

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL J. BLAZEJEWSKI
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000655
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 August 2010.

Military Judge: CDR Douglas P. Barber, Jr., JAGC, USN.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Quantico, VA.

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

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: Maj William C. Kirby, USMC.

30 June 2011

OPINION OF THE COURT

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

PAYTON-O'BRIEN, Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of one specification of unauthorized absence (UA) terminated by apprehension, two specifications of disrespect to a superior noncommissioned officer, and one specification of willful disobedience of an order from a superior noncommissioned officer, in violation of Articles 86 and 91, Uniform Code Military Justice, 10 U.S.C. §§ 886 and 891. The appellant was sentenced to confinement for four months and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

On appeal, the appellant asserts two assignments of errors: (1) that the military judge erred in failing to find the appellant guilty of any of the three specifications under Charge II; and (2) that the military judge erred by failing to consolidate the three specifications under Charge II as an unreasonable multiplication of charges.¹

Factual Background

On 15 June 2010, after an eight-month unauthorized absence from his unit in Camp Lejeune, North Carolina, the appellant was apprehended by law enforcement authorities in Grand Rapids, Michigan, and held in the county jail awaiting transportation to the Marine Corps. On 18 June 2010, after being delivered back to Marine Corps Base Quantico, Virginia, the appellant had an encounter with the duty officer, Sergeant (Sgt) P, at Service Company, Headquarters and Service Battalion, responsible for checking in Marines returned from a period of unauthorized absence, and her supervisor, Gunnery Sergeant (GySgt) K. During the intake process, the appellant became disrespectful toward both of these noncommissioned officers. It is that disrespectful behavior that forms the basis for Charge II and the three specifications thereunder.

Inartful Findings By Military Judge

Under the terms of the pretrial agreement, the appellant was required to plead guilty to all charges and specifications.² When the military judge asked him to enter pleas, the appellant did, in fact, enter a plea of guilty to each charge and specification. Record at 33.³ The military judge thereafter conducted his providence inquiry. In summarizing his findings, the military judge stated, "Lance Corporal, this court finds you: Of the charges now pending before this court: Guilty." *Id.* at 82. The record reveals that there were no charges withdrawn by the Government prior to the announcement of findings. Nor was

¹ Appellant's Brief of 24 Jan 11 at page 1.

² Appellate Exhibit VIII at 5-6.

³ When called upon to enter pleas, the Defense Counsel stated as follows:

Your Honor, Lance Corporal Blazejewski, pleas [sic] as follows:

To Charge I, violation of the UCMJ, Article 86: Guilty,

To the sole specification thereunder: Guilty;

To Charge II, violation of the UMCJ, Article 91: Guilty,

To Specification 1: Guilty,

To Specification 2: Guilty,

To Specification 3: Guilty.

The military judge thereafter confirmed with the appellant that his defense counsel had correctly stated his pleas. Record at 33.

any charge or specification required to be withdrawn or dismissed under the terms of the pretrial agreement.

A servicemember has a right to announcement of all findings in open court. Art. 53, UCMJ; RULE FOR COURTS-MARTIAL 922(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This statutory right of announcement of all findings in open court is a substantial right of the appellant. *United States v. Dilday*, 47 C.M.R. 172, 174 (A.C.M.R. 1973). Not all errors in the announcement of the findings, however, are prejudicial to this right. *Id.* at 173.

We find that the military judge was, at best, inartful in his announcement of the findings as to the three specifications under Charge II. When a military judge has announced the findings which are inartful or ambiguous after accepting a guilty plea, it may still be permissible for this court to affirm such findings. *United States v. Alvarez*, No. 200301744, 2005 CCA LEXIS 191, unpublished op. (N.M.Ct.Crim.App. 21 Jun 2005). If it is clear in examining the language of the specifications, the appellant's pleas, the providence inquiry, the stipulation of fact and any pretrial agreement that it was the intent of the military judge to find the appellant guilty of the charges in question, despite inartful findings, we can affirm the findings entered or clearly intended to be entered on the record. *Id.* Therefore, if we can discern the military judge's intent, we can affirm a finding on appeal, and the appellant is offered double jeopardy protections. *United States v. Perkins*, 56 M.J. 825, 827 (Army Ct.Crim.App. 2001).

