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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, M. FLYNN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICHARD M. ROBERTS
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200042
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 September 2011.
Military Judge: Col G.W. Riggs, USMC.
Convening Authority: Commanding General, 2d Marine Aircraft Wing, II Marine Expeditionary Force, Cherry Point, NC.
Staff Judge Advocate's Recommendation: Col S.C. Newman, USMC.
For Appellant: Maj Jeffrey R. Liebenguth, USMC; LT Ryan Mattina, JAGC, USN.
For Appellee: Mr. Brian Keller, Esq.

26 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.

PER CURIAM:

A military judge sitting as general court-martial convicted the appellant, pursuant to his pleas, of one specification of attempting to possess controlled substances, four specifications of conspiracy, one specification of violation of a lawful general regulation, one specification of wrongful distribution

of controlled substances, one specification of wrongful use of a controlled substance, one specification of larceny, and six specifications of violation of Article 134 for the following: wrongful use of unique health identifiers,[1] identification fraud,[2] defrauding a healthcare benefit program,[3] wire fraud,[4] obstruction of justice, and solicitation, in violation of Articles 80, 81, 92, 112a, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, 912a, 921, and 934, respectively. The appellant was sentenced to confinement for 15 years, a $25,000 fine, reduction to pay grade E-1, and to be discharged from the Marine Corps with a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority (CA) suspended confinement in excess of six years for one year from the date of action.

The case was submitted to the court on its merits.

Background

From November 2008 until his arrest in February 2011, the appellant, with the assistance of other Marines and civilians, operated a scheme whereby he obtained Oxycodone and similar prescription opiates, all Schedule II controlled substances, through the filling of false prescriptions. As part of this scheme, the appellant and his co-conspirators also defrauded TRICARE by using U.S. government-issued ID cards and other personally identifying information to secure remittance for the prescriptions by TRICARE.

First, the appellant purchased blank prescription pad paper through the Internet. Prosecution Exhibit 1 at 13. This paper is used by physicians to write prescriptions and has several security features to prevent tampering. He also used the Internet to obtain the individual Drug Enforcement Agency (DEA) numbers and National Provider Identifier (NPI) numbers of four North Carolina physicians. Record at 124. These two numbers allow licensed physicians to write prescriptions for

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[1] Charged under Article 134, clause (3) for violation of Title 42 U.S.C. § 1320d(6).

[2] Charged under Article 134, clause (3) for violation of Title 18 U.S.C. § 1028(a)(7).

[3] Charged under Article 134, clause (3) for violation of Title 18 U.S.C. § 1347.

[4] Charged under Article 134, clause (3) for violation of Title 18 U.S.C. § 1343.

medications, including prescription opiates. Specifically, the DEA number is required for any Scheduled prescription medication. Next, the appellant used this prescription paper and physician numbers to create specious prescriptions for Oxycodone, OxyContin, Percocet, and Roxicodone pills in varying quantities and dosage. PE 1 at 6.

From 2008 until 2011, the appellant utilized eight Marines, one soldier, and two civilians to fill these false prescriptions. Record at 101. At times, the appellant created false prescriptions written for the individual picking up the prescription. *Id*. at 220. Other times, the appellant and accomplices would obtain the personal information of other individuals to use on false prescriptions. *Id*. at 241-42. In these latter instances, the accomplice picking up the prescription would falsely claim to be the recipient or the recipient's relative, present the recipient's personally identifiable information, and then receive the prescription. *Id.* Payment at the pharmacy was made either with cash or with the requisite TRICARE information. As compensation, the appellant would give his cohort filling the prescription some of the pills from the prescription. PE 1 at 6-7.

After receiving the pills, the appellant would keep some for his personal use and sell the rest to other individuals involved in the prescription scheme, and others who were not involved. *Id*. at 8. Overall, the appellant filled approximately 75 prescriptions. *Id*. at 6. Of these, 40 were submitted to TRICARE for a total payment of $9,569.00. Record at 253. The appellant also stipulated to obtaining a total of at least 5,000 opiate pills. PE 1 at 6.

