

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

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

UNITED STATES OF AMERICA

v.

**JOSEPH A. ZARUBA
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000382
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 January 2010.

Military Judge: CDR Charles Stimson, JAGC, USN.

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

Staff Judge Advocate's Recommendation: LtCol J.A. Lore, USMC.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: Maj William Kirby, USMC.

31 May 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.

PAYTON-O'BRIEN, Senior Judge:

This case is before us a second time after we originally set aside the findings and sentence, and authorized a rehearing.¹ *United States v. Zaruba*, No. 201000382, 2011 CCA LEXIS 27, unpublished op. (N.M.Ct.Crim.App. 28 Feb 2011).

¹ The original approved sentence at the general court-martial included confinement for two years, reduction to pay grade E-3, total forfeiture of pay and allowances, a fine of \$1,000.00, and a bad-conduct discharge.

On 7 October 2011, a rehearing was held.² A military judge, sitting as a special court-martial,³ convicted the appellant, pursuant to his pleas, of wrongful possession and distribution of cocaine, wrongful distribution of oxycodone and Pregabalin, burning an automobile with the intent to defraud an insurer, and solicitation of a fellow Marine to burn an automobile with the intent to defraud, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to confinement for 360 days, reduction to pay grade E-1, and a bad-conduct discharge. On 15 December 2011, the convening authority (CA) approved the sentence.⁴

The appellant now submits two assignments of error: (1) that the charges of burning an automobile with the intent to defraud and solicitation to burn an automobile with the intent to defraud are multiplicitious; and (2) that his sentence upon rehearing is in excess of or more severe than his original approved sentence.⁵

Factual Background

² Prior to the rehearing, a RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) examination was ordered by the military judge. Appellate Exhibit IV. The results of the examination determined the appellant was both responsible for his actions at the time of the offenses and competent to stand trial. AE V. Additionally, during the rehearing, the military judge inquired of the appellant as to any issues of mental responsibility. The appellant raised no motion pertaining to a lack of mental responsibility.

³ The original court-martial was referred as a general court-martial, but the appellant and the convening authority entered into a pretrial agreement, in which the convening authority agreed to refer the case to a special court-martial in exchange for the appellant again entering pleas of guilty to all charges and specifications. AE II.

⁴ To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

⁵ We note that when this matter was initially submitted to this court for review, the appellant averred, *inter alia*, that Specifications 1 and 2 of Charge II were fatally defective for want of the terminal element. Upon rehearing, the Government amended Specifications 1 and 2 of Charge II by adding the terminal element, to wit: "which conduct was, under the circumstances, to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." There was no objection by the appellant to the modification of the specifications. Record at 41.

Between February and March 2009, faced with the need to make costly repairs and the burden of a loan, the appellant asked a fellow Marine and friend, Corporal (Cpl) L, to "get rid" of his automobile. The appellant and Cpl L discussed various ways in which Cpl L would effectuate the destruction of the appellant's vehicle, specifically, burning it. The appellant contemplated that his insurance company would settle with him and satisfy the outstanding note on the vehicle once it was destroyed, relieving the appellant of any further payments. After their plan was devised, sometime between March and August 2009, the appellant had an occasion to go to Florida on temporary duty, and he left the vehicle's keys with Cpl L so that Cpl L could burn the car while the appellant was out of town. Cpl L burned the appellant's car while it was parked in the appellant's yard. Unrelated to the offenses involving the burning of the vehicle, in mid-2009 the appellant committed various offenses involving possession and distribution of controlled substances.

Whether Solicitation and Burning with Intent to Defraud are Multiplicious?

Absent a timely motion, an unconditional guilty plea waives a multiplicity claim absent plain error. *United States v. Hudson*, 59 M.J. 357, 358-59 (C.A.A.F. 2004) (citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)). An "[a]ppellant may show plain error and overcome [waiver] by showing that the specifications are facially duplicative, that is, factually the same." *Id.* at 359 (citations and internal quotation marks omitted). To determine whether the offenses are factually the same, we review the conduct alleged in each specification as well as the providence inquiry conducted by the military judge. *Id.*

Charge II, Specification 1, burning an automobile with the intent to defraud, reads as follows:

In that [the appellant] . . . did, at or near Indian Head, Maryland, between on or about 1 March 2009 and 31 August 2009, willfully and maliciously burn an automobile, the property of the said Sergeant Zaruba, with the intent to defraud the insurer thereof, to wit: Progressive Insurance Company, which conduct was, under the circumstances, to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Charge Sheet.

During the providence inquiry the military judge described the elements of this offense as follows:

That on or about or between 1 March 2009 and 31 August 2009, the [appellant] willfully and maliciously burned an automobile belonging to yourself, Sergeant . . . Joseph A. Zaruba;

That the burning was with the intent to defraud Progressive Insurance Company; and

That under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

Record at 64. The military judge then provided the appellant with the definitions for "willfully," "maliciously," "intent to defraud," and "principal." *Id.* at 64-65.

The following colloquy occurred between the appellant and the military judge:

Q: You understand that while you didn't do the burning, you understand how the government is charging you?

A: Yes, sir.

Q: Essentially, you are not the perpetrator? You were in Florida when it happened; correct?

A: Yes, sir.

Q: At least of the burning, but then you participated with the defrauding; correct?

A: Yes, sir.

Q: Did you share a common criminal purpose with Corporal [L]?

A: Yes, sir.

Q: Did you two kind of - who instigated this idea?

A: I did, sir.

. . . .

Q: Why did you set fire to this - or have Corporal [L] set fire to this car?

