1 August 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	FINAL BRIEF ON BEHALF OF UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. ACM 37460
Captain (O-3) BRENT A. CAMPBELL, USAF, *Appellant.*	)	USCA Dkt. No. 11-0403/AF

FINAL BRIEF ON BEHALF OF UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ERRED, AFTER FINDING ALL THREE CHARGES AROSE OUT OF THE SAME TRANSACTION AND WERE PART OF THE SAME IMPULSE, BY MERGING THEM FOR SENTENCING RATHER THAN DISMISSING THEM.

STATEMENT OF STATUTORY JURSIDICTION

The government accepts Appellant's Statement of Statutory Jurisdiction.

STATEMENT OF THE CASE

The government accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

At trial, Appellant submitted a written motion to consolidate the larceny charge with the possession charge, claiming they were either multiplicious or an unreasonable multiplication of charges. (Jt. App. at 19, 36-41.) His motion acknowledged "multiplicity and unreasonable multiplication of charges are separate principles of law." (Jt. App. at 38.) During arraignment, Appellant expanded only the multiplicity

claim to include the false official statement charge, specifically asking "that Charge II and its specification be dismissed for the additional reason that it's multiplicious with the larceny charge." (Jt. App. at 21.) Further, Appellant only asked for their arguments about the false official statement charge to be "included in the multiplicity motion." (Id.) At no point during the arguments on the motion did Appellant ask for the false official statement charge to be dismissed as an unreasonable multiplication of charges. (Jt. App. at 20-22, 28-29.)

The military judge, however, did consider all three charges under the unreasonable multiplication rubric *prior* to the findings portion of trial. (Jt. App. at 30-31.) After ruling the charges were not multiplicious, the military judge stated:

> I'm not even finding at this point that there is an unreasonable multiplication of charges. But even if there were, I don't think an appropriate remedy at this time would be to dismiss one or two of those offenses, given the different possibilities the members could reach based upon that. But again, I will reconsider that if and when we reach a sentencing portion.

(Jt. App. at 31.) After the members found Appellant guilty of all three charges, the military judge did in fact re-address this issue with Appellant's counsel:

> MJ: [T]he first issue I think we need to address is the issue that's still standing before the court, on the unreasonable

> multiplication of charges, and whether the three offenses should be merged as one. You kind of amended your position, from the time of the initial filing of the motion. But at this point, what you're seeking, defense, is that all three offenses be merged into one. Is that correct?
>
> ADC: Yes, sir.

(Jt. App. at 32-33.)

During argument, Appellant's counsel made it clear he was not seeking relief for unreasonable multiplication of charges, but solely for multiplicity for sentencing purposes, stating:

> Sir, this is under RCM 1003(c)(1)(c). So for this reason, we still argue that all the charges should be merged for multiplicity for the sentencing stage.

(Jt. App. at 34.) After findings, Appellant did not make any mention, motion, or claim for relief or dismissal of any charges for unreasonable multiplication of charges. Appellant modified his position to rely solely on a R.C.M. 1003(c)(1)(c) multiplicity claim. This was confirmed when the military judge announced his decision:

> MJ: [I] do believe it would be appropriate to merge the three offenses into one, for purposes of sentencing. So, based upon that, the maximum punishment would be a dismissal, forfeiture of all pay and allowances, and confinement for five years. Do both counsel agree, based upon the court's ruling, agree with that?
>
> TC: Yes, Your honor.
>
> DC: Yes, sir.

(Jt. App. at 34-35.) The military judge also made his ruling clear to the court members through his sentencing instructions:

> The offenses charged in the specification of Charge I, the specification of Charge II, and the specification of Charge III are multiplicious for sentencing. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

(Jt. App. at 82.)

During argument, the government asked the members to sentence Appellant to a dismissal, ten months confinement, and total forfeiture of all pay and allowances. (Jt. App. at 88.) When discussing confinement, the government stated, "We're not asking for five years. We agree that that is unreasonable." (Jt. App. at 92.)

Further facts regarding Appellant's crimes necessary to the analysis of unreasonable multiplication of charges are contained within the argument below.

SUMMARY OF ARGUMENT

Appellant intentionally and voluntarily waived his right to seek relief under the unreasonable multiplication doctrine when he expressly abandoned that doctrine after initially raising it in a motion at trial. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Furthermore, even if he had not waived this right, under the five-factor test identified in United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001), the military judge did not

err as no unreasonable multiplication of charges existed in this case.

