

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

**Before
R.E. VINCENT, E.C. PRICE, M. FLYNN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DONALD I. MUNDELL
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900314
GENERAL COURT-MARTIAL**

Sentence Adjudged: 27 March 2009.

Military Judge: Maj Glen Hines, USMC.

Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol A.G. Peterson, USMC.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: LT Sergio Sarkany, JAGC, USN.

4 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FLYNN, Judge:

On 27 March 2009, a military judge sitting as a general court-martial (GCM), convicted the appellant, pursuant to his pleas, of attempted indecent language to a child under the age of 16 years and of violating 18 U.S.C. § 2422(b) by attempting to persuade, entice, and induce a person he believed to be under the age of 16 years to engage in sexual intercourse, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The military judge sentenced the appellant to confinement for 18 months and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged but, in accordance with the pretrial agreement, suspended confinement

in excess of 12 months for a period of 12 months from the date of his action.

Six months earlier, on 25 September 2008, the appellant pleaded guilty to similar charges arising out of a Naval Criminal Investigative Service (NCIS) undercover operation. In that case, a military judge sitting as a GCM awarded a reduction in rate to E-1, confinement for 48 months, and a bad-conduct discharge. The charges in the two cases allege similar misconduct except that the undercover agent in the first case was an NCIS agent, whereas the current charges involve an undercover agent from the Pender County, North Carolina, Sheriff's office.

The appellant raises two assignments of error: (1) that the failure to have all known charges tried by a single court-martial constituted prejudicial error, and (2) that relief is warranted under Article 66(c), UCMJ, because referring known charges to two different courts-martial resulted in a second court-martial conviction and likely resulted in greater punishment than had all known charges been referred to one court-martial.

After carefully considering the record of trial and the parties' pleadings, we conclude that the charges of attempted indecent language to a child under the age of 16 years and of violating 18 U.S.C. § 2422(b) by attempting to persuade, entice, and induce a person he believed to be under the age of 16 years to engage in sexual intercourse, in violation of Articles 80 and 134, are multiplicitous for sentencing. We will reassess the sentence. Following our action, we conclude 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 remains. Arts. 59(a) and 66(c), UCMJ.

Background

The record reflects that the appellant engaged in sexually explicit conversations over the internet via instant messaging with two individuals, both of whom were actually law enforcement personnel posing as 14-year-old girls, during essentially the same time period. The date alleged in the charges in the appellant's first court-martial was 19 June 2008. The time period alleged in the charges in the instant case was between 6 June 2008 and 19 June 2008. The appellant was arrested on 19 June 2008 as a result of an NCIS undercover operation and placed in pretrial confinement the following day. His home computer was seized and sent to the Defense Computer Forensics Laboratory for analysis.

On 26 June 2008, charges were preferred against the appellant related to the NCIS undercover operation. The charges were referred to a GCM on 14 August 2008. The terms of a pretrial agreement (PTA) were also agreed upon that day. A week later, on 21 August 2008, an NCIS special agent advised the trial counsel that, in addition to evidence pertaining to the NCIS

operation, the appellant's computer also contained communications and images believed to be from an undercover agent from the Pender County Sheriff's office, as well as another person believed to be an undercover agent but whose identity was unknown. Trial counsel advised the CA's staff judge advocate of the preliminary report and the potential for additional charges and asked whether he should "push forward on additional charges or see if Pender County wants to charge." See Attachment A to Appellant's Consent Motion to Attach Documents of 13 Aug 2009. In response, the Deputy SJA directed: "Do not add charges. Add a second GCM." *Id.* The appellant pled guilty at the first GCM on 25 September 2008. Pursuant to the terms of the PTA, the CA suspended confinement in excess of 18 months.

Charges were preferred in this, the second case on 11 December 2008 and referred on 23 January 2009. The parties entered into a pretrial agreement on 23 January 2009. The results of the appellant's first court-martial were introduced, without objection, as evidence in aggravation during sentencing at the appellant's second court-martial.

Failure to Try All Known Charges in a Single Court-Martial

Before this court, the appellant asserts error in the CA's decision not to try all known charges together. He maintains that because the offenses were not tried together, he has been unfairly burdened with two general court-martial convictions instead of one. We disagree.

The decision to consolidate charges is a procedural matter within the discretion of the convening authority. Military practice has traditionally favored joinder of all known charges. See *United States v. Hays*, 29 M.J. 213, 215 (C.M.A. 1989); *United States v. Silvis*, 31 M.J. 707, 709 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 135 (C.M.A. 1991); see also *United States v. Alexander*, 29 M.J. 877, 878-79 (A.F.C.M.R. 1989) (outlining history of joinder of charges in military practice). RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) states that "[c]harges and specifications alleging all known offenses by an accused may be preferred at the same time." It is not mandatory that all known charges be brought at one time. *United States v. Rascoe*, 31 M.J. 544, 563 n.21 (N.M.C.M.R. 1990); *Alexander*, 29 M.J. at 879; *United States v. Lilly*, 22 M.J. 620, 627 n.3 (N.M.C.M.R. 1986); R.C.M. 307(c)(4), Analysis, App. 21, at A21-23; see also R.C.M. 601(e)(2).

