**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Captain JEREMY M. LUKOWSKI**
**United States Air Force**

**ACM 37095**

**10 September 2008**

Sentence adjudged 18 May 2007 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: Charles E. Wiedie.

Approved sentence: Dismissal, fine of $20,000.00, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of six specifications of making a false official statement, four specifications of larceny of military property, and two specifications of making a false claim, in violation of Articles 107, 121, and 132, UCMJ, 10 U.S.C. §§ 907, 921, 932 respectively.[1] The members sentenced the appellant to a dismissal, a $20,000 fine, two months restriction, and a reprimand. The convening authority approved the findings, the dismissal, the $20,000 fine, and the reprimand.

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[1] The members also found the appellant not guilty of three specifications of making a false official statement.

On appeal, the appellant asks the Court to set aside his findings of guilt and sentence because of the following assertions of error: (1) Specification 5 of Charge I and Specification 2 of Charge II constitute an unreasonable multiplication of charges; (2) Specifications 7, 8, and 9 of Charge I and Specification 3 of Charge II constitute an unreasonable multiplication of charges; (3) Specification 4 of Charge II and Specifications 1 and 2 of Charge III constitute an unreasonable multiplication of charges; (4) that portion of the appellant's sentence that includes a $20,000 fine is inappropriately severe; and (5) the military judge, to the prejudice of the appellant, erred when he failed to read the government witness, ANE, her *Miranda*[2] rights.[3] Finding no error, we affirm.

*Background*

In January 2005, the appellant was reassigned on a remote tour to Kunsan Air Base, Republic of Korea. He had a follow-on assignment to Fort Wainwright, Alaska and, in anticipation of that assignment, the appellant rented a storage facility on Kutter Road, Fairbanks, Alaska. Prior to his Korea assignment, ANE, the appellant's wife, and his infant son moved to Oklahoma to live near ANE's parents.

Yet while so assigned, the appellant filed permanent change of station (PCS) and government entitlement paperwork (basic allowance for quarters forms, temporary lodging allowance forms, family separation allowance forms, and travel vouchers) indicating his wife and infant son resided at the Kutter Road address. The appellant also filed temporary lodging allowance forms and travel vouchers claiming his wife and son stayed with him in lodging during his PCS to Fort Wainwright, Alaska. As a result of the appellant's actions, the Air Force over paid him approximately $20,000.

At trial, the appellant moved the military judge to: (1) find the charges and specifications referenced in issues 1-3 unreasonably multiplicious and (2) advise ANE of her rights against self-incrimination.[4] The military judge denied the appellant's unreasonable multiplication motion but did merge the referenced charges and specifications for sentencing purposes. The military judge also denied the appellant's rights advisement motion but did advise the appellant that he would advise ANE of her rights against self-incrimination if she said anything that would tend to incriminate her.

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] All five issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] While the appellant framed the fifth assertion of error as the military judge's failure to advise ANE of her *Miranda* rights, we will assume, given the fact that ANE was not in custody during her interrogation, the appellant is really citing a failure to advise ANE of her rights against self-incrimination.

*Discussion*

*Unreasonable Multiplication of Charges*

Unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling,* 60 M.J. 91, 95 (C.A.A.F. 2004). Our superior court has noted that "even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the 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).

Rule for Courts-Martial 307(c)(4) provides "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[5] To discern whether an unreasonable multiplication of charges has occurred, our superior court enunciated a five-part test:

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

*Pauling*, 60 M.J. at 95; *Quiroz*, 55 M.J. at 338. The factors are to be balanced, with no single factor dictating the result. *Pauling*, 60 M.J. at 95.

In the case at hand, we find no unreasonable multiplication of charges. While trial defense counsel did object to the charging at trial, the other factors weigh against the appellant. Specifically we note: (1) each charge and specification is aimed at distinctly criminal acts—false official statement, larceny, and false claims; (2) the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality; (3) the number of charges and specifications do not *unreasonably* increase the appellant's punitive exposure; and (4) there is no evidence of prosecutorial overreaching. Moreover, the military judge's decision to merge the referenced charges and specifications for sentencing purposes was fair and clearly a matter within his discretion. In short, the appellant's assertion that the referenced charges and specifications represent an unreasonable multiplication of charges is without merit.

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[5] Manual provisions cited are identical to the provisions in effect at the time of the appellant's court-martial.

*Inappropriately Severe Sentence*

Article 66(c), UCMJ, 10 U.S.C. § 866(c) provides that this Court "may affirm . . . 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." Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

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)). However we are not authorized to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

The appellant defrauded the United States of approximately $20,000 and clearly departed from the standards expected of service members. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, including the $20,000 fine, inappropriately severe.

*Witness Miranda[6] Advisement*

If a witness who is apparently uninformed of the privilege against self-incrimination appears likely to incriminate himself, the military judge, either *sua sponte* or at the request of counsel for either party or the witness, should advise the witness of the right to decline to make any answer which might tend to incriminate him and that any self-incriminating answer may later be used as evidence against him. Mil. R. Evid. 301(b)(2).

While counsel for either party or the witness may request the witness be so advised, the responsibility of such advisement rests solely with the military judge and is a matter within his discretion. *United States v. Woodford*, 11 C.M.R. 914, 917 (A.F.B.R. 1953). Additionally, the self-incrimination privilege of a witness before a court-martial is one personal to the witness, one that does not create a right in any party except for the witness, and one that can be asserted only by the witness. *United States v. Murphy*, 21 C.M.R. 158, 164 (C.M.A. 1956); *United States v. Woodford*, 11 C.M.R. at 917.

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

In the case *sub judice*, the military judge did not abuse his discretion in refusing to advise ANE of her rights against self-incrimination. Moreover, assuming *aguendo* the military judge erred in failing to so advise ANE, the error prejudiced ANE not the appellant and thus cannot serve as the basis of a claim of prejudicial error to the appellant. *See United States v. Brookman*, 23 C.M.R. 193, 196 (C.M.A. 1957) (citing *Murphy*, 7 C.M.A. at 164). *See also United States v. Howard,* 17 C.M.R. 186 (C.M.A. 1954).

*Erroneous Court-Martial Order*

We note that the court-martial order erroneously states the appellant was arraigned at Elmendorf Air Force Base, Alaska rather than at Eielson Air Force Base, Alaska. Preparation of a corrected court-martial order, properly reflecting the appellant was arraigned at Eielson Air Force Base, Alaska is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

*Conclusion*

The findings and the 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 findings and sentence are

AFFIRMED.

OFFICIAL


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