

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

**Before
J.A. MAKSYM, R.E. BEAL, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DAVID A. STROUD, JR.
CULINARY SPECIALIST SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201100145
GENERAL COURT-MARTIAL**

Sentence Adjudged: 14 December 2010.
Military Judge: CAPT Carole Gaasch, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.
Staff Judge Advocate's Recommendation: CDR T.F. De
Alicante, JAGC, USN.
For Appellant: LT Daniel Napier, JAGC, USN.
For Appellee: CDR K.L. Flynn, JAGC, USN; Capt Mark
Balfantz, USMC.

27 September 2011

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 one specification of aggravated sexual contact with a child and one specification of indecent liberty with a child in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The military judge sentenced the appellant to reduction to pay grade E-1, confinement for 5 years, and a dishonorable discharge. In his initial action of 3 March 2011, the convening

authority (CA) approved the sentence as adjudged, and except for that part of the sentence extending to a dishonorable discharge, ordered it executed. Pursuant to a pretrial agreement (PTA), the CA suspended any adjudged or automatic reduction in pay grade for a period of six months from the date of his action. Additionally, the CA waived automatic forfeitures for a period of six months from the date of his action, provided that the appellant established and maintained a dependent's allotment to be paid to his wife in the total amount of the waived forfeitures during the entire period of suspension. The PTA had no effect on the adjudged period of confinement or punitive discharge.

The appellant assigns one error: That the Government unreasonably multiplied the charges against him by parsing a single criminal act into two component parts alleging two criminal offenses. After considering the pleadings of the parties as well as the entire record of trial, 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was charged with three specifications in violation of Article 120, UCMJ, one of which was ultimately withdrawn and dismissed. Record at 166. One of the specifications to which the appellant pleaded guilty alleged aggravated sexual contact whereby the appellant intentionally touched the posterior of VCL, a child who had not attained the age of 12 years, with the intent to gratify his sexual desire. The other specification alleged "indecent liberties in the physical presence of V.C.L., a female under the age of 16 years, by exposing his penis, masturbating, and ejaculating, with the intent gratify his sexual desire." 3 June 2010 Charge Sheet. The appellant pleaded guilty excepting the word "masturbating." Record at 115. Both specifications alleged that the acts occurred on 7 May 2010, and the appellant's statements during his guilty plea colloquy confirmed that the acts took place almost contemporaneously.

The appellant was arraigned on 13 August 2010. *Id.* at 1. An Article 39(a), UCMJ, session was held on 16 September 2010 to litigate pretrial motions. *Id.* at 15. The appellant ultimately pleaded guilty on 14 December 2010. *Id.* at 115. A RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference was held prior to the 14 December session, which the

military judge recounted on the record. *Id.* at 109-15. There is nothing in the record indicating that the defense raised the issue of unreasonable multiplication of charges at any of these sessions. Prior to sentencing, the military judge asked whether either party saw any issue with multiplicity with regard to sentencing. The defense said, no. *Id.* at 167. The military judge further stated that she had thought about how since the appellant's acts were "essentially one course of conduct, there might be an issue with multiplicity for sentencing. But based on the facts as elicited, and the other evidence that's been provided to the court, I agree that these were distinct acts." *Id.* Again, there was no rejoinder from the defense.

On 28 April 2011, appellate defense counsel filed a motion, which was granted, to attach an affidavit from the trial defense counsel (TDC) in the matter. In it, TDC states that in the R.C.M. 802 conference held on 14 December 2010, either he or his co-counsel "briefly raised the issue of the possibility of unreasonable multiplication of charges (UMC) as to two charged offenses: aggravated sexual contact with a child, and indecent liberty with a child, under Article 120, UCMJ, but the military judge did not find the charges to be unreasonably multiplied." Affidavit of Trial Defense Counsel, at ¶ 2. He further avers that "This 802 conference occurred prior to the entry of pleas. The military judge did not summarize the 802 discussion specifically relating to the issue of UMC on the record." *Id.* at ¶ 3. On 31 May 2011, the Government filed a motion, which was granted, to attach an affidavit from the trial counsel (TC) in this matter. In it, the TC states that he has "no recollection of defense counsel or anyone else bringing up the issue of unreasonable multiplication of charges during the 802." Affidavit of Trial Counsel.

Discussion

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." See *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). We evaluate five factors in determining the issue of unreasonable multiplication of charges: (1) Did the appellant object at trial; (2) Is each specification aimed at distinctly separate criminal acts; (3) Does the number of specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting

of the charges? *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). "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). During this analytical process, we are mindful that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). "[T]he prohibition against unreasonable multiplication of charges allows courts-martial and reviewing authorities to address prosecutorial overreaching by imposing a standard of reasonableness." *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007) (citing *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)). If we conclude that the "piling on" of charges is extreme or unreasonable, then we may use our authority under Article 66 to take necessary remedial action. *Quiroz*, 55 M.J. at 338-39 (citing *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000) (*en banc*), *set aside and remanded on other grounds*, 55 M.J. 334 (C.A.A.F. 2001)).