ARGUMENT

APPELLANT WAIVED THIS ISSUE WHEN HE ABANDONED IT AT TRIAL, AND EVEN WITHOUT WAIVER, THE MILITARY JUDGE DID NOT ERR AS THERE WAS NO UNRESONABLE MULTIPLICATION OF CHARGES FOR FINDINGS.

Standard of Review

When an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. Gladue, 67 M.J. at 313. A claim of unreasonable multiplication of charges that has not been waived is reviewed for an abuse of discretion. United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004).

Law and Analysis

a. Appellant intentionally and voluntarily waived his unreasonable multiplication of charges claim at trial and is precluded from raising the claim on appeal.[1]

First, Appellant's intentional and voluntary waiver precludes him from even seeking the relief to which he claims he is entitled. At trial, Appellant initially raised an unreasonable multiplication of charges claim along with a

[1] The United States raised this waiver argument before the Air Force Court of Criminal Appeals (AFCCA) in its answer to Appellant's assignment of error. In its unpublished opinion, AFCCA affirmed Appellant's conviction and sentence by finding "no unreasonable multiplication of charges for findings purposes." United States v. Campbell, No. ACM 37460 (A.F. Ct. Crim. App. 31 Jan 2011) (unpub. op.) (*also available* at Jt. App. at 3.) The Court did not analyze the issue under waiver principles. Id.

multiplicity claim. (Jt. App. at 19, 36-41.)[2] In defense's written trial motion, Appellant explicitly stated that "multiplicity and unreasonable multiplication of charges are separate principles of law." (Jt. App. at 38.) Thus, on the record, Appellant acknowledged the distinct and separate nature of these claims. The military judge deferred ruling on this motion until after findings. (Jt. App. at 31.)

After findings, Appellant could have pursued his unreasonable multiplication of charges claim and asked for dismissal. Instead, Appellant "amended" his position on the record, and solely pursued a claim under R.C.M. 1003(c)(1)(c) for multiplicity for sentencing purposes. (Jt. App. at 32-33.) Immediately after findings, the military judge specifically asked the defense about "the issue that's still standing before the court, on the unreasonable multiplication of charges." (Jt. App. at 32.) The military judge made clear his understanding that Appellant had "amended" his initial position and then asked Appellant's counsel if this was correct. (Id.) Appellant's counsel confirmed with, "Yes, sir." (Id. at 33.) Appellant then argued exclusively for relief under R.C.M. 1003(c)(1)(c) to merge the charges for sentencing purposes for multiplicity. To

[2] AFCCA also found, when analyzing the first Quiroz factor, that "trial defense counsel did make an objection to the charging at trial...." Campbell, Jt. App. at 3.

ensure no question existed about the amended basis for his claim, Appellant's counsel stated to the military judge:

> Sir, this is under RCM 1003(c)(1)(c). So for this reason, we still argue that all the charges should be merged for multiplicity for the sentencing stage.

(Jt. App. at 34.) The plain language of this statement makes it clear Appellant had abandoned his unreasonable multiplication of charges claim and argued solely for "multiplicity for the sentencing stage." (Id.)

Raising an issue and then abandoning it at trial constitutes waiver. In United States v. Lloyd, 46 M.J. 19, 23 (C.A.A.F. 1997), this Honorable Court stated that in cases where an appellant failed to raise multiplicity at trial, he or she would be entitled to relief if the specifications were facially duplicative. This Court added an important caveat: "Express waiver or voluntary consent, however, will foreclose even this limited form of inquiry." (Id.) While Lloyd only addressed multiplicity, this Court later adopted that same caveat regarding express waiver or consent to apply to the concept of unreasonable multiplication of charges. Gladue, 67 M.J. at 314.

This tactical decision to abandon his claim of unreasonable multiplication yielded results for Appellant as the judge found his crimes multiplicious for sentencing, and reduced the maximum sentence that could be adjudged. (Jt. App. at 34-35.) In fact,

the military judge expressly told the court members that they must consider all of Appellant's crimes as one offense for sentencing. (Jt. App. at 82.) Appellant cannot be allowed to tactically drop a motion at trial merely to raise it at the appellate level. In effect, Appellant is attempting to take two bites of the apple.[3]

The issue of unreasonable multiplication of charges was raised and abandoned at trial; thus, Appellant affirmatively and voluntarily waived this issue. Therefore, his claim for relief is without merit.

b. Even if the issue was not waived, no unreasonable multiplication of charges occurred in this case.

