

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

**Before  
L.T. BOOKER, E.C. PRICE, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHARLES G. ROGAN  
CHIEF WARRANT OFFICER-2 (W-2), U.S. MARINE CORPS**

**NMCCA 200900623  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 05 August 2009.

**Military Judge:** LtCol Eugene Robinson, USMC.

**Convening Authority:** Commanding General, Training and Education Command, Quantico, VA.

**Staff Judge Advocate's Recommendation:** LtCol C.M. Greer, USMC.

**For Appellant:** CAPT Patricia Leonard, JAGC, USN.

**For Appellee:** Capt Michael Aniton, USMC.

**30 March 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.**

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of dereliction of duty, adultery, and fraternization, respectively violations of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The convening authority (CA) approved the sentence of reprimand, confinement for 90 days, forfeiture of \$1000.00 pay per month for 12 months, and a dismissal from the service.

The appellant raises four allegations of error before us. He maintains that the adultery and fraternization charges are multiplicitious. He maintains that those same charges represent an unreasonable multiplication of charges. He maintains that the military judge erred by not consolidating those two charges for sentencing purposes. The appellant did not raise any of those three alleged errors before the military judge. He finally complains that the dismissal is an inappropriately severe component of the sentence.

We have examined the record of trial and the parties' pleadings. 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 occurred. Arts. 59(a) and 66(c), UCMJ.

### **Background**

The appellant was a commissioned warrant officer assigned to the Weapons Training Battalion at Marine Corps Base Quantico. At the time of his offenses, he was married but legally separated by court order from his wife, who at the time was living in Nevada. He met Private First Class (PFC) P, a female Marine in his battalion, and began having intercourse with her while he was still married. During the course of that relationship, his divorce from his wife became final. The appellant and PFC P began sharing quarters in Stafford County, Virginia, and she listed that address on the unit roster as her recall address. PFC P also communicated with at least one other junior enlisted Marine about the relationship that she was establishing with the appellant.

The specifications for both the adultery and the fraternization allege activity that occurred on divers occasions in January and February 2009. The allegation of adultery was that the appellant, a married man, had intercourse with a woman who was not his wife. The fraternization specification alleged that the appellant engaged in an intimate and sexual relationship with PFC P in a manner that did not respect the customs of the naval service that prohibited such relations between officers and enlisted members.

### **Multiplicitious Specifications**

"An unconditional guilty plea waives a multiplicity issue unless the offenses are 'facially duplicative'." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004)(quoting *United States*

*v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)). Whether specifications are facially duplicative is a question of law reviewed *de novo*. *Id.* The generally accepted test to determine whether two charges are multiplicitous is whether each offense requires proof of a fact that the other does not. *See, e.g., United States v. Roderick*, 62 M.J. 425, 432 (C.A.A.F. 2006). Applying this test to individual prosecutions ensures that an accused is not subjected, contrary to the Double Jeopardy clause of the 5th Amendment, to multiple convictions for the same offense. *See id.* at 431 (quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Double jeopardy claims, including those founded in multiplicity, are waived by failing to make a timely motion to dismiss unless there is plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)(citations omitted). The appellant bears the burden of persuading us that there is plain error. *Id.* Naturally, "plain error" must be predicated on actual error. Here we discern no error, as the offenses of adultery and fraternization were factually and qualitatively distinct.

In order to prove the appellant guilty of adultery, the Government would have to show that the appellant wrongfully engaged in sexual intercourse with another; that either the appellant or the adulteress was married to another; and that, under the circumstances, the appellant's conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 62b. To prove fraternization, on the other hand, the Government would have to show that the appellant was a commissioned or warrant officer; that he fraternized on terms of military equality with an enlisted member in a certain manner; that he then knew that the other person was an enlisted member; that the fraternization breached service customs; and that, under the circumstances, the appellant's conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. *Id.* at ¶ 83b. Quite clearly from the catalog of the elements, each offense required proof of a fact that the other did not.

