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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Michael BRUMFIELD
Disbursing Clerk First Class (E-6), U.S. Naval Reserve (TAR)

NMCCA 200301150 Decided 12 October 2005

Sentence adjudged 10 September 2002. Military Judge: M.J. Catanese. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR BRIAN BOUFFARD, JAGC, USNR, Appellate Defense Counsel
LT STEVEN M. CRASS, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of conspiracy to steal military property, unauthorized absence terminated by apprehension, larceny of military property, making a false claim against the United States, wire fraud, and money laundering, in violation of Articles 81, 86, 121, 132, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 921, 932, and 934.[1] The military judge sentenced the appellant to confinement for 14 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but in accordance with the terms of a pretrial agreement, suspended all confinement in excess of ten years for a period of ten years from the date of sentencing.

The appellant has presented four assignments of error:

[1] Wire fraud and money laundering are proscribed by 18 U.S.C. §§ 1343 and 1956, respectively, and were charged as violations of the general article, Article 134, UCMJ.

(1) convictions of larceny, wire fraud, and the false claim constituted an unreasonable multiplication of charges; (2) the record of trial is not verbatim because of the failure to transcribe a sidebar conference during the providence inquiry; (3) the plea to larceny was improvident because he lacked the intent to permanently deprive the United States of a portion of the stolen money; and (4) a Waiver of Appeal signed by the appellant on the date of sentencing is invalid. We have carefully considered the record of trial, the appellant's four assignments of error, and the Government's response.

We agree that the purported Waiver of Appeal is not valid, and that the pleas were improvident, in part. We also conclude that there was a unreasonable multiplication of charges. We will take corrective action. As modified, we conclude that the findings and sentence are correct in law and fact and that no material prejudice to any substantial right remains. Arts. 59(a) and 66(c), UCMJ.

Background

The Defense Finance and Accounting Service (DFAS) has various financial programs which allow it to quickly and efficiently make authorized payments to service members. One of these programs is the Military Master Pay Account. To protect the integrity of its financial databases and prevent fraud, DFAS requires that no single person in the field be allowed to both input data and release that data to DFAS. Instead, one individual inputs financial data and a different individual reviews the data and releases it to DFAS. These controls are in place to prevent exactly what occurred in this case.

The appellant was a disbursing clerk first class on board USS BOONE (FFG 28). As such, he was issued a password that allowed him to release financial data to DFAS. However, inputting financial data was the responsibility of a subordinate petty officer, who was issued his own password for this purpose. At some point in time, the appellant observed and memorized the password of his shipmate, which enabled him to input financial data into the system.

In January 2001, the appellant used this ability to input data purporting to show that he was entitled to advance pay, and then released this data to DFAS. This resulted in a direct deposit of money into the appellant's personal bank account-—money that the appellant was not legally entitled to receive. During the ensuing months, the appellant repeated this activity many times, and also learned how to prevent DFAS from recouping the money from his pay, by inputting false information indicating that the advance pay had been repaid locally. After several months, the appellant involved seven of his shipmates and began sending advance pay authorizations to DFAS on their behalf. After most of these transactions, he received a kickback from these shipmates

when they received their money—-which was often as much as 50% of the total amount received.

Over the life of the scheme, the appellant stole almost one-half million dollars, of which he personally received about $230,000.00. The appellant repaid only a small portion of this money.

Waiver of Appeal

We begin with the appellant's fourth assignment of error, in which he contests the validity of a waiver of appeal, which is contained in the record of trial. The Government filed a motion to dismiss the appellant's appeal, based on this waiver of appeal, and we denied the Government's motion. We now reaffirm our denial of the Government's motion.

The waiver of appeal indicates that the appellant and his defense counsel signed it on 10 September 2002, the date of sentencing. There is nothing in the record to indicate that this waiver was ever filed with the convening authority, as required by RULE FOR COURTS-MARTIAL 1110(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) or that it was filed during the ten-day window specified in R.C.M. 1110(f). As such, the waiver is invalid. *See* R.C.M. 1110(g)(4); *see also United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991).

Providence of Larceny Plea

The appellant contends that his guilty plea to larceny is partially improvident because the military judge failed to resolve an inconsistent statement regarding his intent as to a small portion of the money stolen. We agree.

During the providence inquiry, the civilian defense counsel told the military judge that, as to the initial $19,000.00, deposited into the appellant’s personal bank account, “it was his intent to give it back after that time, and it was returned after that time, then he developed the plan not to give it back.” Record at 56. At this point, an unrecorded sidebar conference was held, during which the parties apparently discussed this issue. However, subsequent to this statement, there is nothing in the record that squarely addresses the statement and resolves it. We also note that the stipulation of fact says nothing about the appellant’s intent as to the $19,000.00 while it does state that the appellant intended to steal the remaining $479,000.00.

