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

BEFORE

J.W. ROLPH **C.L. SCOVEL** **J.D. HARTY**

UNITED STATES

v.

Brenton C. BIGGS
Private (E-1), U. S. Marine Corps

NMCCA 200501675 Decided 19 June 2006

Sentence adjudged 30 June 2004. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st Force Service Support Group, MARFORPAC, Camp Pendleton, CA.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LT AIMEE M. COOPER, JAGC, USNR, Appellate Defense Counsel
LT JUSTIN DUNLAP, JAGC, USNR, Appellate Government Counsel

HARTY Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy, false official statement, larceny (24 specifications), and obtaining services by false pretense, in violation of Articles 81, 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 921, and 934. The appellant was sentenced to confinement for 16 months, total forfeiture of pay and allowances, a $4,000.00 fine with a seven-month confinement enforcement provision, and a bad-conduct discharge. The convening authority approved the sentence as adjudged except for the fine, which was disapproved.

We have considered the record of trial, the appellant's two assignments of error claiming the multiple larcenies of U.S. currency were multiplicious for findings or an unreasonable multiplication of charges, and post-trial delay, and the Government's answer. We find 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. *See* Arts. 59(a) and 66(c), UCMJ.

Background

The appellant memorized LCpl M's automatic teller machine (ATM) card personal identification number (PIN), and later stole the ATM card. The appellant then conspired with another Marine to use the stolen ATM card to obtain U.S. currency and items of value. The appellant used LCpl M's ATM card on 23 different occasions and obtained more than $4000.00 in cash and items of value. Some of these transactions occurred on the same day and at the same ATM. In each case of multiple transactions on the same day, the appellant removed the ATM card and reinserted it into the ATM to obtain additional currency.

Multiplicity

In his first assignment of error, the appellant claims that under Charge III, certain specifications[1] alleging multiple larcenies on the same day, are multiplicious with each other, or are an unreasonable multiplication of charges. Appellant's Brief of 30 March 2006 at 6. The appellant also argues that because the larcenies occurred at approximately the same time and from the same ATM, the specifications should be consolidated into one specification for each date, because they were essentially one larceny. At trial, the appellant did not challenge any specification as being multiplicious with any other specification, and entered unconditional guilty pleas.

1. The Law

An unconditional guilty plea waives a multiplicity issue unless the offenses are "'facially duplicative,' that is, factually the same." *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)(citations omitted). Whether two offenses are facially duplicative is a question of law that we will review *de novo*. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002). If the challenged specifications are not factually the same, an appellate review of the multiplicity claim is not required under the guilty plea waiver doctrine. *Lloyd*, 46 M.J. at 24.

When the language contained in challenged specifications charged under the same Article is not facially duplicative, that is, identical, we will apply waiver without further review. If the language contained in challenged specifications charged under the same Article is identical, we will review the record as a whole to determine whether those specifications are factually the same. If they are factually the same, we will not find waiver, and will apply a multiplicity analysis.

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[1] Charge III, Specifications 10-11, 17-19, 21-22, and 23-24.

Even if we find waiver of the appellant's multiplicity claims, we must still decide whether multiple withdrawals from the same ATM, at substantially the same time and place, are but one larceny. "When a larceny of several articles is committed at substantially the same time and place, it is a single larceny . . ." and if someone "goes into a room and takes property . . . , there is but one larceny, which should be alleged in but one specification." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 46c(1)(h)(ii).

2. Facially Duplicative

Specifications 10 and 11 under Charge III allege that the appellant committed two larcenies on the same date from Rite Aid in the amounts of $4.68 and $27.53, respectively. Charge Sheet. Because the specifications allege two different amounts taken, these specifications are not facially duplicative, and, therefore, any multiplicity issue is waived. This same analysis and finding applies to Specifications 21 and 22, and 23 and 24, under Charge III, as well. In each of those sets of specifications, different amounts are alleged to have been taken.

Even if Specifications 10 and 11, under Charge III, were facially duplicative, thereby getting past the waiver issue, we would not grant relief based on multiplicity. During the providence inquiry, the appellant stated that he may have obtained a pack of cigarettes or a food item for $4.68 and something else for $27.53 by swiping the stolen ATM card through the point-of-purchase machine at the cash register. Record at 35-40. Because these transactions were recorded separately, we find that separate acts were required to accomplish each purchase. Therefore, these acts are separate and discrete acts, are not lesser included offenses of each other, and, therefore, are not multiplicious with each other.

Nor would we find that Specifications 21 and 22, and 23 and 24, under Charge III, are multiplicious. Specifications 21 and 22, under Charge III, allege two larcenies from the same victim on 23 March 2002, and Specifications 23 and 24, under Charge III, allege two larcenies from another victim on 24 March 2002. In each case, the appellant withdrew $200.00 on the first withdrawal and $100.00 on the second. Charge Sheet; Record at 52-58.

As to Specifications 21 and 22, the providence inquiry shows that the appellant inserted the stolen ATM card and withdrew $200.00, and then obtained $100.00 later on the same day by repeating the same procedure on "a separate occasion." Record at 54. The record also reflects, as to Specifications 23 and 24, that the second withdrawal was "on another occasion." *Id*. at 56. Because each ATM withdrawal occurred on a "separate occasion," or on "another occasion" than the prior withdrawal, we find that separate acts were required to accomplish each withdrawal. Therefore, the charged acts are separate and discrete acts, are

not lesser included offenses of each other, and, therefore, are not multiplicious with each other.

