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

Before
M.D. MODZELEWSKI, F.D. MITCHELL, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BENJAMIN D. MORRIS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201300269
SPECIAL COURT-MARTIAL

Sentence Adjudged: 10 April 2013.
Military Judge: LtCol Chris J. Thielemann, USMC.
Convening Authority: Commanding Officer, 3d Assault Amphibian Battalion, 1st Marine Division (Rein), Marine Corps Base, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj D.P. Harvey, USMC.
For Appellant: Maj John J. Stephens, USMC.
For Appellee: CDR James E. Carsten, JAGC, USN.

17 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 one specification of disobeying a lawful general order, and two specifications of wrongful possession of a controlled substance, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The

military judge sentenced the appellant to confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, and pursuant to a pretrial agreement, suspended execution of confinement in excess of time-served.

The appellant raises two assignments of error: (1) that the military judge erred by not dismissing one of the two specifications of wrongful possession of a controlled substance after finding the two specifications multiplicious for sentencing, and (2) that the military judge erred by not consolidating the two specifications of wrongful possession of a controlled substance after holding that they were a single criminal act.

After carefully considering the record of trial and the parties' pleadings, we conclude that the findings and the 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), UCMJ.

Background

On or about 15 February 2013, the appellant purchased and wrongfully possessed small quantities of cocaine and methamphetamine in Oceanside, California. He also purchased and wrongfully possessed drug paraphernalia used to facilitate ingestion of methamphetamine.

As part of a pretrial agreement, the appellant agreed to plead guilty, without conditions, to the charged offenses before a military judge in exchange for suspension of all confinement in excess of time served as of the date of sentencing. Appellate Exhibits I-II. The appellant fulfilled the terms of the pretrial agreement, and the military judge accepted the appellant's pleas of guilty. Prior to announcing sentence, the military judge noted that there had been no challenge as to "Specifications 1 and 2 of Charge II for multiplication of charges." Record at 78. He stated that the "court did conduct its own *Quiroz'* [sic] analysis," and concluded that the two specifications alleging possession of cocaine and methamphetamine were "one criminal act," and merged "Specifications 1 and 2 of Charge II for sentencing purposes only" based upon that analysis. *Id*. at 79-80 (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

Multiplicity and Unreasonable Multiplication of Charges

The appellant entered unconditional pleas of guilty to all charges and specifications. On appeal, he asserts that the military judge found the "specifications for possession of cocaine and methamphetamine . . . multiplicious for sentencing[,]" but failed to dismiss one those specifications in accordance with *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Appellant's Brief of 29 Aug 2013 at 4-5. He also argues that the military judge misapplied *Quiroz*, by "not dismissing one of the specifications or consolidating the specifications for purposes of findings" after concluding the two specifications were "one criminal act" and the "same criminal act." *Id*. at 5 (citing *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002) *aff'd* 58 M.J. 183 (C.A.A.F. 2003) (summary disposition)). We disagree.

At trial, the military judge acknowledged then recent changes in case law regarding "multiplicity for sentencing" following the Court of Appeals for the Armed Forces decision in *Campbell*, 71 M.J. at 19. However, the record does not reflect that he found Specifications 1 and 2 of Charge II "multiplicious for sentencing" within the meaning of those terms as discussed in *Campbell*. 71 M.J. at 23 (holding that "there is only one form of multiplicity, that which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis.") (citing *Blockberger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993)). On the contrary, the military judge's use of the phrase "Specifications 1 and 2 of Charge II for multiplication of charges" and serial analysis of those specifications under the "*Quiroz* factors" reflect that he was analyzing whether those two specifications constituted an unreasonable multiplication of charges. Record at 78-80. This conclusion is further supported by the military judge's decision to "merg[e] Specifications 1 and 2 of Charge II for sentencing purposes only based upon *Quiroz* analysis." *Id*. at 80. Therefore, the appellant's first assignment of error is without merit.

With respect to the appellant's second assigned error, to determine whether there has been an unreasonable

multiplication of charges, we will analyze the case under the *Quiroz* framework. 55 M.J. at 338.

With the exception of the military judge's determination that Specifications 1 and 2 of Charge II "were part of the same criminal act" under the second *Quiroz* factor, application of the remaining Quiroz factors does not support a conclusion that that the military judge abused his discretion on findings. The appellant did not "object at trial that there was an unreasonable multiplication of charges and/or specifications;" instead the military judge raised the matter, *sua sponte*. *Id*. Likewise, two specifications alleging wrongful possession of two distinct controlled substances do not "misrepresent or exaggerate the accused's criminality," nor do they "unreasonably increase the [appellant's] punitive exposure" in a trial by special court-martial, where the maximum punishment authorized for each specification, standing alone, includes the jurisdictional maximum punishment authorized at a special court-martial. *Id*. Finally, there is no "evidence of prosecutorial overreaching or abuse in the drafting of the charges," as the separate specifications provide for appropriate contingencies of proof with respect to wrongful possession of two distinct controlled substances, cocaine and methamphetamine. *Id*.

We therefore conclude that the military judge did not abuse his discretion by determining that relief was warranted "solely on sentencing." Record at 79-80. Under these circumstances, we also decline to exercise our authority under Article 66(c), UCMJ, to grant additional relief.

Conclusion

Accordingly, the findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court