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

BEFORE

W.L. RITTER **K.K. THOMPSON** **J. MULROONEY**

UNITED STATES

v.

Mauricio GONZALEZ
Gas Turbine System Technician (Electrical) First Class (E-6), U. S. Navy

NMCCA 200400142 Decided 24 May 2006

Sentence adjudged 6 May 2003. Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Personnel Command, Millington, TN.

Col KATHERINE GUNTHER, USMCR, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

MULROONEY, Judge, delivered an opinion, Parts I, III, and IV of which are for the court and Part II of which concurs in the result. RITTER, Senior Judge, and THOMPSON, Judge, joined Parts I, III, and IV of that opinion. RITTER, Senior Judge, delivered an opinion that is the opinion of the court as to Part II. THOMPSON, Judge, joins in that opinion.

MULROONEY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to mixed pleas, of two specifications of attempted larceny, one specification of fleeing apprehension, two specifications of resisting apprehension, two specifications of larceny, two specifications of assault, and three specifications of unlawfully entering the Navy Exchange, Millington, in violation of Articles 80, 95, 121, 128, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 895, 921, 928, and 930.

The appellant was sentenced to confinement for two years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence and, except for the dishonorable discharge, ordered the punishment executed.

The appellant claims that (1) he was denied his right to a speedy trial, (2) he was subjected to an unreasonable multiplication of charges, and (3) the record of trial is incomplete.

We have examined and considered the record of trial, the appellant's assignments of error as well as the Government's answer and motion to attach. We conclude that, after taking corrective action, the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Part I - Speedy Trial

In the appellant's first assignment of error, he asserts that the military judge erred in denying his motion to dismiss based on what he avers to be a denial of speedy trial, as provided by Article 10, UCMJ. The appellant asks this court to set aside the findings and sentence and dismiss the charges with prejudice. We disagree and decline to grant the requested relief.

The appellant raised this issue below and it was ably litigated. After the hearing, the military judge concluded that the appellant was not denied his Article 10, UCMJ, right to a speedy trial. In reviewing the military judge's speedy trial ruling, we acknowledge that the findings of fact made by the military judge are entitled to "`substantial deference and will be reversed only for clear error.'" *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)(quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)). By contrast, the military judge's legal conclusions pertaining to the speedy trial decision must be reviewed *de novo. United States v. Cooper,* 58 M.J. 54, 59 (C.A.A.F. 2003); *see United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

Once an appellant is placed in pretrial confinement, immediate measures must be taken to notify him of the charges against him and either bring him to trial or dismiss the charges. Art. 10, UCMJ. Although the Government is required to exercise reasonable diligence in bringing an accused to trial, proof of constant motion is not necessary. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Article 10, UCMJ does not require instantaneous trials, but the Government is required to take immediate steps to try an accused in pretrial confinement.

United States v. Hatfield, 44 M.J. 22, 24 (C.A.A.F. 1996). Furthermore, for an appellant to prevail on an assertion that he was deprived of his right to a speedy trial, he must in the first instance come forward and make a *prima facie* showing or colorable claim that he is entitled to relief. *United States v. McLaughlin*, 50 M.J. 217, 219 (C.A.A.F. 1999)(95 days pretrial confinement, absent showing of prejudice, speedy trial demand, or that case was simple for Government to investigate, does not set forth a prima facie case for speedy trial relief.) We will assume, for the purposes of this decision, that the appellant has established the requisite "*prima facie* showing or colorable claim" to merit consideration of the issue on appeal. *McLaughlin*, 50 M.J. at 219.

The factors we are required to consider include: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). We will also consider, as did the *Birge* court, the following specific factors: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial agreement; (2) was credit awarded for pretrial confinement on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the appellant suffer any prejudice to the preparation of his case as a result of the delay. *Id*.

Regarding the length of, and reasons for the delay, the appellant was in pretrial confinement for 88 days at the time of his arraignment. In support of its position at the hearing before the military judge, the Government relied upon several (admittedly modest) logistical obstacles it encountered (including, but not limited to, the imminent mobilization of the Article 32 investigating officer, a Marine reservist,) the holiday season, and investigation of additional incidents after the appellant's arrest. The appellant interposed no demand for a speedy trial below, and the prejudice alleged below related to family hardships which resulted from the appellant's incarceration. The pleas were mixed and credit was awarded for pretrial confinement. Neither Government bad faith, nor prejudice to the defense case as a result of any delay was alleged or evident in the record.

