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

BEFORE

J.W. ROLPH **C.L. SCOVEL** **E.E. GEISER**

UNITED STATES

v.

DUSTIN M FRITZ
Corporal (E-4), U. S. Marine Corps

NMCCA 200600601 Decided 21 November 2006

Sentence adjudged 08 September 2005. Military Judge: R.H. Kohlmann. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

LT AIMEE M. SOUDERS, JAGC, USNR, Appellate Defense Counsel
CAPT STEPHEN WHITE, JAGC, USNR, Appellate Defense Counsel
LT JESSICA M. HUDSON, JAGC, USNR, Appellate Government Counsel
LCDR DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

GEISER, Senior Judge:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a general court-martial of conspiracy to commit larceny, conspiracy to wrongfully dispose of stolen military property, dereliction of duty, and wrongful disposition of military property, in violation of Articles 81, 92, and 108, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 908. The appellant was sentenced to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of nine months for a period of 12 months from the date of his action as provided for in the appellant's pretrial agreement.

The appellant raises four assignments of error. First, the appellant asserts that Specification 1 of Charge I (conspiracy to commit larceny of military property) and Specification 2 of Charge I (conspiracy to wrongfully dispose of the same military property) reflect an unreasonable multiplication of charges (UMC).

Second, the appellant avers that charging a conspiracy to dispose of military property by giving the property to a co-conspirator and separately charging the act of disposing of the property to the same co-conspirator violates Wharton's Rule. Third, the appellant states that charging a conspiracy to dispose of military property by giving the property to a co-conspirator and separately charging the act of disposing of the property to the same co-conspirator constitutes UMC. Finally, the appellant asserts that his sentence is inappropriately severe and disparate to the sentences adjudged to his co-conspirators.

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 was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was an administrative supply clerk assigned to the fiscal section of the Headquarters Group of II Marine Expeditionary Force (HQ, II MEF). In this capacity, the appellant was one of those responsible to execute purchases of items ordered by various sections within the command. The appellant was authorized to execute purchases under $2500 through use of a command credit card assigned to him for that purpose. Purchases over $2500 were executed through the Purchase Request Builder system (PR Builder), a computerized purchasing program.

Use of the latter system required the appellant to copy purchase data from a paper requisition form into the appropriate fields of the computer program. The appellant was only authorized to order items that had been properly approved by a designated command official who would indicate such approval by signing the paper requisition form. In order to enhance security, the appellant's command severed the purchasing function from the comptroller function which involved approving disbursement of the specific funds needed to make a purchase. Thus, while the appellant could modify purchase orders, he did not have the means to independently change the total amount approved for a particular purchase.

Between August and September 2004, the appellant entered into a series of two to three discussions with Corporal (Cpl) Sanchez about circumventing the purchasing/disbursement system to their own advantage. Cpl Sanchez was an administrative clerk in the comptroller section whose duties included documenting approved disbursements of funds for purchases executed by the appellant's section. Similar to the appellant, Sanchez was only authorized to execute disbursements that had previously been approved by the Comptroller or other authorizing official.

The appellant and Cpl Sanchez noted that several sections were ordering 50" plasma television sets for their work spaces.

The appellant and Cpl Sanchez conspired to order an extra television valued at approximately $5000. The plan involved the appellant changing the purchase number from 1 to 2 on the next order to come through him. For his part, Cpl Sanchez would modify comptroller records to increase the authorized disbursement amount to cover the additional purchase. It was agreed that the appellant would notify Cpl Sanchez when the television arrived and Sanchez would take the extra television from the supply storage area to his own quarters.

The television arrived in September 2004 and the appellant notified Sanchez. Sanchez, however, never came to get the television. The reason for his failure to follow through with the plan was never stated on the record. The appellant thereafter became concerned that the extra television would eventually be discovered. He approached another Marine, Lance Corporal (LCpl) Cappon, and offered him the television if he would come and pick it up from the supply storage area. Cappon agreed. In order to facilitate the pick-up, the appellant prevailed on an unwitting subordinate with access to a forklift to move the television from the main storage area to an annex room in the same building. The appellant then provided Cappon a key to the building permitting Cappon to evade security and remove the television. The appellant visited Cappon's room shortly thereafter apparently to see for himself that the television had been removed.

