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

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

UNITED STATES OF AMERICA

v.

BRYAN M. MORGAN
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200442
GENERAL COURT-MARTIAL

Sentence Adjudged: 7 June 2012.
Military Judge: Col Deborah McConnell, USMC.
Convening Authority: Commanding General, 2d Marine Divison, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: Maj Emmett Collazo, USMCR.
For Appellee: LT Brian C. Burgtorf, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

19 February 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 general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was sentenced to confinement for 12 months,

reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.[1]

The appellant asserts two assignments of error in this case: that the three specifications of assault consummated by a battery represent an unreasonable multiplication of charges; and that a bad-conduct discharge and confinement for 12 months is disproportionate and excessive punishment in this case.[2] After considering the pleadings and reviewing the entire record of trial, we find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant attended a party at a neighbor's house in base housing on Camp Lejeune, North Carolina. While at the party, the appellant met and spoke to Mrs. CH, another neighbor, whose husband was a Marine Corps sergeant deployed to Afghanistan. The appellant, who had been drinking, thought Mrs. CH might be attracted to him, and he was interested in having sex with her. Mrs. CH left the party around 2300 to go home. Shortly thereafter, the appellant went to her house uninvited. As Mrs. CH was answering her front door, her phone rang, and she walked away from the door to answer it. The appellant took advantage of this opportunity to let himself in, whereupon he went into her bathroom. The appellant stepped out of the bathroom with his pants down and his penis exposed. He then showed Mrs. CH a condom, telling her that he brought it "just in case." Mrs. CH said I don't want this. The appellant then pushed Mrs. CH up against the wall near the bathroom, touched her breast through her clothing, and took her hand and forced Mrs. CH to touch his exposed penis. When Mrs. CH managed to move away from the wall the appellant put his penis into his pants, and complied with her requests that he leave her home. Further facts relevant to the determination of this case are discussed more fully below.

Unreasonable Multiplication of Charges

At trial, immediately before sentencing arguments were made, the appellant moved to have the three assault

[1] 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).

[2] Both assignments of error are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

specifications merged for the purpose of sentencing. The appellant argued that what occurred between the appellant and Mrs. CH was actually a single assault, motivated by the appellant's singular desire to have sexual relations with Mrs. CH, and that charging the various touchings separately was an unreasonable multiplication of charges. The military judge partially granted the motion, based on her finding that the acts of pushing Mrs. CH against the wall and touching her breast were the result of the same impulse. However, the military judge found that the act of grabbing Mrs. CH's hand and forcing her to touch the appellant's exposed penis was the result of a separate impulse, and thus properly plead as a distinct specification. Accordingly, the military judge merged, for the purpose of sentencing, the two specifications alleging the push and the touching of Mrs. CH's breast (thus reducing the maximum confinement from 18 to 12 months), but let stand as separate the specification alleging the forced touching of the appellant's penis. The appellant contends that this was error.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). While multiplicity is based on the constitutional and statutory prohibitions against double jeopardy, the doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id*.

This court applies five factors in evaluating a claim of unreasonable multiplication of charges:

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

United States v. Quiroz, 57 M.J. 583, 585 (N.M.Ct.Crim.App. 2002) (en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition).

Applying these factors to the appellant's case, we find that there has not been an unreasonable multiplication of charges.

The first factor, objection at trial, clearly weighs in favor of the appellant. However, the second factor does not. In order to determine whether a series of criminal act are "distinctly separate," we look to whether there was an appreciable length of time between the acts, or alternatively, whether that later criminal acts were "not the result of the original impulse, but of a fresh one." *Blockburger v. United States*, 284 U.S. 299, 303 (1932).

In this case, the timeline as to when the criminal acts took place was not well-developed. The appellant said that he was in the victim's home for approximately 20 minutes, which could have easily allowed for the three criminal acts to have been separated by an appreciable length of time. However, when one looks at the victim impact statement, submitted by the Government during sentencing, that document suggests that the three criminal acts happened in quick succession. While the lack of a well-developed timeline might hamper our review in other cases, such is not the case here. We base our decision – as did the military judge - not on the length of time between the acts, but rather on the fact that the acts were the result of different impulses. We agree with the military judge that the urge to touch someone is quite different from the urge to have that person touch you. More specifically, we find that the impulse that led the appellant to push Mrs. CH against the wall and touch her breast was separate from the impulse that led him to force her to touch his exposed penis. Accordingly, the second factor weighs heavily in favor of the Government.

The remaining three *Quiroz* factors also weigh in favor of the Government. The number of charges and specifications neither misrepresent nor exaggerate the appellant's criminality, nor do they unreasonably increase the appellant's punitive exposure. In fact, the appellant's criminality and punitive exposure were greatly reduced in this case as a result of the Government's agreeing, as part of the pretrial agreement, to withdraw wrongful sexual contact and indecent exposure charges in

exchange for the appellant pleading guilty to an additional assault charge (which the military judge later merged into one of the pre-existing assault charges for the purpose of sentencing). Had those charges remained, and the appellant been found guilty, he would have faced an additional two years of possible confinement. Under these facts we find no evidence of prosecutorial overreaching or abuse. Accordingly, we find that the balance tips in favor of the Government and that the charges asserted did not reflect an unreasonable multiplication of charges.

Sentence Appropriateness

The appellant alleges that a bad-conduct discharge and 12 months' confinement are inappropriately severe in light of the nature of his crimes. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This process requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After carefully reviewing the entire record, we conclude that a bad-conduct discharge and confinement for 12 months is appropriate for this particular offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). In reaching this conclusion we considered the fact that the appellant assaulted the wife of a fellow Marine who was on a combat deployment, causing her to suffer from depression and to feel unsafe in her own home on base. In this case granting any sentence relief would be to engage in clemency, which is a function reserved for the convening authority, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court