After examining the entire record and considering the factors identified in *Quiroz*, 57 M.J. at 585-86, we conclude that the charges in this case were not unreasonably multiplied.

First, we note that the appellant did not raise this issue at trial. This significantly weakens his argument because this court has "considerable discretion" to determine whether the appellant "forfeited this issue by not raising it at trial." *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001). Accordingly, factor one does not weigh in his favor. See *Quiroz*, 53 M.J. at 607 (noting that "the failure to raise the issue at trial suggests that the appellant did not view the multiplication of charges as unreasonable" and that "[t]he lack of objection at trial will significantly weaken the appellant's argument on appeal"). The appellant now makes an affidavit-based claim that the issue was in fact raised at the trial level. As such, we look to *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). Our Article 66(c) fact-finding powers do not allow us to decide "disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits." *Ginn*, 47 M.J. at 243. However, there is no need for a fact-finding hearing when all of the evidence in the record "compellingly demonstrates" the accuracy of one party's recollection over another's. *Id.* at 244 (quoting *United States v. Perez*, 39 C.M.R. 24, 26 (C.M.A. 1968)) (internal quotation marks omitted).

In the present case, there is no evidence in the record of trial that this issue was ever raised. In fact, TDC did not even ask that the specifications be considered multiplicious for purposes of sentencing. We are fully aware that multiplicity and unreasonable multiplication of charges are distinct concepts, and we do not mean to conflate the two with this analysis. See *Paxton*, 64 M.J. at 490. However, when facing an affidavit-based claim as we do now, we must look at the record as a whole to see if additional fact-finding is necessary. We first note that when the military judge summarized the 14 December R.C.M. 802 conference, Record at 113-15, she made no mention that UMC had been discussed and neither counsel had any comment or addition to make to her summary. Additionally, it is the court's view that TDC's failure to even ask that the charges be considered multiplicious for sentencing demonstrates that the defense did not see any issue with unreasonable multiplication of charges at trial and it militates against us crediting TDC's claims in his affidavit now on appeal.¹ Therefore, applying the analysis set forth in *Ginn*, we find that the appellant's claim that the issue of unreasonable multiplication of charges was raised at the trial level is "conclusively refuted . . . by the files and records of the case" thus obviating the need to remand for an evidentiary hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Returning to *Quiroz*, we find that the second and third factors cut against the appellant as well, because the two specifications are aimed at distinctly separate criminal acts: the aggravated sexual contact specification deals with physical touching of the victim by the appellant whereas the indecent liberty specification targets actions taken by the appellant in the presence of the victim. The sole charge and the two specifications thereunder do not misrepresent or exaggerate the appellant's criminality. We note that the appellant could prevail on the fourth *Quiroz* factor because the aggravated sexual contact with a child specification has a 20-year maximum punishment and the indecent liberty with a child specification carries a 15-year maximum sentence. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), A12-4. However, the appellant negotiated a pretrial agreement with the CA for a 5-year cap on confinement,

¹ We do not mean to suggest that TDC was ineffective or that he is being dishonest in his affidavit relative to what he recalls from a distant R.C.M. 802 conference. On the contrary, the defense successfully litigated several motions which led to the appellant's release from pretrial confinement along with the issuance of administrative credit under R.C.M. 305(k). Plus, they successfully opposed the Government's motion for telephonic testimony of VCL when it was still believed that the appellant might plead not guilty. However, on the issue of unreasonable multiplication of charges, the defense never objected.

and the trial judge awarded 5 years' confinement as well. See Appellate Exhibit XXVII; Record at 202. In either case, the appellant's confinement is well below the jurisdictional maximum for either offense. Therefore, while the two specifications increased the appellant's maximum punitive exposure, nothing in the record demonstrates that it was unreasonable or prejudicial to the appellant. Finally, we find no evidence of prosecutorial overreaching or abuse in the drafting of the charges.

After a careful review of the record of trial, we find there was no "piling on of charges . . . so extreme or unreasonable as to necessitate the invocation of our Article 66(c), UCMJ, . . . power." *Quiroz*, 53 M.J. at 606 (internal quotation marks and citation omitted). Accordingly, we will not award any relief based on this assignment of error.

Conclusion

The findings and sentence as approved are affirmed.

For the Court

R.H. TROIDL
Clerk of Court