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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SEAN K. HERNANDEZ
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201300142
SPECIAL COURT-MARTIAL

Sentence Adjudged: 3 January 2013.
Military Judge: Maj Eric Emerich, USMC.
Convening Authority: Commanding Officer, 2d Light Armored Reconnaissance Battalion, 2d Marine Division, Camp Lejune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: LT Jennifer Myers, JAGC, USN.
For Appellee: LT Lindsay Geiselman, JAGC, USN.

30 September 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 one specification of conspiracy to distribute cocaine, one specification of failing to obey a lawful order and one specification of soliciting another to distribute cocaine, in violation of Articles 81, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 934. The military judge

sentenced the appellant to 9 months confinement, forfeitures of $800.00 pay per month for 9 months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. In accordance with a pretrial agreement, the CA suspended all confinement in excess of 120 days.

The appellant avers two assignments of error: first, that the conspiracy and solicitation offenses are multiplicious for findings; and second, that the two offenses are unreasonably multiplied. After careful consideration of the record and current case law, 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

While on restriction, the appellant was approached by another Marine, also on restriction, who asked the appellant to procure some cocaine for him. After agreeing to procure cocaine for this Marine, the appellant contacted, via text message, a civilian drug dealer, CJ, who agreed to sell cocaine to the other Marine. The appellant then set up a meeting to enable the sale, which took place off-base in the parking lot of a local gentlemen's club. The appellant was present when the other Marine purchased the cocaine from CJ.

Multiplicious Charges for Findings

The appellant's argument for the first claim of error is that the solicitation offense is a lesser included offense (LIO) of the conspiracy offense since the overt act for the conspiracy offense, as charged, is the solicitous act (the initial text message to CJ). The appellant makes this assertion for the first time on appeal, claiming that these two offenses are multiplicious for findings because they are facially duplicative. We disagree.

In *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997), the Court of Appeals for the Armed Forces (CAAF) adopted the language in *United States v. Broce*, 488 U.S. 563, 575 (1989)[1] in deciding that specifications are facially duplicative when they are "factually the same." The CAAF further stated in *Lloyd* that "the record of trial in a guilty plea court-martial is a more

[1] *See also United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009); *see also United States v. St. John*, 72 M.J. 685, 687 (Army Ct.Crim.App. 2013).

than adequate basis from which to determine whether the offenses are duplicative in the sense intended in *Broce*." *Id.* This Court may consider the stipulation of fact and the entire record of trial for a *Broce* determination in accordance with *Lloyd*. *See generally United States v. Whitaker*, 72 M.J. 292, 293 (C.A.A.F. 2013).

Thus, in addition to the act of texting CJ to sell drugs to the other Marine, we may consider other facts contained in the record that distinguish the solicitation offense from the conspiracy offense. *See United States v. Campbell*, 68 M.J. 217, 219-20 (C.A.A.F. 2009). Specifically, there are two overt acts contained in the stipulation of fact that make the conspiracy offense factually distinct from the solicitation offense.[2]

Additionally, in assessing the appellant's claims, this court also considered the language in *United States v. Ramsey*, 52 M.J. 322, 323-24 (C.A.A.F. 2000), where the CAAF made clear that "solicitation and conspiracy were separate offenses." The CAAF had previously made this holding in a plurality decision in *United States v. Carroll*, 43 M.J. 487, 489 (C.A.A.F. 1996). In a concurrence to both opinions, Judge Sullivan relied on *United States v. Teters*, 37 M.J. 370, 377 (C.A.A.F. 1993), noting that "conspiracy and solicitation were separate offenses because they have different elements." *Carroll*, 43 M.J. at 490.

Recently, in *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012), the CAAF reiterated that, for multiplicity purposes, the appropriate analysis to conduct is the *Blockburger / Teters* analysis, which states:[3]

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

---

[2] Prosecution Exhibit 1, paragraphs 10, 11 and 16; "Once the agreement with [CJ] was made, the accused set up a meeting to take place in Jacksonville, North Carolina between [CJ], the accused, and the other Marine. . . .Setting up a meeting between [CJ] and another Marine was an overt act by the accused for the purpose of bringing about the sale of cocaine from [CJ] to the other Marine. This overt act of setting up the meeting was independent of the agreement to commit the offense. . . . Going to and meeting [CJ] . . . was an overt act by the accused for the purpose of bringing about the sale of cocaine from [CJ]) to the other Marine. This overt act of going to and meeting [CJ] was independent of the agreement to commit the offense."

[3] *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993).

> offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Teters, 37 M.J. at 377 (quoting *Blockburger*, 284 U.S. at 304.)

In the instant case, it is clear that the solicitation and conspiracy are not multiplicious.

Unreasonable Multiplication of Charges

The appellant's claim for unreasonable multiplication of charges ("UMC") is similarly unconvincing and unsupportable.

The test for UMC is set out in *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). The *Quiroz* factors include, but are not limited to, the following: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?; (2) Is each charge and specification aimed at distinctly separate criminal acts?; (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?; (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *Quiroz,* 55 M.J. at 338. *See also Campbell*, 71 M.J. at 24.

Under *Quiroz*, where the accused pleads guilty and fails to raise the issue of UMC at trial, that claim is considered forfeited. *United States v. Gladue*, 67 M.J. 311, 313-14 (C.A.A.F. 2009). In this case, the appellant pleaded guilty to both solicitation and conspiracy and made no motion for UMC either in findings or sentencing. These facts weigh heavily against appellant.

Moreover, the court finds that each charge and specification was aimed at a distinctly separate criminal act, as noted above in our analysis of multiplicity. Similarly, the number of charges and specifications does not misrepresent or exaggerate the accused's criminality. There is no evidence of prosecutorial overreaching or abuse in the drafting of the charges, nor has any been alleged. Finally, we find that the accused's punitive exposure was not unreasonably increased.

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, we find no unreasonable multiplication of charges.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court