Unreasonable Multiplication of Charges

In examining whether an unreasonable multiplication of charges (UMC) exists, we consider five factors: 1) did the appellant object at trial; (2) are the charges aimed at distinctly separate criminal acts; (3) do the charges misrepresent or exaggerate the appellant's criminality; (4) do the charges unreasonably increase the appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). We also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL (2008 ed.), which provides the following guidance: "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." We will grant

appropriate relief if we find that the aggregate of charges is so unreasonable as to warrant invocation of our Article 66(c), UCMJ, authority. *See United States v. Tovar*, 63 M.J. 637, 643 (N.M.Ct.Crim.App. 2006).

As a result of this fraudulent prescription scheme, the appellant pled guilty to three specifications under Article 81[5] and four specifications under Article 134.[6] After applying the *Quiroz* factors to these specifications, we find that two of the Article 81 specifications and two of the Article 134 specifications represent UMC.

A. Did the appellant object at trial?

The record indicates that multiplicity and UMC were discussed at an R.C.M. 802 hearing. Record at 32-33. After announcing findings, the military judge *sua sponte* dismissed Charge I and its specification, attempted possession of controlled substances with intent to distribute, for UMC. *Id*. at 150. This specification represented those instances where the scheme to obtain the drugs failed for one reason or another. The record contains no other reference to UMC. Despite the lack of an objection, we may still address UMC concerns pursuant to our statutory responsibility under Article 66c, UCMJ. *United States v. Joyce,* 50 M.J. 567, 568 (N.M.Ct.Crim.App. 1999).

B. Are the charges aimed at distinctly separate acts?

Article 81 specifications

Specifications 4, 5, and 7 under Charge II focus on the same basic criminal agreement – a single conspiracy to possess and distribute controlled substances. "An agreement to commit several offenses is ordinarily but a single conspiracy." The MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), PART IV, ¶ 5(c)(3). In examining the nature of a conspiracy, we must examine the

[5] Charge II, Specification 4 - conspiring to use personally identifiable information from identification issued by the United States Government in violation of Title 18 U.S.C. §1028(a)(7) ("identification fraud"); Charge II, Specification 5 – conspiring to defraud a healthcare benefit program in violation of Title 18 U.S.C. §1347 ("TRICARE fraud"); Charge II, Specification 7 - conspiring to wrongfully possess and distribute Schedule II controlled substances.

[6] Charge VII, Specification 1 – wrongful use of unique health identifiers for personal gain; Charge VII, Specification 2 – identification fraud; Charge VII, Specification 3 – TRICARE fraud; and Charge VII, Specification 4 – wire fraud.

number of agreements made between the actors. "'[O]ne agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.'" *United States v. Pereira*, 53 M.J. 183, 184 (C.A.A.F. 2000) (quoting *Braverman v. United States*, 317 U.S. 49, 53 (1942)). Furthermore, mere planning conversations as to the details of implementing the original agreement do not create new agreements and new conspiracies. *United States v. Canter,* No. 9901547, 2002 CCA LEXIS 224, unpublished op. (N.M.Ct.Crim.App. 26 Sep 2002).

The appellant stated that, with intent to receive a falsified prescription, he and his co-actors "planned it out ahead." Record at 74. These planning sessions included whether TRICARE would be used, the amount of pills, payment for the prescription filler, prescription information gathered from government IDs, and solutions if any problems transpired. Record at 75. Under the *Pereira* and *Canter* rubric, discussing the use of government IDs and defrauding TRICARE does not create separate and unique conspiracies. Rather, these acts help to carry out the sole principal agreement that is to possess and distribute prescription opiates. Thus, for the Article 81 specifications, this factor weighs in favor of the appellant.

Article 134 specifications

In contrast to the above, the record indicates that these Article 134 specifications are based on separate steps the appellant took in order to obtain illegal prescription opiates. In that respect, these offenses are not based on the same singular act; rather, they were all steps necessary to achieve the overall goal of the conspiracy. For these Article 134 specifications, this factor weighs in favor of the Government.