Specifications 17, 18, and 19, under Charge III, allege that the appellant committed three larcenies of U.S. currency in the amount of $100.00 each from the same ATM on the same date and from the same victim. Charge Sheet. The specifications read identically, and, therefore, are facially duplicative. We must determine from the record as a whole whether the charged acts are multiplicious with each other.

During the providence inquiry, the appellant stated that these three larcenies were committed "right after the other" by inserting the stolen ATM card into the ATM, withdrawing $100.00, removing the ATM card, inserting the ATM card a second time "some moments later," withdrawing another $100.00, withdrawing the ATM card, inserting the ATM card a third time, and again withdrawing $100.00 in currency. Record at 48. Because these transactions were achieved by three separate sets of actions to obtain each $100.00 withdrawal, we find that separate acts were required to accomplish each larceny. Therefore, the charged acts are separate and discrete acts, are not lesser included offenses of each other, and, therefore, are not multiplicious with each other.

3. One Larceny

Our sister court has found that multiple back-to-back withdrawals of U.S. currency from the same ATM with a stolen credit card was but one larceny. *United States v. Clemente*, 46 M.J. 715 (A.F.Ct.Crim.App. 1997). There, the accused left the stolen card in the ATM while he entered the stolen PIN multiple times and obtained funds on multiple tries, interspersed with failed attempts, without removing the card. The court framed the issue as "whether the closely related acts of removing money several times from an ATM which occurred at the same place and time, during a single ATM visit, can be charged as multiple thefts under Article 121, UCMJ," and determined that multiple withdrawals, under these facts, was a single larceny. *Id*. at 718.

While we agree with our sister court based on the facts in *Clemente*, we find that case and the appellant's case are distinguished by the action taken with the stolen cards. Here, the appellant removed the stolen card from the ATM after each transaction and began a new transaction *ab initio* "some moments later," Record at 48, or on "a separate occasion," *Id*. at 54, or "on another occasion," *Id*. at 56. Under these circumstances, we believe that the record as a whole demonstrates that the challenged specifications are not the equivalent of stealing several items from the same place at the same time. *See* MCM, Part IV, ¶ 46c(1)(h)(ii).

We believe that the appellant's fact pattern is more analogous to someone stealing property, removing that property to another location away from the original point of larceny, and then returning to the prior location to steal additional property. Each time the appellant removed the currency and the ATM card, that specific larceny was complete. The appellant subsequently inserted the stolen ATM card and the victim's PIN in order to again gain entry into the location where the prior larceny occurred in order to commit an additional but independent larceny. Therefore, each larceny was a discrete act, separately punishable. S*ee United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996)(holding that separate convictions are allowed for distinct or discrete-act offenses in accordance with the number of discrete acts).

Under these circumstances, we also find that the challenged specifications are not one larceny, but rather separate larcenies committed on the same date. This assignment of error is without merit.

Unreasonable Multiplication of Charges

As part of his first assignment of error, the appellant argues in the alternative, that if the specifications addressed above are not multiplicious, then they are an unreasonable multiplication of charges, and should be consolidated. Appellant's Brief at 7.

To determine whether there has been an unreasonable multiplication of charges, we consider five factors set forth in *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). Applying these factors to the appellant's case, we find no unreasonable multiplication of charges. First, the appellant did not object at trial. Second, the larcenies required separate acts of entry into ATMs and point-of-sale card readers, and are, therefore, directed at separate and distinct criminal acts. For the same reason, we conclude that the method of charging did not exaggerate the appellant's criminality. With respect to the last two *Quiroz* factors, the method of charging the appellant did not inappropriately expose him to greater punishment, nor is there any evidence of prosecutorial overreaching. This assignment of error is without merit.

Post-Trial Delay

For his second assignment of error, the appellant claims that a delay of 566 days from date of sentencing to the docketing of this 94-page guilty plea case has denied the appellant due process. Appellant's Brief at 10.

We consider four factors in determining if post-trial delay violates appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) appellant's assertion of the right

to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id*. In the instant case, there was a delay of 566 days from the date of sentencing to the date of docketing.[2] We find this delay to be facially unreasonable, triggering a due process review.

We balance the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, reasons for the delay, the Government points to confusion concerning who was to perform the post-trial review function for units that deployed to Iraq, and to personnel reductions resulting from deployments. These explanations only concern the delay from the date the record was authenticated until the CA took his action -- a total of 273 days.[3] There is no explanation for why it took 222 days to authenticate this 94-page record of trial. With respect to the third factor, we find no evidence that appellant asserted his right to timely post-trial review prior to filing his Brief and Assignments of Error on 30 March 2006. Finally, regarding the fourth factor, the appellant claims any delay that triggers a due process analysis should also create a presumption of prejudice. Appellant's Brief at 13. This position is contrary to our superior court's guidance on post-trial delay and prejudice. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). We do not find any material prejudice to the appellant's substantial rights. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohey*, 60 M.J. at 103; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F 2002). Considering the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc), we decline to do so.

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[2] Sentence was imposed on 30 June 2004, and the record was docketed with this court on 17 January 2006.

[3] The record was authenticated on 7 February 2005, and the CA took action on 7 November 2005.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge ROLPH and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court