UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LESTER B. PICKINGS
United States Air Force

ACM 36107

29 November 2006

Sentence adjudged 22 September 2004 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Print R. Maggard (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

SOYBEL, Judge:

The appellant was convicted, after mixed pleas, of willful damage to non-military property, wrongful use of marijuana, breach of the peace, willful discharge of a firearm endangering human life, communicating a threat, and unlawfully carrying a concealed weapon in violation of Articles 109, 112a, 116 and 134, UCMJ, 10 U.S.C. §§ 909, 912a, 916 and 934. He was found guilty by a military judge sitting as a general-court martial, and sentenced to a bad-conduct discharge, confinement for 15 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant asserts one error for our review. He contends that the military judge erred by failing to dismiss Charge III and its Specification as being multiplicious with Charge I and its Specification, and Specification 1 of Charge IV.[1] In the alternative, he contends that these specifications constitute an unreasonable multiplication of charges. Finding no error, we affirm.

Background

The appellant and his wife were both assigned to the 12th Missile Squadron, Malmstrom Air Force Base, Montana, as missile chiefs. They soon experienced marital problems and were divorced. Appellant's ex-wife moved into an apartment with another woman in downtown Great Falls, Montana. One evening, the appellant stopped by the apartment to discuss a $116.00 phone bill for which he believed his ex-wife was responsible. Unfortunately, she was not there as she had just started four days of duty preparing meals in the missile field. However, another couple and their young children were at the apartment visiting the roommate of appellant's ex-wife.

Appellant tried to discuss the phone bill issue with his ex-wife's roommate, but she refused to discuss it saying the matter was between appellant and his ex-wife, and that she did not want to be involved. Appellant, soon after this exchange, became angry and argumentative. He left the apartment after showing witnesses what they thought to be a handgun tucked in the waistband of his pants. Seconds after he left, everyone in the apartment heard six gunshots. During the shooting, one of the witnesses saw appellant shooting into both sides of his ex-wife's car. The people remaining in his ex-wife's apartment feared for their safety. The car sustained just over $5,300.00 worth of damage.

Multiplicity

Appellant pled guilty to Charge I and its Specification, Charge III and its Specification with excepted language not relevant here, not guilty to Charge II and its Specification, and not guilty to Charge IV. During the pre-sentencing phase of the trial, the appellant's trial defense counsel made a motion for the military judge to consider Charges I, III, and IV as being multiplicious for sentencing. In the alternative, the appellant's trial defense counsel asked the military judge to find Charges I, III and Specification 1 of Charge IV multiplicious for sentencing. The military judge denied the appellant's motion first motion, but granted the second by saying he would consider the maximum punishment in regards to confinement to be 5 years for all three offenses.

1 Charge I and its Specification alleged willful destruction of non-government property by shooting into an automobile; Charge III and its Specification alleged breach of the peace by wrongfully discharging a firearm on a public street; and Specification 1 of Charge IV alleged discharge of a firearm endangering human life.

Ordinarily, an unconditional guilty plea waives a multiplicity issue, except where the record shows that the challenged offenses are facially duplicative.[2] *United States v. Heryford,* 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). Offenses are facially duplicative if they are factually the same. *See United States v. Oatney*, 45 M.J. 185, 188 (C.A.A.F. 1996).

Although we are not applying the waiver doctrine to resolve this case, the specifications at issue are not factually the same and therefore are not duplicative. We acknowledge that all three involve the discharge of a firearm. However, the offense of willful damage to the car involved damage to another's property, which is separate from the offense of breach of the peace, which requires that the peace be unlawfully disturbed. Both of these are separate from discharging a firearm under circumstances that endanger human life, which requires that other humans be endangered. *See U.S. v. Weymouth*, 43 M.J. 329, 331-32 (C.A.A.F. 1995). Moreover, Charge I protects another's property, Charge III protects the public tranquility, and Specification I of Charge IV protects public safety. Besides being factually separate, each of the three protects distinct, important societal interests.

In terms of proving additional facts as required in the test for multiplicity set out in *Blockburger v. United States*, 284 U.S. 299 (1932), it is undisputed that the government proved the car suffered significant damage. *Id*. at 304. There was clearly a breach of the peace, as evidenced by several people milling around the car after the shooting and the arrival of one of the witnesses from several blocks away after he heard the shots fired. Finally, even though the appellant fired into the car, there was also evidence introduced showing houses or apartments on both sides of the street that were generally in a down-range direction from the shots. Indeed, one of the six shots was never recovered, and as a police officer testified, any of the bullets could easily have traveled out of, or off of the car, and could have penetrated the wall of a nearby house.

This approach also corresponds with the test for multiplicity set forth in *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993), which only allows multiple convictions and punishments under different statutes for the same act or course of conduct, when Congress has appropriately determined that those violations should be punished separately. Given that these three laws protect very distinct societal interests, and require proof of at least one element unique to each charge, we hold that conviction on all three charges does not violate Congressional intent and are therefore not multiplicious.

2 This is obviously applicable to Charges I and III, but not Charge IV.

Unreasonable Multiplication of Charges

The appellant contends that even if the charges are not multiplicious, the prosecution's decision to charge all of these offenses separately is unreasonable. We disagree.

The overarching principle involved in the concept of unreasonable multiplication of charges is overreaching in the exercise of prosecutorial discretion. *See U.S. v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). *Quiroz* sets out five factors, which are not all inclusive, to determine whether the charging of appellant was unreasonable. They are: 1) Was there any objection at trial?; 2) Does each charge and specification cover separate criminal acts?; 3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?; 4) Does the charging unfairly increase appellant's criminal exposure?; and 5) Is there any evidence of prosecutorial overreaching or abuse in drafting the charges? *Id*. at 338.

The standard used to determine whether the prosecution has overreached is one of reasonableness. *Id.* at 339. We begin by recognizing that this issue was never raised at trial. Even so, after reviewing this case we do not find the government acted unreasonably in charging appellant with the three offenses related to shooting the gun. Without a doubt, there were consequences that were related to each of the separate harms the individual statutes sought to prevent. The charges reflect the full and appropriate consequences of appellant's actions and do not excessively punish him by "piling on" extra charges, or exaggerating his criminality. *Id.* at 339. As a result, we find that appellant was appropriately charged given the circumstances surrounding his conduct.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Senior Judge ORR participated prior to his reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court