We find no evidence that the CA acted improperly or unreasonably in proceeding to trial on the existing charges. Rather, he proceeded to trial on charges which had been properly investigated and referred to a GCM prior to discovery of evidence of additional misconduct. In fact, a pretrial agreement was completed and signed one week before NCIS advised trial counsel that there was the potential for additional charges stemming from the Pender County Sheriff's office undercover operation. The

preliminary report also indicated the possibility of additional evidence involving another undercover agent who had not yet been identified. At that time the appellant had been in pretrial confinement for approximately two months. Additional charges could not be joined with the existing ones until an Article 32 investigation of the new charges was either completed or waived by the appellant. As "we find no evidence of unreasonable or vexatious Government conduct" in referring the charges stemming from the Pender County undercover operation to trial separately, we conclude that the convening authority did not abuse his discretion. *Rascoe*, 31 M.J. at 563 n.21.

Moreover, at trial the appellant raised no motions and pled unconditionally to the alleged misconduct. Record at 9, 53; Prosecution Exhibit 2; Appellate Exhibit I. His failure to raise this non-jurisdictional matter constitutes waiver. R.C.M. 905(e) and 910(j); see also *United States v. King*, 28 M.J. 397, 399 (C.M.A. 1989).

Therefore, we conclude this assignment of error is without merit.

Sentence Appropriateness

The appellant asserts that his sentence is inappropriately severe because he now has two convictions instead of one. He does not allege any particular prejudice but, rather, argues generally that "a second court-martial conviction, additional confinement for twelve months and an additional bad-conduct discharge is inappropriately severe when all of the known charges could have been tried at one court-martial." Appellant's Brief of 17 Aug 2009 at 10. We have already determined that the convening authority did not abuse his discretion in electing to refer charges against the appellant to two separate courts-martial.

To the extent the appellant suggests that he was punished more severely as a result of being tried twice, we note that, as the sentencing authority, a military judge is presumed to know the law and apply it correctly, absent clear evidence to the contrary. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citing *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008)). Here, there is no indication that the military judge in the second trial gave improper weight to evidence of the appellant's prior conviction which was admitted during sentencing without objection. To the contrary, in the first trial the military judge awarded 48 months confinement, whereas in the second trial the military judge awarded 18 months confinement. Additionally, the CA agreed to greater protection in the second trial, agreeing to suspend confinement in excess of 12 months whereas in the prior trial the sentence was capped at 18 months. Hence, we find no merit to the appellant's assignment of error.

After considering all of these matters, we also find the sentence to be appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Multiplicity for Sentencing

Although not raised on appeal, we note that the facts and charges in this case are nearly identical to those presented in *United States v. Garner*, 67 M.J. 734 (N.M.Ct.Crim.App. 2009), *rev. granted*, ___ M.J. ___, No. 09-0729, 2010 CAAF LEXIS 39 (C.A.A.F. Jan. 15, 2010). In *Garner*, as in this case, the appellant engaged in on-line conversations with an individual he believed to be a 14-year-old girl. In reality, the individual was an adult undercover police officer. The appellant was convicted, pursuant to his pleas, of attempted indecent language to a child under the age of 16 years and of violating 18 U.S.C. §2422(b) by attempting to persuade, entice, and induce a minor to engage in intercourse and oral sodomy, in violation of Articles 80 and 134, UCMJ. Noting that both offenses were achieved, at least in part, through use of the same explicit language, the court in *Garner* found that the charges were multiplicitious for sentencing purposes. *Garner*, 67 M.J. at 741. The same is true in this case. The language relied upon for both charges is largely the same. Accordingly, following *Garner*, we hold that the charges were multiplicitious for sentencing purposes.

Having found the charges multiplicitious for sentencing, we must assess what, if any, prejudice the appellant may have suffered. We may reassess a sentence to cure the effect of prejudicial error only when we are "confident 'that, absent any error, the sentence adjudged would have been of at least a certain severity'" and, when so convinced, "may reassess and affirm only a sentence of that magnitude or less." *United States v. Buber*, 62 M.J. 476, 477 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)); *see also United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); and *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

Our determination that the charges are multiplicitious for sentencing purposes reduces the maximum authorized confinement from 22 years to 20; all other authorized maximum punishments remain the same. We are confident that the reduced maximum confinement time does not dramatically alter the sentencing landscape. *See Buber*, 62 M.J. at 479. The military judge awarded 18 months confinement and a bad-conduct discharge. In accordance with the PTA, the CA suspended confinement in excess of 12 months for a period of 12 months from the date of his action. We are satisfied that the adjudged sentence for the sole specification under Charge II would have been at least the same

as that adjudged by the military judge and approved by the convening authority.

Conclusion

Accordingly, the findings and approved sentence are affirmed.

Senior Judge VINCENT and Judge PRICE concur.

For the Court,

R.H. TROIDL
Clerk of Court

Senior Judge VINCENT participated in the decision of this case prior to detaching from the court.