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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Tory H. HESTER
Aviation Ordnanceman Third Class (E-4), U.S. Navy

NMCCA 200100325 Decided 15 March 2005

Sentence adjudged 11 July 2000. Military Judge: J.P. Winthrop. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Force, United States Atlantic Fleet, Norfolk, VA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
LT CHRISTOPHER BURRIS, JAGC, USNR, Appellate Government Counsel

SUSZAN, Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of attempted larceny, conspiracy to commit larceny, and making a false official statement, in violation of Articles 80, 81, and 107, Uniform Code Of Military Justice, 10 U.S.C. §§ 880, 881, and 907. The appellant was sentenced to confinement for 6 months and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

We have carefully considered the record of trial, the appellant's three assignments of error, and the Government's response. 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.

Unreasonable Multiplication of Charges

The appellant contends that his convictions of Charge I, attempted larceny, and Charge II, conspiracy to commit larceny, are an unreasonable multiplication of charges. We disagree.

The appellant asserts that the military judge erred by finding that the overt act of giving his automobile keys to his co-conspirator, for the purpose of disposing of the vehicle, was properly the subject of a separate offense. The facts alleged and developed during the providence inquiry were more involved. They consisted of the appellant providing the location of his vehicle and the keys, so his co-conspirator could dispose of the vehicle. Following that, the appellant made a false report to the Naval Criminal Investigative Service and his insurance carrier that his vehicle had been stolen. This was all part of a scheme to collect the insured value of the vehicle from the insurance company. Charge sheet; Record at 141.

We note that military justice does not proscribe convictions for both conspiracy and an attempt. *See United States v. Smith*, 50 M.J. 380, 384 (C.A.A.F. 1999)(Everett, S.J., concurring). In fact it is well-settled that conspiracy can be separately charged and punished along with any crime, which may be the object of the conspiracy. *United States v. Johnson,* 58 M.J. 509, 511 (N.M.Ct.Crim.App 2003)(citing *Iannelli v. United States,* 420 U.S. 770, 777 (1975)); *see also United States v. Nagle,* 30 M.J. 1229 (A.C.M.R. 1990). The offenses of attempted larceny and conspiracy have different elements. Conspiracy requires an agreement to commit an offense and an overt act, while attempt lacks the agreement element and requires an overt act beyond mere preparation. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶¶ 5b and 4b.

The issue was vigorously litigated, along with multiplicity, during the appellant's trial. The military judge found the offenses were not multiplicious for findings, but that they were multiplicious for sentencing. Record at 22, 155. The military judge's findings on multiplicity are not at issue.

At this point we find that the appellant suffered no prejudice during sentencing and no sentencing relief is required under this assignment of error because the military judge considered these offenses as one for purposes of sentencing. However, we still must address the issue of unreasonable multiplication of charges for purposes of the findings as an unauthorized conviction alone constitutes punishment and carries with it the potential of adverse collateral consequences. *United States v. Savage,* 50 M.J. 244, 245 (C.A.A.F. 1999).

We examine claims of unreasonable multiplication of charges according to the standards 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). Pursuant to

Quiroz, we look to the five following factors to determine whether there is an unreasonable multiplication of charges: (1) Did the accused object at trial that there was an unreasonable multiplication of charges? (2) Is each charge aimed at distinctly separate criminal acts? (3) Does the number of charges misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *Id.* at 585-86. 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). Our review of these factors is *de novo* on questions of law for unreasonable multiplication of charges claims. *See United States v. Stanley,* 60 M.J. 622, 629 (A.F.Ct.Crim.App. 2004)(*citing United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002)), *rev. denied*, 60 M.J. 388 (C.A.A.F. 2004).

The appellant raised the issue at trial satisfying the first of five factors in his favor. Moving to the second *Quiroz* factor, as explained above, we conclude each charge is aimed at distinctly separate criminal acts and the charges allege completely separate offenses. With respect to the third and fourth *Quiroz* factors, because the military judge ruled that the appellant could not be separately sentenced for these two charges we do not find a misrepresentation or exaggeration of the appellant's criminality nor do we find the appellant's punitive exposure to be increased. As to the fifth *Quiroz* factor, we find absolutely no evidence of prosecutorial overreaching in the drafting of the charges. In fact, the defense counsel conceded this point at trial and the appellant does not argue it on appeal. We therefore find this assignment of error to be without merit.

Aggravation Evidence

In his second assignment of error, the appellant contends that the military judge erred by admitting evidence in aggravation under RULES FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). We disagree.