In this case, while the military judge could have stated the findings more clearly to the three specification under Charge II, in reviewing this record in its entirety, we are convinced that he clearly intended to convict the appellant of all three specifications in accordance with the appellant's unambiguous pleas, as buttressed by the providence inquiry and the stipulation of fact, and in correlation with the pretrial agreement. More importantly, we note the absence of any objection at trial, or rejoinder to the staff judge advocate's recommendation. Although we decline to designate the military judge's inartful findings error, assuming it is error, under the specific facts of this case, it is clearly harmless.

Unreasonable Multiplication of Charges

Addressing the second assignment of error, the question is whether the Government unreasonably multiplied the number of charges facing the appellant, and thus his criminal exposure, when it charged him with three specifications for his offenses relative to Sgt P and GySgt K upon his return from UA. We first address Specifications 1 and 2 under Charge II. Applying the multipronged test for unreasonable multiplication of charges, we find that these two specifications were not unreasonably multiplied by the Government. *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). We are convinced that the specifications

were aimed at two distinctly separate criminal acts, the appellant's disrespectful language first toward Sgt P, and then the appellant's disrespectful language toward GySgt K. The two specifications did not exaggerate or misrepresent the appellant's criminality, nor did they unreasonably increase the appellant's punitive exposure. Finally, there is no evidence of prosecutorial overreaching or abuse. Accordingly, we find that Specifications 1 and 2 of Charge II do not represent an unreasonable multiplication of charges.

However, with regard to Specification 3 under Charge II, we do find an unreasonable multiplication of charges with Specifications 1 and 2. Essentially, a heated discussion took place between the appellant and Sgt P upon the appellant's return from his unauthorized absence, which resulted in the appellant being charged with two separate specifications (disrespect and disobeying an order). In reviewing the entire record, to include the providence inquiry, the stipulation of fact, the sentencing testimony, and the prosecution exhibits admitted during the Government's sentencing case, the appellant's disrespectful behavior and disobedience toward Sgt P was an ongoing course of criminal conduct, not separate discrete acts (by yelling at Sgt P, he disobeyed Sgt P's order to remain at "parade rest").⁴ We find that the number of charges and specifications misrepresent or exaggerate the appellant's criminality. Under the circumstances of this case, we believe that Specification 3 under Charge II represents an unreasonable multiplication of offenses and will take corrective action in our decretal paragraph.

Sentence Reassessment

Having dismissed Specification 3 under Charge II, we must reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after carefully considering the entire record, we are satisfied beyond any reasonable doubt that the sentencing landscape has not changed significantly, and that the military judge would have adjudged a sentence no less than that approved by the CA in this case. We find the adjudged sentence continues to be fair and appropriate for the appellant's offenses. The appellant is not entitled to any sentencing relief.

Conclusion

The finding of guilty of Specification 3 under Charge II is set aside and that specification is dismissed. The remaining findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the

⁴ We note the stipulation of fact indicates that the appellant, when ordered to stand at parade rest, immediately responded with his disrespectful remark to Sgt P. The providence inquiry leaves it unclear as to exactly when the order was given in relation to the disrespectful language toward Sgt P.

appellant remains. Arts. 59(a) and 66(c), UCMJ. Accordingly, the remaining findings and the sentence as approved by the CA are affirmed.

Senior Judge MAKSYM concurs.

Judge PERLAK, (concurring in part and dissenting in part):

I concur in the majority's resolution of the first assigned error and respectfully dissent from their resolution of the second assigned error, alleging an unreasonable multiplication of charges.

I am not persuaded by the continuing course of conduct proffer by the appellant. In my review and application of the *Quiroz* factors,¹ none of the factors favor the appellant. Already facing the jurisdictional maximum at the forum based on the absence offense, the appellant was also charged with three discrete violations of Article 91, Uniform Code of Military Justice, 10 U.S.C. § 891. The first two were charged under clause 3 of the Article, involving disrespectful language, where spoken words were in issue. In the third specification, notably brought under clause 2 of Article 91, he willfully disobeyed a direct order from a noncommissioned officer. That order required that he physically comport himself as a Marine by addressing his superior noncommissioned officers from the position of parade rest. The conduct in issue in Specification 3 took the form of a physical action in willful violation of an order. Clauses 2 and 3 under Article 91 are statutorily separate offenses aimed at different conduct. One can disobey an order without being disrespectful and one can be disrespectful while obeying an order. On these facts, I cannot conclude that the appellant is entitled to relief for disobeying an order because he chose to do so in the context of using disrespectful language towards his military superiors.

Because I conclude that the form of the specifications does not exaggerate the appellant's criminality, I dissent from the majority's resolution of the second assigned error. I would affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

¹ *United State v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).