We find that, notwithstanding periods of diminished prosecutorial activity, the Government exercised "reasonable diligence" in bringing the appellant to trial. S*ee Cooper,* 58 M.J. at 59; *Kossman*, 38 M.J. at 262. Accordingly, we sustain the finding of the military judge that the appellant was not denied his right to a speedy trial.

Part II - Unreasonable Multiplication of the Charges

The appellant seeks dismissal of numerous specifications based upon his assertion that they reflect an unreasonable multiplication of charges. It is unanimously agreed that relief is warranted. There is likewise unanimous agreement regarding the extent of the relief that is appropriate. As discussed below, the panel members diverge only with respect to the basis upon which relief will be granted.

When loss prevention personnel at the Navy Exchange (NEX) at the Naval Support Activity (NSA) Millington, Tennessee, observed an individual apparently stashing merchandise in the NEX Garden Shop, they contacted NSA Midsouth Security. Midsouth Security set up an after-hours surveillance of the stashed merchandise. The surveillance team was comprised of NEX loss prevention employees monitoring the stashed merchandise via camera inside the Garden Shop and several members of Midsouth Security on watch in the parking lot.

While manning his parking lot surveillance post, Boatswain's Mate First Class (BM1) Michael Vinson observed a blue Honda sedan slowly approach the Garden Shop and circle back. The appellant alighted from the vehicle and headed directly for the Garden Shop. When loss prevention employees gave the word that the appellant had picked up the stashed merchandise, Master-at-Arms Second Class (MA2) Terrance Stallings informed the team, via radio, and gave the order to apprehend. Petty Officers Vinson and Stallings met in the parking lot and, as they approached the appellant, they observed him put something down near an outside automatic teller machine (ATM). When BM1 Vinson identified himself as a member of security, the appellant held up his fists and assumed a hostile posture. BM1 Vinson attempted to take the appellant by the arm, but the appellant struggled with him. The two men landed on the ground and BM1 Vinson could feel the appellant repeatedly tugging at, and grabbing for, BM1 Vinson's 9-millimeter Baretta handgun. BM1 Vinson managed to hold onto his weapon and the appellant leapt to his feet, struck at Stallings, and ran away into the darkness.

Petty Officers Stallings and Vinson lost sight of the appellant in the vicinity of Building 791. Also joining the search was Signalman First Class (SM1) John Sloane, the Midsouth Security Operations Officer, and Sergeant (Sgt) Robert Matthews, the Midsouth Security Watch Commander. When they ran the license tag on the blue Honda, they learned that it was registered to the appellant, and that he was assigned to Building 791.

As the four men approached Building 791, Sloane announced their presence and the group checked out a small, enclosed area containing an air conditioning unit. When Sloane peeked around

the air conditioner and noticed the appellant's feet, the appellant started yelling and charged at him. SM1 Sloane, who had drawn his weapon, was hit by the appellant in the face and fell down. When the appellant got past SM1 Sloane, he turned toward Sgt Matthews, crouched down, and charged at him. Sgt Matthews tackled the appellant, the two struggled on the ground. While trying to extricate himself, the appellant kicked Sgt Matthews several times in the chest. Members of the team were pleading with the appellant to stop resisting. When it appeared that attempts to reason with the appellant would bear no fruit, MA2 Stallings deployed a two-second burst of a chemical agent and the appellant yielded.

Security personnel encountered the appellant twice on the night he was apprehended: once by the ATM, and subsequently, by Building 791. On appeal he claims the Government employed an unreasonable multiplication of charges relative to each of the two encounters.

The appellant argues that charging him with, and convicting him of, both resisting apprehension and flight from apprehension (Charge II, Specifications 1 and 2) constitutes an unreasonable multiplication of charges. It is clear from both the language in the specifications as well as the evidence adduced at the court-martial, that these specifications address the incident between the appellant, Petty Officers Vinson and Stallings, that occurred at the initial encounter, by the ATM outside the NEX (the ATM encounter).