For these reasons, we conclude that there is a substantial basis to question the providence of this 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)). However, there is no question that the appellant intended to temporarily deprive the Government of this money. Therefore, we will affirm a finding of guilty of the lesser included offense of wrongful appropriation as to the $19,000.00 in question.

Providence of Conspiracy Plea

Although not assigned as error, we note that the appellant pled guilty to conspiring to steal $498,576.00. In fact, the conspiracy with the seven shipmates commenced after the appellant had completed the larceny of the $19,000.00, which he stole single-handedly. Accordingly, his conspiracy plea as to the $19,000.00 was improvident.

Unreasonable Multiplication of Charges

Finally, the appellant asserts that the charges of larceny, false claim, and wire fraud constituted an unreasonable multiplication of charges. We agree in part.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4), Discussion. In evaluating whether an unreasonable multiplication of charges exists, we consider five factors: (1) did the appellant object to the alleged unreasonable multiplication of charges at trial?; (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?; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz,* 57 M.J. 583, 585-586 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

In a pretrial motion, the appellant asked the military judge to dismiss the specifications alleging wire fraud and money laundering, as well as conspiracy to commit these offenses, on the basis of an unreasonable multiplication of charges. During the hearing on this motion, the appellant's counsel claimed that charging these offenses in addition to larceny under UMCJ Article 121 and making a false claim against the United States under UCMJ Article 132 constituted an unreasonable multiplication of charges. The military judge denied this motion. However, he later granted a defense motion to consider the offenses of wire fraud and making a false claim to be multiplicious for sentencing.

From the foregoing, it is obvious that the appellant did object to the unreasonable multiplication of charges in the trial

court. In addition, under the facts of this case, the offenses of wire fraud and making a false claim against the United States were aimed at exactly the same criminal conduct: inputting and releasing the data to DFAS. We decline to label separate keystrokes as separate offenses where inputting and releasing the data were both essential acts in fulfilling the appellant's criminal intent.

Convicting the appellant under two different fraud statutes for essentially the same criminal act certainly exaggerated the appellant's criminality and unreasonably increased his punitive exposure. In addition, "the fact that the prosecution negotiated a pretrial agreement to have the appellant plead guilty to both charges indicates the charges were not drafted in this fashion to meet contingencies of proof, suggesting to us prosecutorial overreaching." *Quiroz*, 57 M.J. at 586. Therefore, we conclude that convicting the appellant of both wire fraud and false claim constituted an unreasonable multiplication of charges. Since the Article 132, UCMJ, offense, with a maximum period of confinement of five years, is less serious than wire fraud, which carries a maximum penalty of 20 years imprisonment, we will dismiss Charge VI and its single specification.

The military judge considered the Article 132 offense to be multiplicious for sentencing with the wire fraud offense. For this reason, the appellant was not prejudiced by this error with regard to punishment. In light of the judge's ruling, we conclude that the appellant would not have received a less severe sentence at trial if the military judge had dismissed Charge VI and its single specification as an unreasonable multiplication of charges. Therefore, no sentence relief is appropriate.

Our analysis leads us to a different result regarding the larceny. "[A] larceny is not complete until the thief takes, obtains, or withholds the property of another." *United States v. Lepresti*, 52 M.J. 644, 653 (N.M.C.C.A. 1999). The larceny and the fraud offenses were aimed at distinctly separate criminal acts—-the fraud offenses were complete as soon as the false claims were sent to DFAS, while the larceny was not complete until the money was actually received. Nor do we believe that charging both larceny and fraud misrepresented or exaggerated the appellant's criminality, or unreasonably increased his punitive exposure. For these reasons, we find no unreasonable multiplication of charges with regard to wire fraud and larceny. In that respect, the appellant's assignment of error is without merit.

Conclusion

We have considered the remaining assignment of error that the record is not verbatim because a sidebar conference was not transcribed and included in the record. We conclude that the issue is mooted by our resolution of the improvident plea of guilty to larceny of $19,002.00 that the parties agree was the subject of discussion at the sidebar conference.

The finding of guilty as to Specification 24 of Charge I (conspiracy) is modified by reducing the value of the stolen property from $498,576.00 to $479,576.00. Specification 1 of Charge V is modified to read as follows:

> In that Disbursing Clerk First Class Michael Brumfield, U.S. Naval Reserve (TAR), USS BOONE, on active duty, did, at or near Jacksonville, Florida, on divers occasions from January 2001 until about December 2002, steal U.S. currency, military property, of a value of about $479,576.00, and did wrongfully appropriate U.S. currency, military property, of a value of about $19,002.00, all the property of the United States.

The findings of guilty of Charge VI and its single remaining specification are set aside. That charge and specification are dismissed. As modified, the findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) and affirm the sentence as adjudged. As reassessed, we conclude that the sentence is appropriate and that the sentence is no greater than that which would have been imposed if the prejudicial errors had not been committed.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court