

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**PARRISH C. DIXON, JR.
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201200124
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 21 December 2011.

Military Judge: LtCol Charles C. Hale, USMC.

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: Maj Peter Griesch, USMCR.

For Appellee: Mr. Brian K. Keller, Esq.

31 July 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

GERDING, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of willfully disobeying a noncommissioned officer (NCO), disrespecting an NCO, assaulting an NCO, disobeying a general order, resisting apprehension, using cocaine, possessing cocaine, and assaulting an NCO, in violation of Articles 91, 92, 95, 112a, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 895,

912a, and 928. The appellant was sentenced to confinement for 150 days, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority suspended confinement in excess of 90 days, and deferred and waived automatic forfeitures.

Although not assigned as error, we note that Charge V, assault on an NCO, is multiplicitious with Specification 3 of Charge I, assault on an NCO. An appellant cannot be convicted of both an offense and a lesser included offense. U.S. CONST. amend V; *United State v. Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004). Two charges are impermissibly multiplicitious if one is a lesser included offense of the other. *Id.*

Because the appellant here pleaded guilty unconditionally without objection to Specification 3 of Charge I, and to Charge V, we review for plain error to determine if the two are impermissibly multiplicitious. Plain error occurs where the specifications are facially duplicative. *Hudson*, 59 M.J. at 359. Specifications are facially duplicative if they are factually the same. *Id.* To determine if a specification is factually the same, and therefore a lesser included offense of another, we compare the elements of each offense. *Id.* The offenses are separate offenses if each requires "proof of a fact which the other does not." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Our standard of review for whether an offense is a lesser included offense is *de novo*.

In making our determination, we review the "factual conduct alleged in each specification" and the providence inquiry conducted by the military judge. *Id.* Here, Specification 3 of Charge I alleges:

In that Private First Class Parrish C. Dixon, Jr., U.S. Marine Corps, on active duty, did, at or near National Naval Medical Center, Bethesda, Maryland, on or about 13 November 2011, assault Staff Sergeant [JAN], a Staff Non-Commissioned Officer, then known to the said Private First Class Dixon Jr. to be a Staff Non-Commissioned Officer who was then in the execution of his office, by pushing him in the chest with his hands and by striking him in the head with his fist.

Charge Sheet. Charge V alleges:

In that Private First Class Parrish C. Dixon, Jr., U.S. Marine Corps, on active duty, did, at or near

National Naval Medical Center, Bethesda, Maryland, on or about 13 November 2011, assault Staff Sergeant [JAN], U.S. Marine Corps, who then was and was then known by the accused to be a Staff Non-Commissioned Officer of the United States Marine Corps, by pushing him in the chest with his hands and by striking him in the head with his fist.

Charge Sheet. The appellant pleaded guilty to Specification 3 of Charge I and to Charge V by excepting the word "fist" and substituting the words "open hand." Record at 10-11.

During the providence inquiry regarding Specification 3 of Charge I, the military judge explained to the appellant the elements of a violation of Article 91, UCMJ, assault on an NCO:

That on or about 13 November 2011 at or near the National Naval Medical Center in Bethesda, Maryland, you were an enlisted service member;

That on or about 13 November 2011 at or near the National Naval Medical Center in Bethesda, Maryland, you pushed Staff Sergeant [JAN] in the chest with your hand and struck him in the head with your open hand;

That you did so in the manner that I just described;

That at the time, Staff Sergeant [JAN] was in the execution of his office, which was as your escort; and,

That at the time, you knew that Staff Sergeant [JAN] was a non-commissioned officer.

Record at 67. The military judge provided definitions of the terms "assault," "battery," and "bodily harm."

Recognizing the overlap between Specification 3 of Charge I, and Charge V, the military judge explained the elements of a violation of Article 128, UCMJ, assault on an NCO:

[O]n 13 November 2011 you did bodily harm to Staff Sergeant [JAN];

That you did so by pushing him in the chest with your hands and striking him in the head with an opening [sic]; and,

That bodily harm was done with unlawful force or violence; and,

That Staff Sergeant [JAN] was a noncommissioned officer in the United States; and,

That you knew that Staff Sergeant [JAN] was a non-commissioned officer.

Record at 68-69.

The military judge then elicited facts to support both charges. The appellant told the military judge that on 13 November 2011, he reported to the Officer of the Day that he had suicidal thoughts. In response, the appellant's command sent the appellant to National Naval Medical Center, Bethesda, for psychiatric treatment. Staff Sergeant (SSgt)[JAN], United States Marine Corps, was assigned to escort the appellant to Bethesda.

Once at Bethesda the appellant wanted to smoke a cigarette, but SSgt JAN told him he could not smoke and that he had to get checked in. They went into the lobby and the appellant signed in and filled out paperwork. The appellant then went outside to smoke. SSgt JAN ordered the appellant to return and to put out his cigarette, which the appellant refused to do. SSgt JAN tried to take the cigarette from the appellant by grabbing the appellant's hand. The appellant responded by cursing at him. The appellant struggled with SSgt JAN. He pushed SSgt JAN in the chest and struck him in the head with an open hand.

On the face of the record, the two offenses here, assault on an NCO under Article 91, and assault on an NCO under Article 128, are factually indistinguishable. A violation of Article 91 requires proof of facts that are not required to be proven for a violation of Article 128. But the converse is not true. There are no additional facts which must be proven to establish a violation of Article 128. Therefore, we conclude that Charge V is a lesser included offense of Specification 3 of Charge I, and the charges are facially duplicative. Finding plain error occurred, the finding of guilty to Charge V and its specification shall be set aside.

As a result of our decision, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 41-42 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J.

305, 307-08 (C.M.A. 1986). Although our action on findings changes the sentencing landscape, the change is not sufficiently dramatic so as to gravitate away from our ability to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006).

The appellant remains convicted of serious offenses including drug use, disrespect, assault on an NCO, disobedience to orders, and resisting apprehension. Given that the military judge awarded a sentence that included 150 days of confinement and a bad-conduct discharge, we conclude that, absent the error, the military judge would have imposed, and the convening authority would have approved, the same sentence previously adjudged and approved.

Therefore, we set aside the findings of guilty to Charge V and its specification and dismiss that charge and specification. We affirm the remaining findings and the sentence as approved by the convening authority.¹ Following our corrective action, we find that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Chief Judge PERLAK and Senior Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court

¹ To the extent the convening authority's action purports to order the punitive discharge upon completion of appellate review, it is a nullity and does not require corrective action. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).