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

Before
R.Q. WARD, J.R. MCFARLANE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JEREME M. MCNEELY
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201300099
SPECIAL COURT-MARTIAL

Sentence Adjudged: 16 November 2012.
Military Judge: Col Paul Starita, USMCR.
Convening Authority: Commanding Officer, 2d Battalion, 4th Marines, 5th Marine Regiment, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.
For Appellant: CAPT Stephen White, JAGC, USN.
For Appellee: LT Ann Dingle, JAGC, USN.

8 August 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, one specification of violating a lawful general order, two specifications of larceny, and one specification of housebreaking, in violation of Articles 81, 92, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 921, and 930. The military judge sentenced the appellant to confinement for 300 days, reduction to pay grade E-

1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant submitted two assignments of error, alleging that: 1) the military judge committed plain error by failing to consolidate two specifications of larceny as multiplicious where the specifications were based upon a single larceny; and 2) the military judged committed plain error by not consolidating the conspiracy charge, the larceny charge, and the housebreaking charge as an unreasonable multiplication of charges. After consideration of the pleadings and the record of trial, we find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

On or about 27 January 2012, the appellant was assigned as the "Assistant Duty" for his battalion on Camp Pendleton. Private (Pvt) Lambert was also standing duty that night, as the "Roving Post." While on his rounds, Pvt Lambert discovered an unlocked office containing a number of valuable items. After reporting his discovery to the appellant, Pvt Lambert indicated that he intended to steal the items, and invited the appellant to join in the theft. The appellant agreed and accompanied Pvt Lambert back to the unlocked office, entered the office without permission, and stole a laptop computer and computer mouse, both of which were the property of the United States Government. Later that evening, Pvt Lambert returned to the office several times, filling garbage bags with a number of personal items belonging to a civilian employee assigned to the office. Further facts relevant to disposition of this case are developed below.

Larceny of Items from Different Owners

The Manual for Courts-Martial specifically states that "[w]hen a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶46c(1)(h)(ii); *see also United States v. Harris*, 53 M.J. 514, 522 (N.M.Ct.Crim.App. 2000), *aff'd*, 54 M.J. 433 (C.A.A.F. 2001); *United States v. Lepresti*, 52 M.J. 644, 653 (N.M.Ct.Crim.App. 1999).

Applying those principles to the case at bar, we find that the facts support the appellant's conviction for two separate

specifications of larceny. The providence inquiry and the stipulation of fact both show that although the larcenies were committed in the same office, pursuant to a single plan, they were not committed at substantially the same time. Rather, after the appellant stole the items listed in the one specification, he "walked back to his post to complete the rest of his shift. . . . At some point during the night, Pvt Lambert entered the office separately from Cpl McNeely and proceeded to steal the remainder of the personal and military property" thus forming the basis for the second specification. Prosecution Exhibit 1 at 3. Given these facts, we find no basis, either in law or fact, to question the appellant's guilty plea.[1] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Unreasonable Multiplication of Charges

Although the appellant never made an unreasonable multiplication of charges motion at trial, the military judge did, *sua sponte*, inform the parties that he found no unreasonable multiplication of charges but he nonetheless would merge the conspiracy, larceny, and housebreaking offenses for the purpose of sentencing. Record at 95. The appellant notes that while the military judge did not style it as such, he "appears to have found the specifications at issue an unreasonable multiplication of charges for sentencing . . . ." Appellant's Brief of 5 Apr 2013 at 8. He asserts, however, that the military judge did not go far enough, and that the appropriate remedy was "dismissal or consolidation of the specifications at issue." *Id*. We disagree.

We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Where there is an unreasonable multiplication of charges for findings, the appropriate remedy is to dismiss those charges which are unreasonable. *See United States v. Campbell*, 71 M.J. 19, 22-23 (C.A.A.F. 2012). However, where there is an unreasonable multiplication of charges for sentencing, the appropriate remedy is to merge the charges for sentencing purposes only. *Id*. at 25. To determine whether there has been an unreasonable multiplication of charges we consider the

[1] This case differs from that of the appellant's co-conspirator, Pvt Lambert, in that the providence inquiry and stipulation of fact in that case indicated that Pvt Lambert and the appellant went into the office, and committed the larcenies, at the same time. *United States v. Lambert*, No. 201200458, 2013 CCA LEXIS 270, unpublished op. (N.M.Ct.Crim.App. 28 Mar 2013). Because this case presents us with different facts, we reach a different conclusion.

factors identified in *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition). To determine whether any unreasonable multiplication would apply to 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)).

After examining the entire record and considering the *Quiroz* factors, we conclude that the charges in this case were not unreasonably multiplied for findings. *See United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007) (applying *Quiroz* factors); *Pauling*, 60 M.J. at 95. Each charge is aimed at a distinctly separate criminal act. *See United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996). Further, the number of charges and specifications does not misrepresent or exaggerate the appellant's criminality, nor is there any evidence of prosecutorial overreaching. Nonetheless, as was the case in *Campbell*, "[i]t is not difficult to see how the three specifications in this case might have exaggerated Appellant's criminal and punitive exposure in light of the fact that, from Appellant's perspective, he had committed one act implicating three separate criminal purposes." 71 M.J. at 25. Merger for sentencing was the appropriate remedy in *Campbell*, and was also the appropriate remedy here.

Conclusion

Accordingly, the findings of guilty and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court