"[T]he prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard -- reasonableness -- to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001). The prohibition against unreasonable multiplication of charges addresses the potential for prosecutorial overreaching. Importantly, "the doctrine of

[3] Ironically, Appellant appears dismayed that the military judge "appears to have failed to even consider dismissal of Charges I and III as a remedy after the panel announced its findings. (App. Br. at 10.) Yet, it was Appellant who "amended [his] position" and affirmatively waived request for a remedy for unreasonable multiplication of charges for findings, opting instead for sentencing relief under R.C.M. 1003(c)(1)(c). (Jt. App. at 32-34.)

unreasonable multiplication of charges is a doctrine of reasonableness and not an equitable doctrine of fairness." United States v. Roderick, 62 M.J. 425, 433 n.6 (C.A.A.F. 2006) (*citing* Quiroz at 338-39) (emphasis added).

This Court has "endorsed a five-part test for determining whether the Government has unreasonably multiplied charges." Pauling, 60 M.J. at 95. The factors contained in the five-part test are balanced, and no single factor is dispositive. Id. The test, outlined in Quiroz, asks the following five questions:

> (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 Appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase Appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. (*citing* Quiroz, 55 M.J. at 338).

Prior to analysis of the five factors, the United States must clarify an assertion repeatedly made by Appellant regarding the military judge's "conclusion" regarding unreasonable multiplication of charges. At multiple points in his brief,

Appellant alleges the military judge "correctly determined that the Government had unreasonably multiplied the charges" or language to the same effect. (App. Br. at 4, 6, 13.) As Appellant correctly recognizes in a different part of his brief (App. Br. at 11), the military judge did *not* make a finding regarding whether the charges were unreasonably multiplied. (*See* Jt. App. at 31 (military judge ruling "I'm not even finding at this point that there is an unreasonable multiplication of charges.")) Instead, the military judge postponed a decision regarding this motion until after members announce their findings. (Id.) By that point, Appellant had amended his request by dropping his motion for unreasonable multiplication of charges and substituting requested relief for muliplicious for sentencing under R.C.M. 1003(c)(1)(c). (Id. at 32-34.) With respect to this multiplicity for sentencing issue, the military judge found "that all three offenses essentially arose out of this same transaction" and merged them for sentencing purposes. (Id. at 34.) The military judge at no time found unreasonable multiplication of charges.

Turning to the analysis of the five Quiroz factors, it is clear that no unreasonable multiplication of charges occurred.

(1) *Did the accused object at trial?*

As discussed above in section "a" and in note 2, the issue was both raised and abandoned at trial.

(2) *Is each specification aimed at separate criminal acts?*

Each specification represented a separate criminal act. While these criminal acts may have all taken place in the same transaction, this fact does not destroy their unique criminality. In Charge I, Appellant made a conscious decision to make a false official statement to gain access to controlled medications. On 28 different occasions within the charged time period, Appellant falsely asserted that a doctor had ordered Vicodin or Percocet for a particular patient in order to gain access to the Pyxis machine. (Jt. App. at 72-74, 89-90 (trial counsel summarizing testimony about divers false official statements in argument.)) He could have gained access in a variety other ways not involving a false official statement (i.e. doing the same thing at his civilian nursing job, purchasing them illegally or legally, etc.) Yet, Appellant made the choice to commit this specific crime in order to access these drugs.

After gaining access in the Pyxis machine, Appellant faced another decision: whether or not to take the pills out. On 28 separate occasions instead of closing the drawer, Appellant repeatedly chose to remove the Percocet and Vicodin pills and take them into his possession. (Jt. App. at 76-77, 89-90 (trial counsel arguments summarizing testimony about divers possession of Percocet and Vicodin.)) Whenever he did this, he unlawfully

possessed a controlled substance. As a trained nurse with years of experience, Appellant was fully aware of the unlawful nature of possessing Schedule II and Schedule III drugs without proper authorization.

