

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Tyrone DAVIS
Sergeant (E-5), U. S. Marine Corps**

NMCCA 200600163

Decided 27 February 2007

Sentence adjudged 02 December 2004. Military Judge: J.D. Bauer. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Corps Base, Quantico, VA.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
LCDR PAUL D. BUNGE, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A general court-martial composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of conspiracy to receive stolen military property, making a false official statement, receiving stolen military property, and possessing mail containing stolen property, in violation of Articles 81, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 934. The appellant was sentenced to confinement for 48 months, forfeiture of \$1,193.00 pay per month for 48 months, reduction to pay grade E-1, a bad-conduct discharge, and a \$20,000 fine or 24 months of additional confinement if the fine was not paid. The convening authority approved the sentence as adjudged but, pursuant to a post-trial agreement, suspended the \$20,000 fine and all confinement in excess of 24 months for 12 months.

On appeal, the appellant asserts that Specifications 1 and 2 of Charge III constitute an unreasonable multiplication of charges because they arise from a single course of conduct,

exaggerated his crime, and impermissibly increased his punitive exposure. He further avers that the record of trial is incomplete because the Article 32, UCMJ, investigation report and the staff judge advocate's (SJA) Article 34, UCMJ, advice letter are "missing" from the record.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

At the time of the offenses, the appellant was a reservist on active duty stationed with Marine Air Group-42, Detachment-B, Norfolk, Virginia. His brother, Corporal (Cpl) Roscoe Davis III, U.S. Marine Corps, was a mail clerk stationed at Naval Air Base (NAB) Signoella, Italy. In his capacity as a mail clerk and section leader during his shift, Cpl Davis had control over the registered mail cage and access to the flight line for loading and unloading mail. Sometime during the night shift from 1930, 20 January 2002 to 0730, 21 January 2002, while working as the section leader in the registered mail cage, Cpl Davis stole a registered mail package addressed to the Disbursing Officer, Administrative Support Unit, Southwest Asia, Bahrain. The package was one of four sent from the Bank of America's military banking division and contained \$320,000.00¹ in twenty-dollar bills, property of the United States military. The remaining three packages made their way to Bahrain. Subsequently, Cpl Davis and the appellant agreed that Cpl Davis would send him some of the stolen money.

In January and February 2002, Cpl Davis had his girlfriend mail four packages to the appellant. The appellant received at least one of those packages, which contained a large amount of twenty-dollar bills. At his house, the appellant showed Cpl Jerold Sims and another Marine one "brick" of new twenty-dollar bills. The appellant told Cpl Sims and the other Marine that his brother found the money on the flight line and would be sending him more through the mail. Shortly thereafter Cpl Sims and the other Marine broke into the appellant's home looking for the money but found nothing. Later Cpl Sims intercepted an incoming mail package addressed to the appellant from his

¹ A "bundle" of twenty-dollar bills is 100 bills; a "brick" consists of ten bundles or 1,000 bills. The stolen package contained 16 bricks of twenty-dollar bills. Record at 116-18.

brother. When Cpl Sims opened the package, he found similarly bound bricks of new twenty-dollar bills.

Unreasonable Multiplication of Charges

The appellant contends that Specification 1 of Charge III (receiving stolen military property, U.S. currency greater than \$500) is an unreasonable multiplication of charges with Specification 2 of Charge III (violation of 18 U.S.C. § 1708 by possessing postal package containing stolen property). Appellant's Brief of 31 Aug 2006 at 3. We disagree.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *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.*

We apply five non-exclusive 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 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition); *accord Quiroz*, 55 M.J. at 339 ("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers"). "These factors must be balanced, with

no single factor necessarily governing the result." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Furthermore, in deciding issues of unreasonable multiplication of charges, we also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion, which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Applying these factors to the appellant's case, we find that there has not been an unreasonable multiplication of charges.

We note that the appellant did not object at trial, which significantly weakens his argument on appeal. Although important, that single factor is not dispositive of the issue. The specifications cited, although involving the same stolen property, are aimed at two distinct criminal acts involving different victims and addressing separate crimes.

Under Specification 1 of Charge III, the appellant's conduct violated Article 134, UCMJ. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 106. His conduct under Specification 2 of Charge III violated 18 U.S.C. § 1708, a federal statute specifically enacted to protect the integrity of the mail system. Although under the facts of this case the offenses were completed when the appellant received the package from his brother in the mail, the victims were different and the appellant's misconduct for each was a distinctly separate criminal act. See also *United States v. Langdon-Bey*, 739 F.2d 1285 (7th Cir. 1984)(held a single act may be basis for conviction of theft of mail and possession of stolen mail, both in violation of 18 U.S.C. § 1708, and receiving and concealing government property with intent to convert it, in violation of 18 U.S.C. § 641). Furthermore, the appellant could have committed the offense of receiving the stolen military property by a means other than using the mail system.

The appellant's misconduct under Specification 1 negatively impacted the workings of the Government and directly affected the operations of the disbursing office which was to receive the funds. This misconduct victimized the military and its personnel who were to benefit from the receipt and use of this currency. The appellant's misconduct under Specification 2 violated the integrity of the U.S. mail, which victimized the mail system itself.

The two separate specifications under Charge III do not misrepresent or exaggerate the appellant's criminality and they

do not unreasonably increase the appellant's punitive exposure. Finally, there is no evidence of prosecutorial overreaching or abuse in the drafting of the specifications at issue. Consequently, we do not find that the cited specifications constitute an unreasonable multiplication of charges.

Incomplete Record of Trial

The appellant's second assignment of error contends that because the Article 32, UCMJ, investigation report and the Article 34, UCMJ, SJA's advice letter are missing the record of trial is incomplete and, therefore, this court cannot review it. Appellant's Brief at 5 (citing R.C.M. 1103(b)(3)). We disagree. Arts. 32(e) and 66(c), UCMJ; *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

The Government asserts in brief that the appellant's Article 32, UCMJ, investigation was waived. Government's Answer of 2 Oct 2006 at 6. The appellant submitted no reply. Failure to follow the requirements of Article 32, UCMJ, "does not constitute jurisdictional error." Art. 32(e), UCMJ. Moreover, the appellant fails to allege and we find no prejudice because of these purportedly missing documents. *United States v. Murray*, 25 M.J. 445, 447-49 (C.M.A. 1988).

Even assuming no Article 34, UCMJ, advice letter was ever prepared, the appellant's failure to object or raise the issue at trial or during the post-trial review process until this appeal, waives this claim. R.C.M. 905(b)(1); *see United States v. Swan*, 45 M.J. 672, 679 (N.M.Ct.Crim.App. 1996); *see also United States v. Madigan*, 54 M.J. 518, 520 (N.M.Ct.Crim.App. 2000)("If no such advice was ever prepared . . . the referral . . . to a general court-martial was erroneous. However, the error is not a jurisdictional flaw, is not *per se* prejudicial error, and mandates reversal only if appellant suffered actual prejudice.")(quoting *United States v. Blaine*, 50 M.J. 854, 856 (N.M.Ct.Crim.App. 1999)(internal quotation marks omitted)).

We have examined the record of trial including all post-trial documentation and find no prejudice to a substantial right of the appellant. Although it would be error not to prepare and forward an Article 34, UCMJ, letter and to attach the document to the record of trial, we conclude that any error in this case was harmless beyond a reasonable doubt. Art. 59(a), UCMJ. The appellant's second assignment of error is without merit.

Conclusion

Accordingly, the approved findings and the sentence are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court