

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

**Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RICHARD L. BAILEY
GUNNER'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200800897
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 August 2008.

Military Judge: CAPT David Bailey, JAGC, USN.

Convening Authority: Commander, Navy Region Mid-Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: LCDR W.A. Record,
Jr., JAGC, USN.

For Appellant: LT Sarah Harris, JAGC, USN.

For Appellee: Maj Tai Le, USMC.

29 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of violation of a lawful general regulation and wrongful sexual contact, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. § 892 and 920. Contrary to the appellant's plea, the military judge also convicted him of an additional violation of Article 120, UCMJ, that the previously pleaded-to wrongful sexual contact was committed by placing the victim in

fear of physical injury or other harm, constituting abusive sexual contact. The approved sentence was confinement for eight months, reduction to pay grade E-1 and a bad-conduct discharge.

The appellant submitted two assignments of error, the first asserting that the military judge committed plain error by not dismissing the specification of wrongful sexual contact upon entering a finding of guilty to the abusive sexual contact specification, as multiplicitious for findings. The court notes that the military judge did specifically rule that he would consider the two Article 120 specifications multiplicitious for sentencing. Record at 368. The second assignment avers that the convening authority erred in attempting to execute the appellant's bad-conduct discharge.

We have considered the record of trial, the appellant's two assignments of error, the Government's answer and the appellant's reply. We will take corrective action in our decretal paragraph and, following that action, conclude that the findings and sentence, as modified herein, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The charges in this case stem from a single incident occurring in the office of the leading petty officer for the Honor Guard unit of Commander, Navy Region Mid-Atlantic. In this office, the appellant permitted a female shipmate to use a Government computer he was then logged onto. While the victim was seated at the computer, the appellant came up behind and alongside her and engaged in various acts of physical contact of a sexual nature.

The misconduct in this case was charged three ways under Article 120. Specification 1 alleged sexual contact causing bodily harm; the appellant pleaded not guilty to this specification and was so found. It was alleged in Specification 2 as abusive sexual contact and again in Specification 3 as wrongful sexual contact. Alternative charging is frequently a requisite practice, as the Government must perfect its case anticipating varying contingencies of proof. Given a single incident and single set of operative facts, the various theories of Article 120 pertain to the facts as developed by the court-martial, but they do not thereby necessarily state separate offenses. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F.

2008)(citing *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000)). In this case, the military judge erred in not dismissing Specification 3, alleging wrongful sexual contact (carrying a 1-year maximum sentence), upon finding the appellant guilty of the more aggravated abusive sexual contact alleged in Specification 2 (carrying a 7-year maximum sentence), for the same incident.

Multiplicity

"The prohibition against multiplicity is grounded in compliance with the constitutional and statutory restrictions against Double Jeopardy." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)(citation and internal quotation marks omitted); see also *United States v. Craig*, 67 M.J. 742 (N.M.Ct.Crim.App. 2009). We review multiplicity claims *de novo*. *United States v. Campbell*, 66 M.J. 578, 580 (N.M.Ct.Crim.App 2008), rev. granted, 67 M.J. 416 (C.A.A.F. 2009).

"Specifications are multiplicitious for findings if each alleges the same offense, if one offense is necessarily included in the other, or if they describe substantially the same misconduct in two different ways." *Campbell*, 66 M.J. at 581 (citing RULE FOR COURTS-MARTIAL 907(b)(3)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Discussion).

As to the first assignment of error, reviewing the matter for plain error and mindful of the holding in *United States v. Savage*, 50 M.J. 244, (C.A.A.F. 1999)(citing *Ball v. United States*, 470 U.S. 856 (1985)), we find the appellant has met his burden of showing there was error, that it was plain or obvious, and that there was prejudice. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). The prejudice took the form of an additional wrongful sexual contact conviction and increased punitive exposure generally.

The record of trial amply provides discussion on the position of the parties and legal analysis of the military judge in determining that Specification 3 was a lesser included offense of Specification 2, with civilian defense counsel in concurrence. Record at 46-49; 188; 307; 365.

While not enumerating wrongful sexual contact as a *per se* lesser included offense of abusive sexual contact, the Manual for Courts-Martial specifically acknowledges that, "[d]epending

on the factual circumstances," wrongful sexual contact can be a lesser included offense of abusive sexual contact. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45e(8). Such is the case here, with the only significant difference between the specifications being the additional element of placing the victim in fear, as proven in the contested portion of the court-martial. We take appropriate action as to findings in our decretal paragraph.

Unreasonable Multiplication of Charges

While raised as a matter of multiplicity for findings, this court also decides, in the context of the new Article 120, that the findings in their current form cannot stand as they present an unreasonable multiplication of charges. In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), the court accepted five factors in determining whether a multiplication of charges is unreasonable. The third factor addresses the prejudice inherent in "misrepresenting or exaggerating" an appellant's criminality. Separate and distinct from this, the fourth factor addresses whether the charges and specifications "unfairly increase" the appellant's punitive exposure. *Id.* at 338.

While the military judge's sentencing ruling mitigated any potential sentencing prejudice to the appellant arising from the Government's alternative charging methodology, the appellant was nonetheless prejudiced in that he was found guilty of an additional specification involving a sex offense when he should have been convicted of one specification under Article 120. Corrective action by the military judge with respect to findings was necessary. Again, we will take appropriate action as to findings in our decretal paragraph.¹

Conclusion

The finding of guilty to Specification 3 under Charge II is set aside and Specification 3 of Charge II is dismissed. In light of the military judge's ruling on multiplicity for sentencing, there is no change to the sentencing landscape or basis to reassess. See *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998)(citing *United States v. Sales*, 22 M.J. 305, 307 (1986)).

The remaining findings of guilty and sentence are affirmed.

¹ The appellant's second assignment of error is without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

For the Court

R.H. TROIDL
Clerk of Court