A: Because I didn't want to make the payments anymore. My car was messed up.

. . . .

Q: Did you intend to defraud Capital One⁶ and Progressive Insurance?

A: Yes, I did, sir.

Q: Capital One is not on the charge sheet, but what were you going to defraud Progressive Insurance of?

A: The amount I owed on the car, sir.

Q: They were going to pay off the note for you?

A: Yes, sir.

Id. at 65, 67, 70.

The specification for appellant's solicitation reads as follows:

In that [the appellant] . . . , did, at or near Indian Head, Maryland, between on or about 1 February 2009 and 31 March 2009, wrongfully solicit Corporal [L], U.S. Marine Corps to steal, burn, part out, or destroy the said Sergeant Zaruba's automobile with the intent to defraud the insurer thereof, which conduct was, under the circumstances, to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Charge Sheet.

During the providence inquiry the military judge described the elements of this offense as follows:

[T]hat on or about or between 1 February 2009 and 31 March 2009, at or near Indian Head, Maryland, you wrongfully solicited Corporal [L], United States Marine Corps, to commit the offense of burning with intent to defraud by having Corporal [L] steal burn, part out, or destroy your automobile with the intent to defraud the insurer;

⁶ Capital One, a financial institution, was the lien holder of the appellant's vehicle. Record at 67.

That you specifically intended that Corporal [L] commit the offense of burning with the intent to defraud; and

That under the circumstances, the conduct of you [sic] was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Record at 57-58.

When asked by the military judge why he thought he was guilty of this specification, the appellant provided the following response:

Sir, because I asked a friend, Corporal [L], to get rid of my car for me: To burn it, destroy it, to get rid of it while I was on a training op in Florida. It was because I had messed up the car so much. It was damaged, and I couldn't afford to keep making the payments. I knew it was against the law, and Corporal [L] set the car on fire in my front yard. I admit that soliciting another Marine to commit a crime is conduct that could bring discredit on the Marine Corps.

Id. at 59.

Comparing the specifications, elements, and pertinent portions of the record of trial, it is clear that each charge required proof of facts that the other did not. The required elements for the two offenses are not identical. The solicitation does not require that burning with intent to defraud actually occur. As is apparent with the different time periods, the offense of burning with intent to defraud does not encompass the offense of solicitation. Our review of the colloquy between the appellant and the military judge reveals that the focus of the burning charge is on the appellant's intent to defraud Progressive Insurance whereas the focus of the colloquy between the appellant and the military judge with regard to the solicitation charge was his act of making another Marine a criminal by bringing him into his fraudulent activity. The appellant has failed to meet his burden to show that the specifications are factually the same.

Was the Rehearing Sentence In Excess of or More Severe?

The appellant stands convicted following a trial by a special court-martial rather than a general court-martial. He avers now that the sentence approved by the CA after his rehearing, which included reduction to E-1 vice a reduction to E-3, was "in excess of or more severe" than the sentence originally approved by the CA at his general court-martial.

Article 63, UCMJ, provides that upon a rehearing, no sentence in excess of or more severe than the original sentence may be approved. RULE FOR COURTS-MARTIAL 810(d)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), implements this statutory provision by requiring that offenses on which a rehearing has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial. The discussion following R.C.M. 810(d) explains: "At a rehearing, the trier of fact is not bound by the sentence previously adjudged or approved." The burden of protecting an accused against higher sentences rests with the convening authority at the time action is taken on an adjudged sentence from a rehearing. *United States v. Davis*, 63 M.J. 171, 175, (C.A.A.F. 2006). As we recently articulated in *United States v. Altier*, No. 201000361, 2012 CCA LEXIS 156, at *6, unpublished op. (N.M.Ct.Crim.App. 30 April 2012), *petition for rev. filed*, __ M.J. __ (C.A.A.F. May 17, 2012), the complexity of components which make up sentences in the military justice system tends against establishing a fixed table of substitutions. Therefore, rather than a one-to-one comparison of each category, the two sentences should be examined as a whole to determine if the second sentence is more severe than the first.

We have examined the record of trial and the pleadings of the parties. We hold that under the facts and circumstances of this case, the sentence approved by the CA following the rehearing was not in excess of, or more severe than, the appellant's original approved court-martial sentence. Art. 63, UCMJ; R.C.M. 810(d). While the appellant's pay grade was two levels lower than the original, there was 370 fewer days of confinement, a lack of total forfeiture of pay and allowances, and no fine.⁷ As a whole, the appellant's sentence was not in excess or more severe than his original sentence.

⁷ Although a reduction pursuant to Article 58a, UCMJ, is not considered part of the sentence, but rather an independent administrative consequence under certain conditions specified by statute, *United States v. Lundy*, 60 M.J. 52, 55 (C.A.A.F. 2004), we note that under either sentence, the appellant would suffer automatic reduction to E-1.

Conclusion

We are convinced that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The findings and sentence are affirmed.

Senior Judge MAKSYM concurs.

Senior Judge PERLAK (Dubitante):

I concur in the majority's resolution of the first assigned error. As to the second assigned error, I concur with reservations on the Article 63, UCMJ, analysis employed by the majority, as articulated in my separate opinion in *United States v. Altier*, No. 201000361, 2012 CCA LEXIS 156, at *9-13, unpublished op. (N.M.Ct.Crim.App. 30 April 2012), *petition for rev. filed*, __ M.J. __ (C.A.A.F. May 17, 2012). I otherwise concur in affirming the findings and sentence.

For the Court

R.H. TROIDL
Clerk of Court