

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**AARON J. MAYS
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100499
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 10 June 2011.

Military Judge: LtCol Gregory Simmons, USMC.

Convening Authority: Commanding Officer, 5th Marine Regiment, 1st Marine Division (REIN), MarForPac, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: CDR Kimberly D. Hinson, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

13 March 2012

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 special court-martial convicted the appellant, pursuant to his pleas, of a three-day unauthorized absence and missing movement by design in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. The appellant was sentenced to

confinement for 10 months, forfeiture of \$978.00 pay per month for 10 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 90 days pursuant to a pretrial agreement.¹

In his sole assigned error, the appellant argues that the military judge committed plain error when he failed to dismiss the unauthorized absence offense as a lesser included offense of the missing movement. In response, the Government argues: 1) the appellant waived the issue for appeal, 2) unauthorized absence and missing movement are not facially duplicative, and 3) even if the issue was not waived, the appellant was not prejudiced.

Background

At trial, after announcing findings, the military judge *sua sponte* stated that he considered whether the two charges were multiplicitous and concluded they were not after reviewing *United States v. Baba*, 21 M.J. 76 (C.M.A. 1985), *United States v. Murray*, 17 M.J. 81 (C.M.A. 1983), and *United States v. Olinger*, 47 M.J. 545 (N.M.Ct.Crim.App. 1997), *aff'd* 50 M.J. 365 (C.A.A.F. 1999). The military judge then asked if counsel wished to comment on his findings. The defense counsel responded, "Yes, sir. I believe the facts in this case justify that finding, sir." Record at 47.

Discussion

The threshold question is whether or not the appellant waived appellate review of the multiplicity issue. Waiver is the intentional relinquishment or abandonment of a known right. When an appellant waives a waivable right at trial, it is extinguished and may not be raised on appeal. See *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (applying waiver to multiplicity issue where appellant unconditionally waived all waivable motions in pretrial agreement).

Multiplicity is a concept that derives from the Double Jeopardy Clause of the U.S. Constitution which prevents defendants from being punished twice for the same act. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). There is a presumption against the waiver of constitutional rights, and the

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

record must be clear that there was "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (citations and internal quotation marks omitted). Nonetheless, counsel may waive constitutional issues on behalf of their clients under non-exceptional circumstances. *Id.* at 157.

This court has previously addressed this particular issue in a companion case, *United States v. Peila*, NMCCA 201100500, unpublished op. (N.M.Ct.Crim.App. 24 Jan 2012). As in *Peila*, we view the present case as an appropriate case to apply the waiver doctrine.²

The appellant's case is significantly distinguishable from *Harcrow*, 66 M.J. at 156, because the law as to what constitutes multiplicitious charges on findings is well-settled. See *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010); *Paxton*, 64 M.J. at 490; *United States v. Craig*, 67 M.J. 742, 746 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010). The appellant declined to raise a multiplicity issue on his own and when the military judge raised the issue, he disavowed any entitlement to relief on that basis. Additionally, the appellant does not allege, nor do we find, any other exceptional circumstances attendant to this guilty plea. Thus, we find waiver.

Conclusion

The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

² Unlike other courts, the military Courts of Criminal Appeals are not bound by the waiver doctrine due to the awesome, plenary powers of review granted to them by Article 66(c), UCMJ. *United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010) (citing *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)).