The appellant pled and was found guilty of conspiring with Cpl Sanchez to steal the television, and then subsequently conspiring with LCpl Cappon to wrongfully dispose of the television. He also pled and was found guilty of the wrongful disposition of the television and dereliction of duty for altering the number of televisions to be purchased in the PR Builder system.

Unreasonable Multiplication of Charges

In his first assignment of error, appellant contends that Specification 1 of Charge I, alleging a conspiracy between the appellant and Cpl Sanchez to steal a 50" plasma television, and Specification 2 of Charge I, alleging a separate conspiracy with LCpl Cappon to wrongfully dispose of the same 50" plasma television, constitutes UMC. Appellant's Brief of 31 Jul 2006 at 4. We disagree.

UMC is a separate and distinct concept from multiplicity. *See 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 UMC stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.*

This Court applies five factors in evaluating a claim of UMC:

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?

See 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."). Applying these factors to appellant's case, we find that there has not been UMC.

With respect to the first factor, we note that the appellant did not object at trial, which significantly weakens his argument on appeal. *United States v. Martinezmaldonado*, 62 M.J. 697, 699 (N.M.Ct.Crim.App. 2006); *rev. denied*, 63 M.J. 466 (C.A.A.F. 2006). Regarding the second factor, each of the conspiracies charged in the instant case includes distinctly separate criminal acts. The initial conspiracy between the appellant and Cpl Sanchez contemplated the wrongful entry of inaccurate data into computerized supply and fiscal systems as well as the subsequent removal of the television from command supply spaces. That conspiracy came to an end when Cpl Sanchez, for whatever reason, declined to continue with the scheme after the television arrived and was available for pick-up. The second conspiracy, initiated by the appellant over one month later, though still focused on the same television, involved a new co-conspirator and a new plan. Under the new conspiracy, the appellant convinced an unwitting junior Marine to move the box containing the television to a less-frequented part of the building in order to limit the possibility of discovery. It also involved the appellant providing a key to the building to LCpl Cappon so that his new co-conspirator could avoid security when he took the television.

The number of charges does not exaggerate or misrepresent the appellant’s criminality or unreasonably increase the appellant’s punitive exposure. When the appellant realized that Cpl Sanchez was not going to follow through with his final part of the conspiracy, the appellant could simply have left the television where it was without further action. Instead, the

appellant purposefully sought out a new co-conspirator to remove the television from the storage area and even involved an unwitting fourth Marine to move the television to a less-frequented area of the building. These actions were not contemplated in the first conspiracy with Cpl Sanchez and were aimed less at theft than at concealing the appellant's earlier actions from discovery. Finally, the appellant fails to offer and we do not find any evidence of prosecutorial overreaching or abuse in the drafting of the charges. We conclude, therefore, that Specifications 1 and 2 of Charge I do not reflect UMC.

Wharton's Rule and UMC

The appellant asserts that charging a conspiracy to wrongfully dispose of military property by giving the property to a co-conspirator and separately charging the act of disposing of the property to the same co-conspirator violates Wharton's Rule. Alternatively, the appellant avers that charging the conspiracy and wrongful disposition detailed above constitutes UMC. We disagree with both assertions.

As correctly noted by the military judge at trial (Record at 61-62) and the Government on appeal, Wharton's Rule applies only to substantive offenses that *require* concerted criminal activity between two or more individuals to constitute the offense. *United States v. Crocker*, 18 M.J. 33, 37 (C.M.A. 1984). It does not apply to situations such as the one at bar in which the circumstances surrounding a particular substantive offense coincidently happen to result in such concerted criminal activity. Examples of classic Wharton's Rule substantive offenses which by definition require the concerted activity of at least two individuals include bigamy, adultery, and incest. *Id.* (quoting *Iannelli v. United States*, 420 U.S. 770, 782-84 (1975)).