Likewise, the appellant avers that it was unreasonable to charge and convict him of separate assaults on Sgt Matthews and SM1 Sloane (Charge IV, Specifications 2 and 3) along with a resisting apprehension specification (Charge II, Specification 3.) The specification language and evidence on the merits make it clear that these specifications relate to the subsequent encounter which took place outside Building 791, where the appellant was ultimately subdued (the Building 791 encounter).

In determining whether there is an unreasonable multiplication of charges, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *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).

Regarding the first *Quiroz* factor, although the appellant entered mixed pleas, he did not raise the issue of unreasonable multiplication of charges below. Thus, consideration of this factor does not advance his position on appeal.

In applying the second *Quiroz* factor (whether the challenged specifications are aimed at distinctly separate criminal acts) to the ATM encounter, we note that to sustain a conviction for fleeing apprehension, "[t]he flight must be active, such as running or driving away." MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2002 ed.), Part IV, ¶ 19(c)(2). With respect to resisting apprehension, [t]he resistance must be active, such as assaulting the person attempting to apprehend." MCM, Part IV, ¶ 19(c)(1)(c). We find that the two provisions are directed at distinctly criminal acts. On the facts of this case, it was clearly possible for the appellant to resist the law enforcement officers attempting to place him in custody at the ATM without running away. These specifications were aimed at distinctly separate acts and consideration of this factor does not advance the appellant's position relative to the fleeing and resisting apprehension specifications (Charge II, Specifications 1 and 2.)

Application of the second *Quiroz* factor to the resisting apprehension and assault specifications that arose from the Building 791 encounter yields a different conclusion. On the facts of this case, the assaults against Sgt Matthews and SM1 Sloane (Charge IV, Specifications 2 and 3) constituted the "active" resistance that was required to sustain the conviction for resisting apprehension (Charge II, Specification 3.) *Id.* The appellant bowled over Sm1 Sloane, causing a blow to his head and struggled and kicked Sgt Matthews until MA2 Stallings subdued him with a chemical agent. Simply put, on these facts, the appellant's actions in assaulting Sgt Matthews and SM1 Sloane *was* the manner of the active resistance required to sustain the resisting apprehension conviction. *Cf. United States v. Jean*, 15 M.J. 433, 434 (C.M.A. 1983)(assault and resisting apprehension found multiplicious for findings purposes.) Thus, consideration of this factor militates in favor of the appellant concerning Charge IV, Specifications 2 and 3.

Application of the final three *Quiroz* factors, favor the Government with respect to the ATM encounter fleeing and resisting apprehension specifications (Charge II, Specifications 1 and 2.) The appellant was correctly charged and convicted of actively resisting the efforts to lawfully apprehend him and fleeing the scene thereafter. The separate crimes were fairly charged and proved with no evidence of prosecutorial overreaching.

The application of the last three factors to the Building 791 resisting apprehension (Charge II, Specification 3) and

assault specifications (Charge IV, Specifications 2 and 3) presents a closer question. Although the facts as charged and adduced in these specifications present a temporally compact active resistance to an attempt to apprehend the appellant, he stands convicted of three specifications. Resisting apprehension carries a maximum sentence of a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for one year. MCM, Part IV, ¶ 19(e)(1). Assault upon a person in the execution of law enforcement duties carries a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years. MCM, Part IV, ¶ 54(e)(5). Although the potential for prejudice in this regard was somewhat ameliorated by the fact that the case was tried before a military judge sitting as a general court-martial, the fact remains that under the sentencing scheme employed by the Government, the appellant was subjected to a maximum punishment which included a more severe discharge and seven years of confinement as opposed to one.

Accordingly, after a careful balancing of the factors set forth in *Quiroz*, I would affirm the fleeing and resisting apprehension specifications that relate to the ATM encounter (Charge II, Specifications 1 and 2,) and would set aside and dismiss the assault specifications that relate to the Building 791 encounter (Charge IV, Specifications 2 and 3) as an unreasonable multiplication of charges and reassess the sentence. In my view, this disposition based upon unreasonable multiplication of charges obviates the need to examine the multiplicity issue which was not raised before the military judge and not specifically raised on appeal. The plain error analysis engaged in by the majority of this panel does no violence to the law, but in my view, this approach is the correct one.