For both specifications under the General Article charge, the period of the offense was "divers occasions" in January and February 2009. The appellant admitted before the military judge that he and PFC P engaged in sexual intercourse on numerous occasions before the appellant's divorce became final in early February. Record at 35. At some point during the relationship, PFC P moved in to the appellant's off-base apartment, and the two addressed each other by first names. By the appellant's own

admission, the two frequently "hung out" together in his apartment. *Id.* at 46-47.

We reiterate that the appellant bears the burden of persuading us that there is error in this case. He has not persuaded us that socializing on terms that ignore differences in rank is the same as engaging in sexual intercourse while married to another. He has likewise not persuaded us that these two offenses are not temporally distinct. By pleading guilty, an accused does more than admit that he did the various acts alleged in a specification; "he is admitting guilt of a substantive crime." *United States v. Broce*, 488 U.S. 563, 570 (1989). "Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does [an accused] who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.*; see also *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009).

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

"Unreasonable multiplication of charges" is a related but distinct concept from multiplicity. It generally is understood to address the dangers of prosecutorial overreaching. See *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). The Courts of Criminal Appeals police unreasonable multiplication of charges through exercise of their powers of review under Article 66, UCMJ. *Id.* at 338. We consider the following factors to determine whether "piling on" was so extreme as to require invocation of our authority under Article 66: whether the appellant objected to the multiplication at trial; whether each charge and specification is aimed at distinctly separate criminal acts; whether the number of charges and specifications misrepresents the appellant's criminality; whether the number of charges unfairly increases punitive exposure; and whether there is any evidence of overreaching. *Id.*

As noted at the outset, the appellant did not object to any unreasonable multiplication of charges at trial. Record at 17. We set out in some detail above our rationale for concluding that the specifications are aimed at distinctly separate criminal acts. In our view, the number of charges and specifications do not in any way misrepresent the appellant's criminality, again for reasons largely discussed in our treatment of the multiplicity argument and as further supported by the appellant's responses during the providence inquiry. We believe that the number of charges does not *unreasonably*, see

*Quiroz*, 55 M.J. at 339, increase the appellant's punitive exposure, as eliminating one or the other of the General Article convictions would reduce the maximum possible confinement by at most 2 years; and finally, the nature and the duration of the misconduct amply support the prosecutorial determination to proceed on both offenses.

### **Merger for Sentencing**

Once the presentencing portion of the trial began, it became abundantly clear that the two offenses were in fact separate. Combining the providence inquiry with the information in Prosecution Exhibit 2, the military judge properly concluded, as do we, that the appellant committed two distinctly separate criminal acts -- adultery, as evidenced by the sexual intercourse in January mentioned in PE 2, as well as fraternization, as evidenced by PFC P's statement that "CWO-2 ROGAN and myself have maintained an adult relationship wherein we have exchanged intimacies" beginning in January 2009 and continuing to the date of the statement, 24 February, well after the appellant's divorce was final. There was no reason to merge the two offenses for sentencing.

### **Severity of Sentence to Dismissal**

"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)).

Dismissing an officer with 16 years' service is, in fact, a strong punishment. We are not unmoved by the appellant's lengthy and accomplished service, during the course of which he made combat deployments and earned personal awards for his actions in combat. We note, however, that this particular officer engaged in a lengthy adulterous relation with a considerably junior enlisted member; that the first instance of adultery occurred while the two of them were in a duty status; that the adultery occurred between members of the same battalion; that when the appellant's divorce became final, he maintained an intimate relationship with the junior Marine, even after he had admitted his transgressions to his superiors; and

that word of the adultery and fraternization had spread to other active-duty Marines. We are satisfied that the appellant's entire sentence is appropriate for him and for his offenses, and we will not invade the province of the CA by exercising any sort of clemency in this case. See *Healy*, 26 M.J. at 396.

### **Conclusion**

Accordingly, we affirm the findings and the approved sentence.

Judge PRICE and Judge PERLAK concur.

For the Court

R.H. TROIDL  
Clerk of Court