The wrongful disposition of military property can be achieved by a single individual. The fact that, in the instant case, two individuals conspired to effect the wrongful disposition of the television and the fact that one of the individuals ended up with the television does not create a violation of Wharton's Rule. With respect to the assertion of UMC, the Government's decision to charge conspiracy to wrongfully dispose of military property as well as the actual wrongful disposition of that property was not objected to at trial. The charges and specifications reflect distinctly separate criminal acts, do not in any way misrepresent or exaggerate the appellant's criminality, and do not unreasonably increase the appellant's punitive exposure.

It is well-settled that conspiracy can generally be separately charged and punished along with any crime which may be the object of that conspiracy. *Iannelli*, 420 U.S. at 777. The rationale for this principle is that "[a] conspiracy, [which] is a partnership in crime . . . has ingredients, as well as implications, distinct from the completion of the unlawful

project." *Pinkerton v. United States*, 328 U.S. 640, 644 (1946). The appellant does not aver, and we do not find, any evidence of prosecutorial overreaching or abuse in the drafting of the charges. We conclude, therefore, that a finding of guilty to Specification 2 of Charge I and Charge III and its specification does not violate Wharton's Rule or reflect UMC.

Inappropriately Severe and Disparate Sentence

The appellant argues that his sentence is inappropriately severe and highly disparate from the punishment awarded to his two co-conspirators, Cpl Sanchez and LCpl Cappon. As a general rule, a court-martial may impose any legal sentence that it deems appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Sentence appropriateness involves the "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In raising the issue of sentence disparity, the appellant has the burden of "demonstrating that any cited cases are 'closely related' to his . . . case and that the sentences are 'highly disparate.'" *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982).

The Government appears to concede that LCpl Cappon's case is closely related to the appellant's and should be considered. With respect to Cpl Sanchez, however, the Government argues that we should not consider the fact that his case was referred to nonjudicial punishment as such disposition is not a court-martial conviction and is a matter of discretion for the convening authority. We disagree with the latter assertion and will consider the resolution of both co-conspirators' cases. *See United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R 1994).

LCpl Cappon was convicted at a general court-martial of conspiracy to wrongfully dispose of military property, wrongful disposal of military property, and receiving stolen property. He was sentenced to confinement for five months, forfeiture of $1,000.00 pay per month for a period of five months, and reduction to pay grade E-1. Cpl Sanchez's case was initially referred to a general court-martial but, pursuant to a pretrial agreement, was resolved at nonjudicial punishment. Cpl Sanchez was found guilty of larceny and was sentenced to 11 days restriction, forfeiture of $820.00 pay per month for a period of two months, and reduction to pay grade E-3. Staff Judge Advocate's Recommendation of 19 Jan 2006 at 3-4.

While the appellant is correct that both LCpl Cappon and Cpl Sanchez were active participants in various aspects of the schemes and acts to which the appellant pled guilty, the appellant was the only individual of the three who was involved

in both schemes. Further, we note that, although Cpl Sanchez participated in the financial chicanery that facilitated the theft of the television, he, for whatever reason, elected not to follow through by actually taking the television. LCpl Cappon, while he was personally enriched when he took the television, played no part in the earlier fiscal malfeasance that permitted the theft to occur. Further, the appellant's actions were carried out while he occupied a position of trust while Cappon did not. While Sanchez and Cappon were guilty of offenses, neither participated in the schemes to the extent and for the length of time that the appellant did.

Based upon the entire record, we find that the appellant's sentence is not inappropriately severe for these very serious breeches of trust. Art. 66(c), UCMJ. Given the appellant's previous nonjudicial punishment, his conscious decision to involve other Marines in his criminal enterprise, and mindful of the appellant's character and background, we are convinced that the sentence is appropriate in all respects for the offenses and this offender. The maximum punishment authorized for all of the appellant's offenses included, *inter alia*, over 40 years of confinement and a dishonorable discharge. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). We further find that there is a rational basis for the disparity between the appellant's sentence and those of his co-conspirators. We will not second-guess the convening authority's decision to treat these cases differently.

Conclusion

The approved findings and sentence are affirmed.

Chief Judge ROLPH and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge SCOVEL participated in the decision of this case prior to commencing terminal leave.