

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

Charles Wm. DORMAN

W.L. RITTER

M.J. SUSZAN

UNITED STATES

v.

**William W. WINKIS
Chief Electronics Technician (E-7), U.S. Navy**

NMCCA 200301073

Decided 16 December 2004

Sentence adjudged 8 July 2002. Military Judge: K.E. Grunawalt. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Submarine Development Squadron TWELVE, Naval Submarine Base New London, Groton, CT.

CAPT RYAN WILSON, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was tried before a special court-martial composed of a military judge sitting alone. In accordance with his pleas, the appellant was convicted of one specification of violating a lawful order issued by the Secretary of the Navy, and four specifications of willful dereliction of duties, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The adjudged and approved sentence consists of confinement for 75 days, forfeiture of \$200.00 pay per month for 2 months, reduction to pay grade E-5, and a bad-conduct discharge. Upon taking action, the convening authority suspended all confinement for a period of 12 months from the date of trial, and he disapproved the automatic reduction in grade below E-5.

We have reviewed the record of trial, the appellant's assignment of error, and the Government's response. In his assignment of error, the appellant argues that he was subjected to an unreasonable multiplication of charges when he was charged with 5 specifications for essentially the same

misconduct. We find merit in the appellant's argument. Following our review and corrective action, we conclude that the findings and sentence are correct in law and fact and that no error remains that is materially prejudicial to substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Unreasonable Multiplication of Charges

In May 1999 the appellant was serving on board the USS AUGUSTA (SSN 710). During that month the former Communication Security Material (CMS) Custodian was relieved of duties and the appellant was assigned those duties. The appellant also served as the radio chief aboard his boat. He inherited a CMS system that was in disarray but, as evidenced by his conviction, the appellant did not greatly improve the system. In fact, by December of 2001 the USS AUGUSTA's security account was removed from the ship so that a thorough inventory of the problem could be conducted.

Eventually the appellant was charged with five separate specifications alleging violations of Article 92, UCMJ. The first specification alleges that he violated Secretary of the Navy Instruction 5510.36 (17 Mar 1999), **on divers occasions**, between December 1999 and January 2002. Specifically, he is alleged to have "failed to maintain control and safeguard COMSEC information." Charge Sheet. Additionally, he was charged with four specifications of willful dereliction of duty for failing to perform specific duties required by **SECNAVINST 5510.36**. Three of these specifications also allege that he failed to perform these duties **on divers occasions**, beginning in May 1999.

During the providence inquiry into one of the specifications of dereliction of duty, the appellant informed the military judge that most of the examples of how he failed to perform his duties were "repetitional(sic) type from a--from the first specification" Record at 62. Further, examination of Prosecution Exhibit 1, the stipulation of fact, reveals a high correlation of the same facts supporting each of the five specifications.

In his assignment of error, the appellant argues for the first time that he was subjected to an unreasonable multiplication of charges. He succinctly argues that "[t]he gravamen of the appellant's offense is that he failed to maintain, control, and safeguard COMSEC information in violation of the subject SECNAVINST." Appellant's Brief of 29 Jun 2004 at 2 (emphasis removed). He also notes that the specific instances of dereliction under Specifications 2-5 of the Charge also serve as the factual basis supporting the appellant's guilty plea to violating the SECNAVINST under Specification 1 of the Charge. *Id.* at 3. As relief, he seeks the dismissal of Specifications 2-5, and either a return of the record of trial for sentence reassessment or for this court to disapprove the bad-conduct discharge.

In determining whether there is an unreasonable multiplication of charges, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

In this case, the first *Quiroz* factor is not satisfied because the issue was not raised at trial. This fact significantly weakens the appellant's current argument. The second and third *Quiroz* factors clearly fall in the appellant's favor. We agree with the appellant's characterization that the gravamen of the offense is the appellant's failure to maintain control, and safeguard COMSEC materials and information. With respect to the next factor, the method in charging the appellant did not unreasonably expose him to greater punishment because the appellant was tried by a special court-martial. Finally, we find absolutely no evidence of prosecutorial overreaching. In fact, although we do not encourage such a practice, the Government could have elected to charge the appellant with individual acts of misconduct as opposed to charging his misconduct under specifications that alleged the misconduct was committed "on divers occasions."

While we conclude that the appellant has been subjected to an unreasonable multiplication of charges, we do not find it as pervasive as the appellant contends. In Specifications 2-5 of the Charge there is an element of willfulness that is not present in Specification 1. Accordingly, we do not find it an exaggeration of the appellant's criminality to leave undisturbed his conviction to Specification 5 of the Charge. We find it appropriate to single out that specification because it encompassed a longer time period than does Specification 1, and it also alleges specific violations on divers occasions of a nature not specifically addressed by the appellant during the providence inquiry concerning Specification 1.

Conclusion

Accordingly, the findings of guilty to Specifications 2, 3, and 4 under the Charge are set aside. The remaining findings are affirmed. As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v.*

Sales, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment of the sentence, the sentence, as approved by the convening authority, is affirmed.

Senior Judge RITTER and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court