduct and impermissibly increase the appellant's punitive exposure.

We have examined the record of trial, the assignments of error and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The appellant's first two assignments of error are without merit.<sup>1</sup>

#### **Unreasonable Multiplication of Charges**

The appellant contends that Specifications 4 and 6 of Charge II (violated a lawful general order by having sexual relations with AW and providing alcohol to AW) are unreasonably multiplied with Specifications 6 and 7 of Charge IV (discredit the service by having sexual relations with AW and providing alcohol to AW). Appellant's Brief of 22 Dec 2005 at 7. We disagree.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). While multiplicity is based on the constitutional and statutory prohibitions against double jeopardy, the doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the

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<sup>1</sup> The appellant's first assignment of error involving a prior NJP relates to an inappropriate sexual relationship with AW. The charge at NJP involved inappropriate conduct on 3 October 2001. The charges at trial involved inappropriate conduct between 10 November 2001 and 15 February 2002. Each was a distinct criminal act which, aside from the identity of the victim, did not overlap in any way. The appellant's second assignment of error alleges that the military judge improperly failed to dismiss various specifications that he found multiplicious for findings. This is wholly inaccurate. The military judge found the specifications multiplicious for sentencing and provided the members an appropriately cleansed charge sheet for their deliberations. Record at 521.

potential for overreaching in the exercise of prosecutorial discretion." *Id.*

This Court applies five factors in evaluating a claim of unreasonable multiplication of charges:

- 1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
- 2) Is each charge and specification aimed at distinctly separate criminal acts?
- 3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
- 4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
- 5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*See United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition); *accord Quiroz*, 55 M.J. at 339 ("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers."). Applying these factors to the appellant's case, we find that there has not been an unreasonable multiplication of charges.

We note that the appellant did not object at trial, which significantly weakens his argument on appeal. Although important, that single factor is not dispositive of the issue. The specifications cited, while involving the same victim, are aimed at distinct criminal acts involving different sets of victims. In the first instance, the appellant's conduct violated paragraph 6(d) of Depot Order 1100.4A dated 21 May 1992. Such disobedience has a direct negative impact on good order and discipline within a command and within the military, generally.

In the second instance, the appellant's misconduct had a direct negative impact outside the military. As the appellant acknowledged during his providence inquiry, his conduct, aside from being violative of the cited Depot instruction, was also the type of activity which would lessen a parent's inclination to have their daughters meet with Marine recruiters or join the Marine Corps because of what they could perceive as a dirty, unseemly method of recruiting. Record at 475. The appellant's conduct, wholly aside from its impact on good order and discipline within the Marine Corps, had a significant potential

to negatively effect how the Marine Corps was perceived by the local community and negatively impact recruiting effectiveness in the region and nationally.

The number of charges and specifications do not misrepresent or exaggerate the appellant's criminality and they do not unreasonably increase the appellant's punitive exposure. Finally, there is no evidence of prosecutorial overreaching or abuse in the drafting of the charges. Consequently, we do not find that the cited specifications constitute an unreasonable multiplication of charges.<sup>2</sup>

### **Conclusion**

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTO concur

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>2</sup> A similar analysis applies to the other specifications cited by the appellant which involve the provision of alcohol to underage drinkers (Specification 6 of Charge II and Specification 7 of Charge IV) and to his allegation that charging his sexual relations with a prospective recruit both as an orders violation and as adultery (Specification 3 of Charge II and Specification 2 of Charge IV). The appellant's assertion that charging the forging of a document (Specification 1 of Additional Charge II) separately from the passing of the document (Specification 2 of Additional Charge II) is equally without merit.