Part III - Incomplete Record of Trial

In his final assignment of error, the appellant avers that the record of trial is incomplete. Specifically, the appellant alleges that the requirements of Article 54(c)(1)(A), UCMJ have not been satisfied because the record does not contain a verbatim transcript of witness testimony taken at the Article 32, UCMJ, investigation, as well as four exhibits considered in sentencing.[1]

[1] Interestingly, although Article 54(c)(1), UCMJ, requires the preparation of a verbatim record when the adjudged sentence includes a discharge, and R.C.M. 1103(f)(1) precludes the approval of a bad-conduct discharge without an adequate record of trial, the appellant has petitioned for relief in the form of approval of only so much of the sentence that provides for a bad-conduct discharge, confinement for six months and forfeiture of two-thirds pay for six months.

Without conceding error, the Government has moved to attach the missing exhibits as well as the verbatim transcript referred to by the appellant on appeal.2 The appellant has offered no objection, and that motion is granted.

A "complete record of the proceedings and testimony" must be prepared for every general court-martial in which the adjudged sentence includes a bad-conduct discharge. Art. 54(c)(1)(A), UCMJ. "A 'complete record' is not necessarily a 'verbatim record.'" *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). The Constitution does not require a verbatim record of a criminal trial. *Id.* The President has directed that a complete record in a general court-martial in which a bad-conduct discharge was adjudged shall include, in addition to a transcript of the trial itself, exhibits which were received in evidence and any appellate exhibits. R.C.M. 1103(c)(1). Where an omission from the record of trial is substantial, it raises a presumption of prejudice that the Government must rebut. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979).

While there is no requirement that the record of a court-martial contain the verbatim transcript of Article 32 witness testimony, the absence of prosecution exhibits that were considered in sentencing would obviously present a stronger argument in favor of relief and would, in our view raise a presumption of prejudice. However, the attachment of the missing exhibits and the Article 32 transcript renders the issue moot. We need not reach the issue of whether the omissions were substantial and decline to do so as a matter of discretion.

Part IV - Conclusion

The appellant's convictions of Charge IV, Specifications 2 and 3, alleging a violation of Article 128, UCMJ, are set aside. Charge IV is ordered dismissed. The remaining findings are affirmed.3

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), *United States*

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[2] Actually, this is the Government's second attempt at accomplishing this task. During the Government's case on the merits, the trial counsel asked the military judge to attach the transcript of BM1 Vinson's Article 32 testimony as an appellate exhibit after it was used by the defense to cross examine him. The military judge declined to do so, stating "No. It's the Article 32. I mean the Article 32 is in the record." Record at 331.

[3] Although the appellant has correctly brought to our attention that the court-martial order in the case fails to reflect that he was found guilty of Charge IV, Specification 2 by exceptions and substitutions, the relief granted above renders any error in this regard moot.

v. Peoples, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Having carefully reassessed the sentence, we find it to be appropriate, and no greater than that which would have been imposed if the error had not occurred. Accordingly, we affirm the sentence approved on review below.

RITTER, Senior Judge:

Part II - Multiplicity

The court adopts the factual recitation from Part II of Judge Mulrooney's opinion concerning the appellant's contention that his charges were unreasonably multiplied. The court also adopts his discussion and conclusions on this assignment of error, with one exception. Rather than finding Specifications 2 and 3 of Charge IV to be an unreasonable multiplication of Specification 3 of Charge II, we find the former charge and specifications to be multiplicious with the latter charge and specification.

The Discussion of RULE FOR COURTS-MARTIAL 907(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) states "[a] specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other." *See also United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002); *United States. v. Cherukuri*, 53 M.J. 68, 72 (C.A.A.F. 2000). Since multiplicity was not raised at trial, the issue is waived unless there was plain error. *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). Waiver may be overcome if the charges are "facially duplicative that is, factually the same." *Id*. (quoting *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)(internal quotation marks omitted)). This determination is based on the record of trial, as well as the specifications themselves. *Lloyd*, 46 M.J. at 23.

Assault is a lesser included offense of resisting apprehension. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 19(d)(1). We conclude that the assaults alleged in Specifications 2 and 3 of Charge IV facially duplicate the force used to actively resist apprehension, as charged in Specification 3 of Charge II. Accordingly, we hold that finding

the appellant guilty of Specifications 2 and 3 of Charge IV constituted plain error and that these lesser included offenses are hereby set aside and dismissed. *Britton*, 47 M.J. at 199.

For the Court

R.H. TROIDL
Clerk of Court