UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SCOTT W.F. AUBIN
United States Air Force

ACM S30332

31 May 2005

Sentence adjudged 30 January 2003 by SPCM convened at Hanscom Air Force Base, Massachusetts. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

STONE, GENT, and SMITH
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's answer thereto. The appellant avers that Specifications 1 and 3 of Charge I are multiplicious and/or an unreasonable multiplication of charges. We disagree and affirm.

We first address the multiplicity issue. In *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004), our superior court summarized the rules and standards for assessing multiplicity claims where the appellant first raises the issue on appeal. An appellant may show plain error and overcome waiver by demonstrating that the specifications are facially duplicative, that is, factually the same. *Id.* (citing *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001)). *See also United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). The test to determine whether an offense is factually the same as

another offense is the "elements" test. *Hudson*, 59 M.J. at 359 (citing *United States v. Foster*, 40 M.J. 140, 142 (C.M.A. 1994)). "Under this test, the court considers 'whether each provision requires proof of a fact which the other does not.'" *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "To determine whether the offenses are factually the same, we review the 'factual conduct alleged in each specification,' as well as the providence inquiry conducted by the military judge at trial." *Id.* (citations omitted). In the case before us, distinct and different falsehoods are alleged in each specification. Therefore, proof of a different fact is necessary to prove each specification. Thus, the specifications are not facially duplicative. We hold that the specifications are not multiplicious.

Moreover, by failing to object at trial, the appellant waived any consideration of whether there was an unreasonable multiplication of charges. In *United States v. Erby*, 46 M.J. 649, 652 (A.F. Ct. Crim. App. 1997), *aff'd*, 9 M.J. 134 (C.A.A.F. 1998), we emphatically stated, "[A]n accused waives any argument respecting an unreasonable multiplication of charges, as distinguished from double jeopardy/multiplicity, by failing to bring it up at trial." *See also United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001) (a Court of Criminal Appeals' Article 66(c), UCMJ, 10 U.S.C. § 866(c), power "includes the power to determine that a claim of unreasonable multiplication of charges has been waived or forfeited when not raised at trial"). Even when waiver does not apply, we test for an unreasonable multiplication of charges by considering and balancing the factors identified in *United States v. Quiroz*, 55 M.J. 334, 337-38 (C.A.A.F. 2001). These factors do not weigh in the appellant's favor. We hold that the challenged specifications do not constitute an unreasonable multiplication of charges.

Accordingly, we conclude the findings and sentence are correct in law and fact, and no error prejudicial to the appellant's substantial rights occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court