R.C.M. 1001(b)(4) permits the Government to introduce evidence of:

> any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of . . . medical impact on or cost to any person . . . who was the victim of an offense . . . and evidence of significant adverse impact on the mission, . . . or efficiency of the command . . . .

Further, sentencing evidence, like all other evidence, is subject to the balancing test of MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)(citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)).

It is well-established that a military judge has broad discretion to determine whether matters will be admitted as aggravation evidence under R.C.M. 1001(b)(4). *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997)(citing *Rust*, 41 M.J. at 478)). Whether a circumstance is directly related to or results from the offenses calls for considered judgment by the military judge, and appellate courts will not overturn that judgment lightly. *Id.* (citing *United States v. Jones*, 44 M.J. 103, 104-05 (C.A.A.F. 1996)). A military judge also enjoys "wide discretion" in applying MIL. R. EVID. 403. *Manns,* 54 M.J. at 166 (citing *United States v. Harris*, 46 M.J. 221, 225 (C.A.A.F. 1997)).

In the appellant's case, the military judge admitted evidence during sentencing of the arson of the appellant's car committed by his co-conspirator and burn injuries suffered by a co-conspirator. The military judge found that the evidence in aggravation was "relevant under R.C.M. 1001(b)(4), and that it does result from the offenses of which the accused has been convicted." Record at 163. Applying MIL. R. EVID. 403, the military judge further found that the probative value of the evidence was not outweighed by its prejudicial effect. We find the manner in which the appellant's co-conspirator disposed of the car and the injury suffered by a co-conspirator "directly related to" the offenses. Moreover, this evidence was essential to understanding "'the circumstances surrounding that offense or its repercussions. . . .'" *United States v. Irwin*, 42 M.J. 479, 483 (C.A.A.F. 1995)(quoting *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982)). Further, even assuming evidence of the car fire and injury was inadmissible under MIL. R. EVID. 403, we are confident that this evidence did not prejudice the appellant. *Wilson,* 47 M.J. at 156. Accordingly, this assignment of error is without merit.

Providence of Plea

The appellant next contends that his plea to attempted larceny under Charge I was improvident because his actions did not go beyond mere preparation. We disagree.

The elements of the offense of attempt under Article 80, UCMJ, are:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

MCM, PART IV, ¶ 4b. To be guilty of an attempt, an appellant "'must have engaged in conduct which constitutes a substantial step toward commission of the crime. . . .'" *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987)(quoting *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977)); *see also Smith*, 50 M.J. at 383; *United States v. Schoof,* 37 M.J. 96, 102 (C.M.A. 1993); *United States v. Rothenberg*, 53 M.J. 661, 663 (A.F.Ct.Crim.App. 2000). To amount to a "substantial step," such conduct must go beyond "devising or arranging the means or measures necessary for the commission of the offense" and be "strongly corroborative of the firmness of the defendant's criminal intent." *Schoof, 37* M.J. at 103 (quoting *Byrd*, 24 M.J. at 290); *see also Rothenberg*, 53 M.J. at 663.

Before accepting a guilty plea, the military judge must determine, through inquiry of the accused, facts sufficient to satisfy every element of the offense. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); R.C.M. 910(e). Rejection of such a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). With respect to an attempt charge, we will only set aside a guilty plea if, as a matter of law, the appellant's actions fall unambiguously short of being a direct movement toward the commission of the offense. *Rothenberg,* 53 M.J. at 664 (citing *Smith*, 50 M.J. at 383; *Schoof*, 37 M.J. at 103).

In this case, we find that the appellant's conduct went beyond "devising or arranging the means or measures necessary for the commission of the offense" and was "strongly corroborative of the firmness" of his criminal intent. *Schoof,* 37 M.J. at 103 (quoting *Byrd,* 24 M.J. at 290). The appellant admitted that at the time he gave his keys to Airman Mims he fully intended to collect the insurance proceeds to pay off his car loan. To that end, the appellant stated that he called the insurance company the next day and reported his car stolen. By doing so, we find that the appellant unambiguously made a direct movement toward the commission of the offense of attempted larceny. *See United States v. Jones,* 32 M.J. 430, 432 (C.M.A. 1991)(holding that delivering car and car keys to another goes beyond mere preparation). As the record of trial reveals no substantial basis in law and fact for questioning military judge's acceptance of the appellant's guilty plea to attempted larceny, we find the appellant's plea under Charge I provident.

Conclusion

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

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court