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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Ronald W. ROBINSON
Corporal (E-4), U.S. Marine Corps

NMCCA 200300335 Decided 29 October 2004

Sentence adjudged 10 October 2002. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, SC.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR ALICIA CONNOLLY-LOHR, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel
CDR BOYCE CROCKER, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

In accordance with his pleas, the appellant was convicted by a military judge, sitting as a general-martial, of three specifications of conspiracy to commit larceny of military property (rifle and pistol ammunition and M-16 30-round rifle magazines), four specifications of wrongful sale or disposition of military property, and three specifications of larceny of military property. The appellant’s crimes violated Articles 81, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 908, and 921. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 5 years, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged and, in accordance with the terms of a pretrial agreement, suspended confinement in excess of 36 months for 12 months from the date of the appellant’s release from confinement.

We have examined the record of trial, the appellant's three assignments of error, all alleging an unreasonable multiplication of charges (UMC), and the Government's response. We conclude

that UMC occurred, but not as asserted in any of the appellant's assignments of error. We find that, based on the specific facts of the appellant's case, Specification 2 of Charge III (larceny of military property) represents UMC with Specification 1 of Charge III (larceny of military property). We shall take corrective action in our decretal paragraph. As modified, we conclude that the findings are correct in law and fact and that no error prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Unreasonable Multiplication of Charges

In the appellant's first assignment of error, he asserts that his convictions on two specifications of larceny of military property (Specifications 1 and 2 of Charge III) constituted UMC with the conviction of conspiracy to commit larceny of military property (Specification 1 of Charge I). In the appellant's second assignment of error, he asserts that his conviction on one specification of larceny of military property (Specification 3 of Charge III) constituted UMC with the conviction of conspiracy to commit larceny of military property (Specification 3 of Charge I). In the appellant's third assignment of error, he asserts that his conviction on one specification of larceny of military property (Specification 3 of Charge III) constituted UMC with the conviction of conspiracy to commit larceny of military property (Specification 2 of Charge I). In all three assignments of error, the appellant avers that this court should dismiss the UMC specifications and reassess the sentence. We disagree and address the appellant's three assignments of error as one.

In determining whether there is UMC, 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).

The appellant is correct in asserting that RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), requires that each specification alleged at courts-martial shall state only one offense. However, his reliance on this court's decision in *United States v. Oestmann*, 60 M.J. 660 (N.M.Ct.Crim.App. 2004), *amended & aff'd on reconsideration*, ___ M.J. ___, No. 200301443 (N.M.Ct.Crim.App. 30 June 2004), is misplaced. *Oestmann* involved two Sailors conspiring to possess hashish, a controlled substance, with the intent to distribute. The underlying offense charged in *Oestmann* was distribution of hashish between only the two members of the conspiracy. Since the underlying offense required *concerted criminal activity*, both co-conspirators either actually possessed or constructively

possessed the hashish for the benefit of the other co-conspirator.

We conclude that in the factual scenario presented in the appellant's case, however, the underlying offense of larceny of military property does not require *concerted criminal activity* for its completion. Accordingly, the appellant's reliance on this court's decision in *Oestmann* is inapposite.

Although not assigned as error, we conclude that based on the specific facts of the appellant's case, Specifications 1 and 2 of Charge III constitute UMC. After applying the five non-exclusive factors we have established to examine claims of UMC -- including the appellant's failure to raise this issue at his trial -- we are convinced that the appellant's specific misconduct reflected in Specifications 1 and 2 of Charge III should be consolidated into a single offense. *See Quiroz,* 57 M.J. at 583. As such, we will take corrective action in our decretal paragraph.

Maximum Authorized Punishment

Although not assigned as error, we note that during the appellant's trial the military judge advised the appellant, with the concurrence of both trial counsel and trial defense counsel, that the maximum sentence imposable included 73 years confinement. Upon the military judge's review of the record for authentication, he determined that an error occurred in the computation of the maximum confinement. At that point, the military judge ordered a post-trial, Article 39(a), UCMJ, session pursuant to R.C.M. 1102(d). "The military judge may direct a post-trial session *any time before the record is authenticated*." R.C.M. 1102(d)(emphasis added).

During the post-trial session, the military judge advised the appellant of the error in computation of the maximum confinement, and then advised him that the maximum confinement was 37 years. Record at 96. The military judge then inquired of the appellant,

> Q: So the question I have of you is when I advised you in court that the maximum was 73 years worth of confinement you pled guilty with that understanding that that's what you were facing. Knowing that the maximum penalty is substantially less than that, do you still want to plead guilty under the terms of your pretrial agreement or do you desire to withdraw your guilty pleas and enter not guilty pleas?
> A: I wish to keep the pretrial agreement, sir.
>
> . . .
>
> Q: You understand that if you were to change your plea to not guilty the fact that you pled guilty and entered

into the pretrial agreement could not be used against you in any way?
A: Yes, sir.

Q: You still want to plead guilty?
A: Yes, sir.

Q: And have the pretrial agreement in effect?
A: Yes, sir.

Id. at 96-97. The military judge then adjourned the post-trial session.

R.C.M. 1102(c) *only* describes those matters not subject to post-trial sessions. Post-trial sessions may not be directed:

> (1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;
>
> (2) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code; or
>
> (3) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

R.C.M. 1102(c). However,

> The military judge may [order] an Article 39(a) [post-trial] session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty *or the sentence*.

R.C.M. 1102(b)(2), in part (emphasis added).

In the appellant's case, the military judge acted under an incorrectly computed maximum confinement, when he originally sentenced the appellant. We note that the military judge, at the conclusion of the post-trial colloquy with the appellant, never stated on the record that even though the maximum punishment imposable was substantially less than that considered by him during deliberations, he still would have imposed the same punishment upon consideration of a maximum punishment of just 37 years. Moreover, we conclude that R.C.M. 1102(c) does not preclude a military judge from reassessing a sentence post-trial, before authentication, in those cases where an original sentence was based on an erroneous and substantially greater maximum confinement. Of course, such a reassessment could not extend to increasing the severity of the sentence. R.C.M. 1102(c)(3).

However, we find that the appellant was not prejudiced by this error of omission. In our collective wisdom, it is quite clear that the military judge, having not stated so on the record, considered his original sentence as the appropriate punishment for the appellant and his serious offenses, despite the initial error in computation of the maximum punishment imposable. Moreover, trial defense counsel did not request that the military judge reassess the sentence.

Conclusion

Accordingly, Specification 2 of Charge III is merged with Specification 1 of Charge III. Specification 1 of Charge III is amended by adding the words, "on divers occasions," after the word, "did," and adding the words, "and approximately 400 9mm ammunition rounds, of a value of about $64.00," after the sum, "$2886.00." Specification 2 of Charge III is dismissed. We affirm the remaining findings, as modified.

Upon reassessment of the sentence, we find that the sentence received by the appellant is clearly appropriate and that he would not have received any lighter sentence even if he had not been convicted of the one larceny of military property violation involving the smallest amount of ammunition, especially in light of the remaining serious offenses, the matters presented in aggravation, and the information presented in extenuation and mitigation. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We order that the supplemental promulgating order accurately report the findings of the appellant's court-martial.

Senior Judge PRICE and Judge HEALEY concur.

For the Court

R.H. TROIDL
Clerk of Court