Finally, once he possessed the drugs in question, Appellant was faced with one last choice: whether to steal them or not. The Pyxis machine allowed for returning drugs or wasting them if they were not used by a patient. (Jt. App. at 116.) Thus, Appellant could have used the machine to return them, or he could have returned them to another nurse or doctor. Instead, on 28 different times, he made an independent choice to commit an additional crime when he intentionally decided to keep them from the Air Force forever. (Jt. App. at 74-76, 89-90 (trial counsel arguments summarizing testimony about divers larceny.))

Appellant argues his actions constitute a single crime of larceny by false pretenses. (App. Br. at 7.) Article 121, however, consolidated what had been three common law forms of theft into one general statute. United States v. Antonelli, 35 M.J. 122, 124 n. 1 (C.M.A. 1992). In so doing, Congress made the various theories of proof (false pretenses being one of them) immaterial to the guilt or innocence of larceny under Article 121. Id. at 124. What matters to the crime of larceny is the intent to permanently deprive the owner of his property. Id. at 125 (*citing* United States v. Aldridge, 8 C.M.R. 130, 131-

32 (1953). As such, Appellant's attempt to merge the crime of false official statement under Article 107 with the crime of larceny under Article 121 falls woefully short. *See generally,* United States v. Bulger, 41 M.J. 194 (C.M.A. 1994) (upholding appellant's conviction for both false official statement and larceny where he misrepresented paying spousal support to his separated wife while receiving pay at the with dependent rate).

(3) *Does the number of charges and specifications misrepresent or exaggerate Appellant's criminality?*

Charging the three distinct crimes Appellant committed 28 separate times does not in any way misrepresent or exaggerate Appellant's criminality. A review of the separate and distinct crimes Appellant committed, the manner in which his crimes were charged, and the maximum allowable punishments for Appellant's crimes all point to a negative response to the third Quiroz factor.

First, Appellant stole from the government, and that charge must stand given his intent to deprive the United States permanently of its property. *See* Antonelli, 35 M.J. at 125. Appellant could have stolen in many different ways, but his preferred method was to gain access to his desired goods by making a false official statement. That represents a separate crime with separate consequences. Indeed one of the direct consequences of Appellant's false official statement was that a

patient, Ms. Smallwood, was unable to refill a prescription when requested as her medical records falsely showed she had been prescribed Vicodin. (Jt. App. at 103-04.) Appellant committed a third crime by possessing controlled drugs. He could have stolen any number of non-controlled drugs or items, but again, he made the choice to steal an item that it was a crime to merely possess without authorization. Thus, the only fair way to characterize the criminality of Appellant's conduct is to allow each charge to stand.

Moreover, Appellant's charges demonstrate a fair and reasonable exercise of prosecutorial discretion. In Pauling, this Court found an appellant could not meet the third Quiroz criteria where prosecutors had charged "the forgery of 16 checks and four indorsements in two specifications." 60 M.J. at 95. Likewise, by charging Appellant with three crimes on divers occasions versus each individual lie, theft, and possession, the government exercised its prosecutorial discretion in a fair and reasonable manner. *Compare* Jt. App. at 5-7 (charge sheet) *with* Jt. App. at 53 (identifying sealed[4] prosecution exhibits of medical records showing Appellant repeated his crimes 28 separate times).

[4] Note, pursuant to the United States' request, AFCCA ordered these 28 medical records and corresponding Pyxis print-outs sealed due to HIPAA concerns. Order, United States v. Campbell, No. ACM 37460 (A.F. Ct. Crim. App. 6 Dec. 2010).

Finally, a review of the maximum allowable punishments for these charges allows for a reasonable basis to evaluate Appellant's criminality. Appellant asks this Honorable Court to dismiss the false official statement and possession charges, claiming the government unreasonably multiplied the larceny charge. (App. Br. at 7, 13.) Conveniently, the two charges Appellant wants dismissed, however, both have much higher maximum punishments than the larceny charge. The maximum punishment for larceny of military property valued under $500 is only a bad conduct discharge,[5] total forfeitures, and confinement for one year. Yet the maximum punishment for either the false official statement or drug possession is a dishonorable discharge, total forfeitures, and confinement for five years. Here, Appellant stretches the bounds of the imagination by requesting to receive essentially not one, but two free passes for more serious crimes under an ironic application of a doctrine of reasonableness.