C. Do the charges misrepresent or exaggerate the appellant's criminality?

As explained *supra*, Specifications 4, 5 and 7 of Charge II are essentially one criminal agreement and for that reason we find that these Article 81 offenses exaggerate the appellant's criminality. Additionally, Specifications 1, 2, 3, and 4 under Charge VII, while they may represent individual acts completed by the appellant, are all necessary means to achieve the object of the conspiracy and the ultimate offense of illegally obtaining prescription opiates. When an ultimate offense is committed through separate means from which the appellant can also be charged, individually charging both the means and the

ultimate offense can be evidence of UMC. *See United States v. Sharp*, No. 9801723, 2000 CCA LEXIS 30, at 9-10, unpublished op. (N.M.Ct.Crim.App. 23 Feb 2000). The appellant's criminal goal was to illegally obtain prescription opiates through fraudulent prescriptions. These four Article 134 specifications merely separate the means of achieving that goal into its component parts – use of the DEA/NPI numbers, obtaining requisite personally identifiable information, obtaining the security paper for the prescriptions, and defrauding TRICARE. Individually charging the appellant with each step in his criminal enterprise under the facts of this case exaggerates his criminality. This factor weighs in favor of the appellant.

D. Do the charges unreasonably increase the appellant's punitive exposure?

The appellant's guilty pleas to Specifications 4 and 5 of Charge II increased the maximum penalty by 25 years.[7] Specification 7 of Charge II, conspiracy to possess and distribute Schedule II controlled substances alone carried a maximum of 15 years. Specifications 1 and 4 of Charge VII increased the maximum penalty by another 25 years.[8] Even without these 4 specifications, the appellant still faced a maximum confinement penalty of 87 years.[9] Adding another 50 years for four more convictions unreasonably increased the appellant's punitive exposure. This factor also weighs heavily in the appellant's favor.

E. Is there any evidence of prosecutorial overreaching or abuse in the drafting of charges and specifications?

Arguably, when the appellant violated multiple statutes in carrying out his scheme, each of those acts can form the basis of an offense. Furthermore, drafting charges with contingencies of proof in mind is permitted. R.C.M. 307(c)(4), Discussion. Thus we see no evidence of prosecutorial overreaching or abuse

[7] Per 18 U.S.C. § 1028(b)(1)(D), the maximum confinement under Specification 4 of Charge II is 15 years. Per 18 U.S.C. § 1347, the maximum confinement under Specification 5 of Charge II is 10 years.

[8] Per 42 U.S.C. § 1320d-6(b)(2), the maximum confinement under Specification 1 of Charge VII is 5 years and per 18 U.S.C. § 1343, the maximum confinement under Specification 4 of Charge VII is 20 years.

[9] As noted earlier, the military judge dismissed Charge I and its sole specification based on UMC. He re-calculated the maximum confinement as 137 years. Record at 151.

in the drafting of these charges and weigh this factor in favor of the Government.

Conclusion

In balancing all five *Quiroz* factors, we find that the third and fourth factors weigh heavily for the appellant and tip the balance in his favor. The findings of guilty for Specifications 4 and 5 of Charge II and Specifications 1 and 4 of Charge VII are set aside, and those specifications are dismissed. The remaining findings are affirmed. Notwithstanding these actions, we find that the sentencing landscape has not dramatically changed and we can reassess the sentence.[10] *United States v. Buber,* 62 M.J. 476, 479 (C.A.A.F. 2006); *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). We conclude that absent the error the sentencing authority would have adjudged and the CA would have approved the same sentence. Accordingly, we affirm the sentence as approved by the CA.

The supplemental court-martial order will reflect that the military judge dismissed Charge I and its specification, and that the Article 132 violations were under Charge VI and not Charge IV.

For the Court

R.H. TROIDL
Clerk of Court

[10] While our action reduces the maximum confinement penalty, the gravamen of the appellant's offenses has not changed. The specifications we have dismissed remain proper matters in aggravation for the sentencing authority's consideration.