UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALONZO HAMPTON
United States Air Force

ACM 34939

6 February 2003

Sentence adjudged 7 November 2001 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Maria A. Fried, Major Jefferson B. Brown, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

BURD, ORR, W.E., and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

The appellant was convicted, consistent with his pleas, of willful dereliction of duty on divers occasions, violation of a lawful general regulation, specifically the Joint Ethics Regulation (JER), on divers occasions, wrongful appropriation of military funds on divers occasions, and wire fraud[1] on divers occasions, in violation of Articles 92, 121, and 134, UCMJ, 10 U.S.C. §§ 892, 921, 934. His adjudged and approved sentence consists of a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

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[1] The appellant was convicted of violating 18 U.S.C. § 1343 by voluntarily and intentionally devising a scheme to defraud the United States government of unauthorized payments of his military pay by using interstate wire communications. This statute was assimilated as a violation of Article 134, UCMJ, 10 U.S.C. § 934.

The appellant asserts three errors. First, he contends that his convictions for dereliction of duty and violation of the JER are multiplicious. Next, he avers the charges in his case constitute an unreasonable multiplication of charges. Finally, the appellant submits his sentence is inappropriately severe.

The appellant served as a pay technician in the Comptroller Squadron at McGuire Air Force Base, New Jersey. He had access to the Air Force Pay and Finance Electronic Computer System. On 35 occasions, the appellant improperly accessed the computer system and arranged, for his benefit, 30 partial payments in the amount of $6,900 and 5 advance payments in the amount of $6,850. The appellant was in New Jersey at the time of the offenses and the accessed computer system was in Colorado.

Multiplicity

Charge I contains two specifications. Specification 1 alleges willful dereliction of duty on divers occasions by failing to comply with restrictions not to exceed his authorized access to the Air Force Pay and Finance Electronic Computer System. Specification 2 alleges violation of the JER on divers occasions by wrongfully using a government communications system for other than official and authorized purposes. Prior to entry of his pleas, the appellant moved to dismiss Specification 2 of Charge I on the grounds of multiplicity. The military judge denied the appellant's motion, ruling "that each specification addresses a separate and distinct illegal act which Congress has appropriately determined should be punished separately." The appellant then entered an unconditional plea of guilty.

Ordinarily, an unconditional guilty plea waives a multiplicity issue, except where the record shows that the challenged offenses are facially duplicative. *United States v. Heryford* 52 M.J. 265, 266 (2000); *United States v. Lloyd*, 46 M.J. 19, 23 (1997). Offenses are facially duplicative if they are factually the same. *United States v. Oatney*, 45 M.J. 185 (1996). The two specifications at issue are not factually the same and therefore are not duplicative. The offense of dereliction of duty involved conduct separate from the conduct targeted by the violation of the JER. The appellant was derelict in the performance of his duties by exceeding his access to the Air Force Pay and Finance Electronic Computer System and he violated the JER by wrongfully using a government communications system for other than official use and authorized purposes.

Our review of the record leads us to conclude that the military judge properly applied the test for multiplicity set forth in *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). The military judge held, and we agree, "that each specification addresses a separate and distinct illegal act which Congress has appropriately determined should be punished separately." We acknowledge that the specifications are related to each other in that they involve different aspects of the means used to commit the wrongful

appropriation of government money. However, this fact does not make the specifications multiplicious or duplicative. We also note that the dereliction offense requires an additional element – actual knowledge of the assigned duties – that is not required in the specification alleging violation of the JER.

Unreasonable Multiplication of Charges

In his second assignment of error, the appellant alleges that both specifications of Charge I should be set aside as an unreasonable multiplication of charges. Unlike the doctrine of multiplicity, which is grounded in the double jeopardy prohibitions of the Constitution of the United States, the prohibition against the unreasonable multiplication of charges is an equitable concept premised on Rule for Courts-Martial (R.C.M.) 307(c)(4) Discussion. The Discussion to R.C.M. 307(c)(4) states, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." *See United States v. Quiroz*, 55 M.J. 334, 336-39 (2001); *United States v. Deloso*, 55 M.J. 712 (A.F. Ct. Crim. App. 2001), *pet. denied*, 56 M.J. 317 (2002).

The parties agree that the appellant waived this issue at trial. On the substance of the issue, the Court acknowledges the government charged the appellant not only with wrongful appropriation, but also the means to commit the wrongful appropriation. However, as discussed above, each offense is aimed at a distinctly separate criminal act, even though each is part of a common scheme to misappropriate government funds. The number of charges neither misrepresents nor exaggerates the appellant's criminality, but rather presents an accurate portrayal of the appellant's criminal conduct. There was an increase in the appellant's punitive exposure from 5½ years to 8 years. This increase is neither unfair nor disproportionate to the alleged criminal conduct. Lastly, the appellant has presented no evidence of prosecutorial overreaching or abuse in drafting the charges. The appellant's alleged error of unreasonable multiplication of charges is without merit.

Sentence Appropriateness

Finally, the appellant argues that his sentence is inappropriately severe. This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). In order to determine the appropriateness of the sentence, this Court must consider the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

He asks that consideration be given to his nine years of service and that he "essentially stands convicted of paying himself his own pay before the government was

actually required to pay it to him." The appellant was an experienced member of the Air Force, pending promotion to staff sergeant. He abused his position of trust and improperly accessed on 35 occasions a sensitive Air Force computer for his own personal monetary benefit. We do not find the sentence inappropriately severe. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Art. 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator