

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

**Before  
C.L. REISMEIER, J.A. MAKSYM, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHRISTOPHER KINARD  
AVIATION BOATSWAIN'S MATE AIRMAN (E-3),  
U.S. NAVY**

**NMCCA 201000084  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 24 September 2009.  
**Military Judge:** CDR Bethany Payton-O'Brien, JAGC, USN.  
**Convening Authority:** Commander, Navy Region Southwest, San Diego, CA.  
**Staff Judge Advocate's Recommendation:** CDR D.C. King, JAGC, USN.  
**For Appellant:** LT Michael Torrisi, JAGC, USN.  
**For Appellee:** Capt Mark Balfantz, USMC.

**24 June 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

**PER CURIAM:**

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of attempted sodomy with a child under the age of 12, indecent liberties/conduct with a child, and sodomy with a child under the age of 12, in violation of Articles 80, 120, and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 920, and 925, respectively. The military judge sentenced the appellant to confinement for 33 years and a dishonorable discharge. The convening authority approved the sentence as adjudged, and in accordance with the pretrial agreement, suspended confinement in excess of 25 years and deferred and waived automatic forfeitures.

In his sole assignment of error, the appellant claims that the military judge abused her discretion when she failed to find that the appellant's convictions for attempted sodomy, indecent liberties/conduct and aggravated sexual contact with a child were multiplicious or an unreasonable multiplication of charges. After carefully considering the record of trial, the appellant's assignment of error, and the Government's response, we partially agree with the appellant's assertion that the specifications reflect an unreasonable multiplication of charges, and will order relief in our decretal paragraph. After taking corrective action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

The providence inquiry and Prosecution Exhibit 1, a stipulation of fact, established that between January and February 2008, at his home in Brunswick, Maine, the appellant's 6-year-old son, LE, hosted one of the victims, XAG, for a sleep-over. XAG was 7 or 8 years old at the time. After the boys fell asleep, the appellant approached the sleeping victim, XAG, and pulled the victim's pants down, exposing and touching XAG's penis. The appellant then uttered the words "would you like to have your penis sucked?" XAG awoke during the encounter, and ran from the room. The appellant stated that his intent in pulling down XAG's pants and asking XAG if he wanted his penis sucked was to commit the offense of sodomy, and that he intended to arouse himself. He further admitted that his intent when he touched XAG's penis was to arouse himself.

Based on these events, the appellant pleaded guilty to attempted sodomy, indecent liberties/conduct with a child, and aggravated sexual contact, in violation of Articles 80 and 120, UCMJ.<sup>1</sup> It is these specifications the appellant asserts are multiplicious or represent an unreasonable multiplication of charges. We agree in part.

Multiplicity and unreasonable multiplication of charges are distinct concepts. Multiplicity is a constitutional violation under the Double Jeopardy Clause, which occurs if, contrary to the intent of Congress, a court imposes multiple convictions and punishments under different statutes for the same act or course of conduct. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007) (quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Even if offenses are not multiplicious, the prohibition against unreasonable multiplication of charges allows courts-martial and reviewing authorities to address prosecutorial overreaching by imposing standards of reasonableness. *Id.* (citing *United States v. Rodderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)).

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<sup>1</sup> The appellant was also convicted, based upon his pleas of guilty, of two additional specifications of indecent liberties/conduct, and two specifications of sodomy, all involving LE.

We first note that the appellant entered a pretrial agreement in which he agreed to waive all waivable motions. While this provision would normally operate to waive the issue the appellant now raises, *see United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009), the parties held a pretrial conference, memorialized on the record by the trial judge before entry of pleas, during which the court, *sua sponte*, raised the issue of unreasonable multiplication of charges or multiplicity for sentencing. Record at 9. The judge noted during the summary of the conference that the defense informed her that they had a case they desired to send her, and that, subsequent to the discussion, the defense sent the court a copy of "52 M.J. 809" (*United States v. Balcarczyk*). *Id.* Again, immediately before announcing sentence, the military judge noted that although there was no "specific" request by the defense, she was going to treat Charge I and the specification thereunder (attempted sodomy) and Specification 1 under Charge II (indecent liberties/conduct with a child) as "one for sentencing purposes," in light of the referenced case. Record at 188. Based upon the military judge ruling *sua sponte* on the issue of multiplicity and unreasonable multiplication of charges for findings purposes immediately before announcing sentence, we will not apply waiver in this case.

The first question is whether the attempted sodomy, indecent liberties/conduct, and aggravated sexual contact committed by the appellant amount to the same act or course of conduct, or whether they are separate, distinct and discrete acts allowing separate convictions. Under the facts of this case, we conclude that the conduct involved several distinct acts. The acts of pulling down XAG's pants and exposing his penis, communicating an indecent proposal to XAG, and touching XAG's penis are separate from each other and separate from the attempted sodomy. We hold that these offenses are not multiplicious as a matter of law.

The second question is whether the Government unreasonably multiplied the charges. In considering this question, we apply a five-part test: (1) did the accused object at trial; (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; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

The first criterion favors the appellant. Although the appellant did not object at trial, counsel discussed the issue in a pretrial conference with the military judge in some fashion not entirely clear on this record. The military judge then relied upon the case submitted by counsel in addressing multiplicity, unreasonable multiplication of charges, and treating offenses as one for the purposes of sentencing.

We resolve the second and third criteria in favor of the appellant as well. Although the touching underlying the aggravated sexual contact was not alleged within either Charge I or Specification 1 of Charge II, the conduct underlying Specifications 1 and 2 of Charge II were overt acts of the attempted sodomy under Charge I. We view the parsing of the conduct underlying Specifications 1 and 2 of Charge II - pulling down XAG's pants, touching XAG's penis, and inquiring whether XAG wanted to be sodomized -- to be a lascivious step-by-step detailing of criminal conduct. This was an attempt to sodomize XAG by pulling down XAG's pants, grabbing his penis, and making an indecent proposal to the child. They are not separated by time, distance, or impulse, despite the obvious difference in intent elements between Charge I and II. What was one transaction became the basis of three separate charges.

The appellant cannot, however, meet the fourth criterion. He faced a potential life sentence for the completed sodomies alleged in Specifications 1 and 2 of Charge III. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 51(e)(3). As to the last factor, it is neutral. The elements of the three subject specifications differ, suggesting no prosecutorial overreaching or abuse, but we recognize that this one transaction has been parsed into component parts in order to allege three offenses.

Accordingly, we dismiss Specifications 1 and 2 of Charge II as an unreasonable multiplication of charges with the specification of Charge I. We have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Upon reassessment, we conclude that there has not been a dramatic change in the penalty landscape as a result of our action, and that the sentence as adjudged and approved is appropriate and no greater than would have been adjudged but for the error noted. Accordingly, we affirm the remaining findings and the approved sentence.

For the Court

R.H. TROIDL  
Clerk of Court