UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOHN A. LEWIS
United States Air Force

ACM 36894

14 July 2008

Sentence adjudged 09 September 2006 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Jennifer Whittier.

Approved sentence: Bad-conduct discharge, confinement for 90 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Amber E. Hirsch.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a general court-martial (panel of officer and enlisted members) convicted the appellant of one specification of willfully damaging military property and one specification of sabotage by willfully injuring a national defense utility with the intent to interfere with the national defense of the United States, in violation of Articles 108 and 134, UCMJ, 10 U.S.C. §§ 908 and 934. The adjudged and approved sentence consists of a bad-conduct discharge, 90 days confinement, and reduction to E-1.

The appellant asserts three assignments of error. Specifically the appellant asserts that: (1) the evidence is factually and legally insufficient to support his convictions; (2) his sentence of a bad conduct discharge, 90 days confinement, and reduction to E-1 is inappropriately severe in light of the circumstances surrounding the offenses and the mitigating factors; and (3) the specifications of Charge I and Charge II are multiplicious for findings. Finding no error we affirm the findings and the sentence.

Background

On 16 October 2005, the appellant was the primary loadmaster on a C-17 aircraft that was returning from Spangdahlem Air Base (AB), Germany. His crew's original mission was to fly the C-17 aircraft from Spangdahlem AB to Pittsburgh International Airport, Pittsburgh, Pennsylvania, spend the night in Pittsburgh, and return the C-17 aircraft to Charleston Air Force Base, South Carolina the next morning. The appellant, a Pittsburgh native, was elated that the mission would be stopping for the night in Pittsburgh as it would allow him to spend time with his family and friends. However, two of the appellant's crew members had pressing matters--an illness and a short-notice training requirement--that necessitated, at least in the minds of appellant's crew, revising the mission to eliminate the overnight stay in Pittsburgh.

The appellant, upon learning that he and his crew would not be spending the night in Pittsburgh, became disappointed and angry. Shortly after arriving in Pittsburgh, the aircraft inexplicably developed an aircraft emergency bus problem. As a Pennsylvania Air National Guard (PANG) maintenance crew attempted to repair the aircraft, the appellant confessed to Senior Airman (SrA) MS that he (the appellant) had broken the aircraft by disconnecting the cannon plug near the aircraft's battery compartment. The PANG maintenance crew was unable to repair the aircraft. The aircraft was grounded and, as a result, the appellant, the appellant's crew, and the aircraft's passengers were delayed in Pittsburgh for two days awaiting the aircraft's repair.

While the appellant's crew stayed at a local hotel, the appellant stayed with his family. Subsequent investigations revealed that the aircraft emergency bus problem experienced by appellant's aircraft could be replicated by disconnecting the cannon plug near the aircraft's battery compartment. At trial, the appellant unsuccessfully argued his innocence, mounted a good military character defense, and attacked the credibility of SrA MS. This brings us to the current issues.

Discussion

Factual and Legal Sufficiency

The appellant asserts the government failed to prove him guilty by proof beyond a reasonable doubt of the offenses of which he was convicted. We review claims of factual and legal insufficiency de novo, examining all the evidence properly admitted at trial, and applying the standards established by our superior courts. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Quintanilla,* 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

Several witnesses testified that on 16 October 2005, the appellant was the primary loadmaster on a C-17 aircraft (tail number 891192) that was returning from Spangdahlem AB. Captain RL testified that the C-17 aircraft is "an Air Force asset . . . [that contributes to the national defense of the United States by] carry[ing] combat loads, bombs, bullets [and] troops directly to the war fighter in Iraq, Afghanistan or other areas in support of the ongoing conflict." He further testified that on 16 October 2005, the C-17 aircraft had transported cargo pallets and passengers to the Pittsburgh International Airport and had plans to transport Marine passengers to Charleston.

Several witnesses testified that shortly after arriving in Pittsburgh the aircraft inexplicably developed an AC emergency bus problem. The parties stipulated that $758.78 was spent to repair the aircraft. While the appellant's crew stayed at a local hotel, the appellant stayed with his family. Finally, with the concurrence of trial and defense counsel, the military judge took judicial notice that 18 USC 2155(a) was in effect on 16 October 2005. The witness testimony, especially the testimony that the appellant confessed to breaking the aircraft by disconnecting the cannon plug near the battery compartment, provided sufficient basis for a rational trier-of-fact to conclude beyond a reasonable doubt that the appellant committed the offenses of which he was found guilty. Moreover, based on the aforementioned evidence, we ourselves are convinced beyond a reasonable doubt the appellant is in fact guilty of the offenses of which he has been found guilty.

Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

When conducting our review, we should also be mindful that Article 66(c), UCMJ, has a sentence appropriateness provision that is "a sweeping Congressional mandate to ensure a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citing *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)). Article 66(c), UCMJ, "requires that [we] independently determine, in every case within [our] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [we] affirm." *Baier*, 60 M.J. at 384-85. However, our duty in this regard is "highly discretionary" and does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's authorization to his defense counsel to argue for a bad-conduct discharge, albeit in lieu of confinement, belies the appellant's notion that a bad-conduct discharge is inappropriately severe. Moreover, even if the appellant had not authorized his counsel to argue for a bad-conduct discharge, we nevertheless find a bad-conduct discharge and the remaining portions of the sentence appropriate under the circumstances. Put simply, we do not find the appellant's sentence inappropriately severe and instead find the sentence appropriate for this offender and his offenses. *See Baier,* 60 M.J. at 383-84; *Healy,* 26 M.J. at 395.

