

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

**Before
J.A. MAKSYM, J.R. PERLAK, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ADAM J. MURPHY
PERSONNEL SPECIALIST FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201000262
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 December 2009.

Military Judge: CDR Bethany Payton-O'Brien, JAGC, USN.

Convening Authority: Commanding Officer, USS RODNEY M. DAVIS (FFG 60).

For Appellant: CAPT Johnathan W. Bryan, JAGC, USN.

For Appellee: LCDR Clay Trivett, JAGC, USN.

23 November 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy, two specifications of failure to obey an order or regulation, five specifications of making a false official statement, one specification of larceny, one specification of fraud, and one specification of bribery in violation of Articles 81, 107, 121, 132, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 921, 932, and 934. The appellant was sentenced to eleven months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. In an act of clemency, the CA suspended confinement in excess of six months.

The appellant asserts that the Government engaged in an unreasonable multiplication of charges because all of the charged conduct was based on the same transaction.

After carefully considering the parties' briefs and reviewing the record of trial, we are convinced that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Unreasonable Multiplication of Charges

The prohibition against unreasonable multiplication of charges allows this court to address prosecutorial overreaching by imposing a standard of reasonableness. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007); *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). In addressing whether the Government has unreasonably multiplied charges, this court applies a five-part test:

- (1) Did the appellant 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?

Paxton, 64 M.J. at 491; *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

In this case we need not engage in an analysis of the five factors because we find the appellant waived all non-waivable motions. The appellant agreed to waive all motions except those that are otherwise non-waivable as part of a pretrial agreement pursuant to RULE FOR COURTS-MARTIAL 705(c) (1) (B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Appellate Exhibit I at 4, ¶16e. Waiver, as distinct from forfeiture, "is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (citing *Olano*, 507 U.S. at 733-34). The concern

behind the unreasonable multiplication of charges is not constitutional but, in fact, a presidential policy. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (citing *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995)).

The military judge and the appellant discussed the specially negotiated provisions of paragraph 16 of the pretrial agreement after the providency inquiry concluded. Paragraph 16e provided that the appellant agreed to waive all motions, except those which are otherwise non waivable. The military judge inquired whether the appellant understood this paragraph. The appellant indicated he did. The military judge also inquired if anybody forced the appellant to waive any motions. The appellant answered no. Record at 104. At an earlier stage of the proceedings, prior to the entry of pleas, the defense counsel advised the trial judge that there were no motions. *Id.* at 12. We also note that the appellant's indication that there were no motions occurred shortly after the military judge mentioned her concern relative to unreasonable multiplication of charges. *Id.* at 10.

In this case, the appellant made an affirmative decision to waive all motions pursuant to his pretrial agreement. He received a substantial benefit from his waiver when his case was referred to a special court-martial, which limited his potential sentence to the jurisdictional maximum of the special court-martial.

Assuming *arguendo* that waiver does not apply, having applied the *Quiroz* factors, we concur with the military judge's conclusion that Charge II and Charge III were not an unreasonable multiplication of charges based on the providence inquiry and the stipulation of fact. We further agree that the larceny and false claim charges, Charges IV and V respectively, also were not an unreasonable multiplication of charges.

Conclusion

Accordingly, we affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court