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

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

UNITED STATES OF AMERICA

v.

DANIEL L. MURPHY
MACHINIST'S MATE FIRST CLASS (E-6), U.S. NAVY

NMCCA 201200486
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 July 2012.
Military Judge: LtCol Charles Hale, USMC.
Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.
Staff Judge Advocate's Recommendation: LCDR M.H. Lee, JAGC, USN.
For Appellant: LT Gabriel Bradley, JAGC, USN.
For Appellee: LT Lindsay Geiselman, JAGC, USN; Capt Samuel Moore, USMC.

30 May 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 14 specifications of violating a lawful general order (fraternization and sexual harassment), three specifications of wrongful sexual contact, five specifications of assault consummated by a battery, and one specification of adultery, in violation of Articles 92, 120, 128 and 134, Uniform Code of

Military Justice, 10 U.S.C. §§ 892, 920, 928 and 934. The military judge sentenced the appellant to confinement for 70 months, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended confinement in excess of 18 months for the period of confinement served, suspended adjudged forfeitures for six months, and waived automatic forfeitures for six months.[1]

In his sole assignment of error, the appellant alleges that the military judge abused his discretion by refusing to merge three specifications of assault consummated by a battery which were committed against a single victim on different dates. While not raised as error, we also specified issues as to whether the appellant's convictions of multiple offenses for each individual victim were an unreasonable multiplication of charges.

After reviewing the record of trial and the pleadings of the parties, we hold that several of the appellant's convictions are an unreasonable multiplication of charges and we will take corrective action in our decretal paragraph. After our corrective action, we find the remaining findings of guilty and reassessed sentence correct in law and fact, and no errors materially prejudicial to the substantial rights of the appellant remain. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was assigned to Recruit Training Command, Naval Service Training Command, in Great Lakes, Illinois. At various points during the time period March to September 2011, he engaged in a course of inappropriate conduct and comments toward seven different female junior Sailors. All of the females were students at Recruit Training Command and the appellant was one of their Recruit Division Commanders. The comments included unwelcome sexually explicit remarks and requests for relationships outside of the command, which violated lawful general orders prohibiting sexual harassment and unduly familiar relationships. For these actions the appellant was convicted of a specification of sexual harassment and a specification of fraternization for each victim.

[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

In addition to his inappropriate comments, the appellant also kissed three of the victims without their consent and grabbed or touched body parts of three of the victims without their consent. The appellant, who was married, also engaged in consensual oral and vaginal sexual intercourse with one of the junior sailors. These actions comprised the conduct that resulted in the appellant's convictions for assault consummated by a battery, wrongful sexual contact, and adultery.

Unreasonable Multiplication of Charges

Immediately after findings at his guilty plea proceeding, the appellant asked the military judge to merge Specifications 1, 2, and 3 of Charge III (assault consummated by a battery) for sentencing.[2] These specifications charged the appellant with kissing one victim, Seaman Apprentice I.C., without consent on three separate occasions. The military judge denied the appellant's motion as he determined the assaults occurred on three different dates, were not part of the same immediate transaction, and therefore were separate and distinct acts. The appellant did not request the military judge to find any of his other convictions an unreasonable multiplication of charges.

We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)).

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." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). In order to determine whether there is an unreasonable multiplication of charges, we apply the five-factor test set forth in *Quiroz*: (1) whether the accused objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality; (4) whether the number of charges and

[2] Record at 196. We note that before a pretrial agreement had been reached, the parties had commenced litigation on a pretrial motion filed by the defense based on unreasonable multiplication of charges as it pertained to certain offenses. *Id.* at 26-30. After an agreement was reached between the parties, the defense indicated its intention to the court to renew the motion after the providence inquiry was complete, and indicated it would focus its argument on Specifications 1-3 under Charge III. *Id.* at 32.

specifications unreasonably increases the appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *Id*. at 338. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

We find that the military judge did not abuse his discretion by refusing to merge the three specifications of Charge III for sentencing. While the military judge did not complete a specific *Quiroz* analysis on the record, he properly recognized that each nonconsensual kiss was a separate criminal act under the second *Quiroz* factor. Completing our own analysis, we find that only the first *Quiroz* factor weighs in the appellant's favor on this issue, so there was not an unreasonable multiplication of charges on these three specifications.

Turning now to our specified issues, we find that there was an unreasonable multiplication of charges between the sexual harassment and fraternization specifications for several of the victims: Seaman Apprentice I.C., Seaman M.T., Seaman T.F., and Seaman L.S.. The Government concedes that Specifications 11, 12, 13, and 14 of Charge I (fraternization) are an unreasonable multiplication of charges with Specifications 4, 5, 6, and 7 of Charge I (sexual harassment) for four of the victims. Applying the five *Quiroz* factors, we concur with the Government's conclusion.

While the appellant did not object under the first factor, the remaining factors weigh in his favor because the military judge relied on the exact same underlying conduct to find the appellant guilty of both crimes. Because we believe that the facts underlying these specifications were "substantially one transaction," we find that there was an unreasonable multiplication of charges for these four victims.[3] Thus, we set aside and dismiss the appellant's convictions for four of the fraternization specifications.

Sentence Reassessment

[3] For the remaining three victims, "Seaman Recruit M.W., Seaman L.L., and Seaman J.L., our review of the record reveals that the military judge relied upon additional facts for the fraternization specifications as compared to the sexual harassment specifications, and thus we find that those convictions are not unreasonably multiplied.

Having dismissed four specifications under Charge I, we must determine whether we are able to reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006), and carefully considering the entire record, we conclude that there has not been a "dramatic change in the 'penalty landscape.'" *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Our dismissal of four Article 92 convictions alters the sentencing landscape from a maximum of 34 years of confinement to 26 years of confinement. Because this change is not dramatic, we are confident in our ability to reassess the sentence.

Conclusion

The findings of guilty as to Specifications 11, 12, 13, and 14 of Charge I are set aside and those specifications are dismissed. The remaining guilty findings are affirmed. We affirm only so much of the sentence as provides for confinement for 58 months, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. We conclude that such a sentence is no greater than that which would have been awarded by the military judge for the charges and specifications that we affirm and is appropriate under the circumstances of this case.[4]

For the Court

R.H. TROIDL
Clerk of Court

[4] We note that the sentence as reassessed is still well below the maximum possible confinement of 26 years. We also note that this reassessment will likely not impact the actual sentence served by the appellant because he negotiated for a very favorable pretrial agreement provision, which limited confinement to 18 months.