Multiplicity

The appellant asserts that the specification of Charge I is multiplicious with the specification of Charge II. We review claims of multiplicity for findings de novo. *United States v. Hudson*, 59 M.J. 357, 358 (C.A.A.F. 2004). Absent plain error, an appellant's failure to raise multiplicity for findings at trial constitutes waiver and precludes consideration on appeal. *United States v. Lloyd,* 46 M.J. 19, 21-22 (C.A.A.F. 1997); *United States v. Spears,* 39 M.J. 823, 823-24 (A.F.C.M.R. 1994). The appellant bears the burden of showing that such an error occurred. *United States v. Powell,* 49 M.J. 460, 464-65 (C.A.A.F. 1998). To meet this burden, the appellant must show: (1) error; (2) that the error was plain, clear, or obvious; and (3) that the error affected his substantial rights. *United States v. Olano*, 507 U.S. 725, 734 (1993). The appellant failed to raise a multiplicity for findings issue at trial and thus, absent a finding of plain error, this issue is waived.

Offenses are multiplicious if one is a lesser-included offense of the other, *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002), or if the offenses are "facially duplicative," i.e., factually the same. *United States v. Heryford,* 52 M.J. 265, 266 (C.A.A.F. 2000) (quoting *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)). To determine whether the offenses are facially duplicative courts apply the elements test. Under this test, the court considers whether each provision requires proof of a fact which the other does not. Rather than adopting a literal application of the elements test, the

resolution of multiplicity claims "can only be resolved by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one or more elements of the other offense - and vice versa." *Hudson*, 59 M.J. at 359 (C.A.A.F. 2004) (quoting *United States v. Foster*, 40 M.J. 140, 146 (C.M.A. 1994)); *see also Blockberger v. United States*, 284 U.S. 299, 304 (1932). Stated alternatively, the pragmatic or realistic comparison approach of *Foster* still requires, at the very least, a conclusion that one offense could not possibly be committed without committing the other offense. *Foster*, 40 M.J. at 146.

In the case *sub judice*, each offense requires proof of a fact that the other does not and thus the offenses are not multiplicious for findings. The offense enunciated under Charge I requires proof that the damage was of a value greater than $500 or of some lesser amount whereas the offense enunciated under Charge II does not require such proof. The offense enunciated under Charge II requires proof that the appellant acted with the intent to interfere with the national defense of the United States, whereas the offense enunciated under Charge I does not require such proof.

Additionally, it was possible to commit charge II without committing charge I—especially if there was no damage.[1] Thus the offenses, notwithstanding their similarities of requiring proof that the appellant pulled a cannon plug on the questioned aircraft, are not multiplicious for findings.[2] The appellant has failed to meet his burden of showing plain error much less error.

Moreover, assuming arguendo that the appellant had been successful in showing plain error, he has failed to show that the error has affected his substantial rights. In this regard, the court notes that the military judge found and instructed the members that the offenses were the same for sentencing purposes and that the appellant would be subjected to the maximum punishment for the offense that carried the greatest potential punishment (Charge II). The appellant was not subjected to the maximum punishment for both offenses, was only sentenced as if he committed one offense as opposed to two, and received a sentence well below the maximum punishment of the offense (Charge I) that carried the lesser maximum punishment.

Finally, though not raised as an issue at trial nor on appeal, and with full cognizance that multiplicity is not synonymous with an unreasonable multiplication of charges, we also find that the charges do not constitute an unreasonable multiplication of

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[1] If the Pennsylvania Air National Guard (PANG) maintenance crew had been able to repair the aircraft on 16 October 2005, that would have obviated the need send the Charleston maintenance crew to Pittsburgh to repair the aircraft. There would have been no damage—certainly not the $758.78 damage that formed the basis of the government's case—and no basis to charge the Article 108, UCMJ violation. However, given the aircraft's temporary disability there still would have been a basis to charge the Article 134, UCMJ violation.

[2] Such would arguably be the case even if one were to equate the term: (1) "without proper authority" with the term "wrongful"; (2) "damage" with the term "injure"; and (3) "military property" with the term "national defense utility."

charges.[3] Namely we find that: (1) the appellant failed to object at trial that there was an unreasonable multiplication of charges; (2) each charge and specification is aimed at distinctly criminal acts--damage to government property and sabotage that interferes with the national defense of the United States[4]; (3) the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality; (4) the number of charges and specifications do not *unreasonably* increase the appellant's punitive exposure; and (5) there is no evidence of prosecutorial overreaching. *United States v. Pauling,* 60 M.J. 91, 95 (C.A.A.F. 2004); *see also United States v. Quiroz,* 55 M.J. 334, 337-38 (C.A.A.F. 2001).

Conclusion

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[3] We address unreasonable multiplication of charges in recognition of the fact that such has long provided reviewing authorities with a traditional legal standard -- reasonableness -- to address the consequences of an abuse of prosecutorial discretion. *See United States v. Quiroz,* 55 M.J. 334 (C.A.A.F. 2001).

[4] Arguably not every act of damaging military property is done with the intent to interfere with the national defense of the United States and thus not every act of damaging military property will constitute sabotage.