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

Before
R.Q. WARD, K.M. MCDONALD, S.A. DOMINGUEZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

TYREE A. FOLKS
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201300258
SPECIAL COURT-MARTIAL

Sentence Adjudged: 2 April 2013.
Military Judge: Maj Nicholas Martz, USMC.
Convening Authority: Commanding Officer, 10th Marine Regiment, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: CAPT Stephen White, JAGC, USN.
For Appellee: Maj Crista D. Kraics, USMC.

31 December 2013

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 a special court-martial convicted the appellant, pursuant to his pleas, of nine specifications of violating a lawful general order (sexual harassment), one specification of indecent exposure, and four specifications of assault consummated by a battery in violation of Articles 92, 120(c), and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920(c), and 928. The military judge sentenced the appellant to be reduced to E-1, 120 days of confinement, hard labor without confinement for sixty days, to

be restricted for sixty days, and a bad-conduct discharge. The convening authority (CA) granted clemency and disapproved the hard labor and restriction. A pretrial agreement had no effect and the CA approved the remaining sentence as adjudged.

The appellant raises three assignments of error (AOE) – all of which assert the unreasonable multiplication of the sexual harassment offenses.[1] Specifically, the appellant claims that his "punitive exposure was unreasonably multiplied as a result of prosecutorial overreaching." Appellant's Brief of 6 Sep 2013 at 2. He asks us to consolidate the affected offenses and reassess the sentence. After careful consideration of the record and briefs of the parties, 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).

Background

The appellant, a Marine sergeant (E-5), was convicted, pursuant to his pleas, of misconduct that included sexually harassing six junior Marines in his unit over an eight-month period. The sexual harassment took place on-duty in the appellant's work area aboard Camp Lejeune and during a one-month field exercise at Ft. Bragg. All but one of the victims was subjected to harassment on multiple occasions. The harassing language used and the context of the harassment was different on each occasion.

Unreasonable Multiplication of Charges

The appellant expressly declined to raise an unreasonable multiplication of charges issue prior to his pleas. Record at 5-6.[2] However, immediately after the military judge accepted the

[1] AOE I claims that Specifications 2 and 3 of Charge II amount to an unreasonable multiplication of charges for sentencing, because the two offenses "arose out of a continuing course of misconduct (sexual harassment)." Appellant's Brief at 6. Likewise, AOE II claims that Specifications 4 and 5 of Charge II and Charge VI, Specification 1 constitute an unreasonable multiplication of charges for sentencing for the same reason. Last, he argues that Specifications 8 and 9 of Charge II also amount to an unreasonable multiplication of charges for sentencing for the same reason.

[2] Prior to entering into the providence inquiry, the military judge, summarizing the RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) session held "a few moments" before going on the record, noted that: "We discussed whether there were any multiplicity or unreasonable multiplication of charges for sentencing issues, and defense counsel indicated there were none . . . . Do counsel have anything to add to that?"

appellant's pleas of guilty, the defense claimed that these three sets of specifications constitute an unreasonable multiplication of charges for sentencing. *Id.* at 92. Moments later, when the military judge characterized the appellant's motion as "unreasonable multiplication of charges for sentencing", trial defense counsel agreed. *Id*. at 93. The military judge denied the motion and did not grant any relief. *Id.* at 93.

The Court of Appeals for the Armed Forces has recently made clear that "at trial three concepts may arise: multiplicity for double jeopardy purposes; unreasonable multiplication of charges as applied to findings and, unreasonable multiplication of charges as applied to sentence." *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012).

We review a military judge's decision to deny relief on an unreasonable multiplication of charges motion for abuse of discretion. *Id.* at 22. What is substantially one transaction should not be the basis for an unreasonable multiplication of charges. R.C.M. 307(c)(4). To determine whether there has been an unreasonable multiplication of charges we apply the factors identified in *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002) (*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition).

In determining whether any of the charges should be consolidated for sentencing, as opposed to findings, the court looks to whether the "charging scheme . . . implicate[s] the *Quiroz* factors in the same way that the sentencing exposure does. In such a case, and as recognized in *Quiroz*, 'the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings.'" *Campbell*, 71 M.J. at 23 (quoting *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001)). The *Quiroz* factors include, but are not limited to the following:

(1) Did the accused object at trial;
(2) Are the charges aimed at distinctly separate criminal acts;
(3) Do the charges misrepresent or exaggerate the accused's criminality,

(4) Do the charges unreasonably increase the accused's punitive exposure; or

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Record at 5-6. In response, the trial counsel said: "Trial counsel concurs." *Id.* at 6. Following the trial counsel, the defense counsel said: "Defense concurs, sir." *Id.*

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

Campbell, 71 M.J. at 24.

After examining the entire record and considering the *Quiroz* factors, we conclude that the charges in this case were not unreasonably multiplied for sentencing. *See United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007) (applying *Quiroz* factors); *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Although the appellant objected at trial, we conclude that each specification was aimed at a distinctly separate criminal act. Here, the separate criminal acts were the distinct episodes of sexual harassment varied by timeframes and venues, notwithstanding that two of the six victims described in Charge II have multiple specifications listed. Additionally, the record contains ample evidence to support that the language and context of the harassing conduct was different in each specification. Last, the number of charges and specifications did not misrepresent or exaggerate the appellant's criminality, nor did it unreasonably increase the appellant's punitive exposure, nor was there any evidence of prosecutorial overreaching.

Taking into account the enumerated *Quiroz* factors, as well as all of the other facts and circumstances present in the record and the submissions of the parties, the military judge did not abuse his discretion in denying relief.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court