(4) *Does the number of charges and specifications unreasonably increase Appellant's punitive exposure?*

Appellant was not subjected to any increase in punitive exposure. This Court has held that when the military judge merges the charges for multiplicity for sentencing purposes, then the fourth Quiroz criterion is not implicated. Pauling,

[5] Obviously, Appellant, as an officer, is not subject to a bad conduct or dishonorable discharge. The types of punitive discharge for enlisted

60 MJ at 96. As previously clarified, the military judge never ruled there was an unreasonable multiplication of charges, but he did find the charges were multiplicious for sentencing. (Jt. App. at 34-35.) Further, he instructed the members they must consider all crimes as one for sentencing purposes. (Jt. App. at 82.)

Appellant now creatively argues that his punitive liability was unreasonably increased through "creative charging." (App. Br. at 7.) Appellant argues that his proper punitive liability was limited by the larceny charge to one year confinement, dismissal, and forfeiture of all pay and allowances. (Id.) Notably however, Appellant did not object to the sentence maximum stated by the judge of five years confinement. (Jt. App. at 81 (military judge instructing members on maximum sentence without objection); *see also,* R. at 506 (Appellant explicitly concurring with maximum sentence calculation.))

Appellant cites this Court's decision in Roderick for the proposition that the conviction of two "additional charges" are prejudicial themselves. (App. Br. at 12.) This Court, however, was not evaluating the fourth Quiroz factor when stating that an appellant had been prejudiced in his conviction of three additional charges. 62 M.J. at 433. Instead, this Honorable Court found prejudice because the military judge explicitly

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punishments are referenced only to show the seriousness of the crimes.

stated that dismissal was not an option available to him when considering unreasonable multiplication of charges for findings. Id. (military judge concluded he had "no power at the findings phase to address allegations of unreasonable multiplications of charges outside the multiplicity realm.") In this case, the military judge was under no misapprehension about his power to dismiss any unreasonably multiplied charges. (*See* Jt. App. at 31.) To the contrary, the Appellant withdrew the issue of unreasonable multiplication of charges from the military judge and replaced it with the issue of multiplicity for sentencing. (Jt. App. 32-34.) As such, Appellant's argument that he unjustly received three separate federal convictions is without merit.[6]

In sum, Appellant was not subject to any increase in punitive exposure, much less any unreasonable increase.

(5) *Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?*

An honest assessment of the charging decisions in this case shows the government did not unreasonably multiply charges. As previously articulated, the government did not charge each

[6] Likewise, Appellant's reliance upon the Supreme Court's decision in Ball v. United States, 470 U.S. 856, 864-65 (1985), for the proposition that the impact of separate convictions "may not be ignored" is unfounded. (App. Br. at 12.) In Ball, the Supreme Court found Congress did not intend to subject felons to two convictions under firearms statutes for both receipt and possession of the weapon as one "*necessarily* includes" proof of the other. 470 U.S. 862 (emphasis in original). In contrast, here Congress clearly intended Articles 107 and 121 to be separate federal convictions. *See supra*, argument regarding Antonelli on page 12.

theft, each false statement, or each possession separately. Nor did the government undertake any esoteric exercise in creative charging. For example, no charges were brought for conduct unbecoming an officer and a gentleman, or for dereliction of duty, or for wrongful appropriation of the use of the Pyxis machine's services, or for reckless endangerment by effecting medical records, or for failure to obey a regulation, etc. What the government did do was appropriately charge each crime committed through a fair and reasonable exercise of prosecutorial discretion. Put simply, "this was not a case of 'unreasonable multiplication of charges by creative drafting.' Rather, this was a case of appropriately charging Appellant's overly-creative criminal activity." Pauling, 60 M.J. at 96 (internal citations omitted).

In light of the above, Appellant fails to meet the Quiroz test as there was no unreasonable multiplication of charges in this case even if this Honorable Court should find that Appellant did not waive this issue. Therefore, Appellant's claim should be denied.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court find Appellant waived his right to seek relief or, alternatively, affirm the lower court's decision that no unreasonable multiplication of charges occurred.

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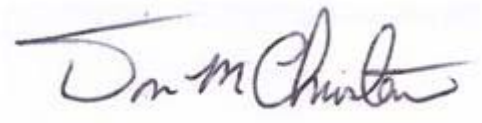

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Mr. Dwight Sullivan, Acting Chief, Appellate Defense Division on 1 August 2011.

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