UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KEVIN D. RODRIGUEZ
United States Air Force

ACM 36964

10 September 2008

Sentence adjudged 10 January 2007 by GCM convened at Buckley Air Force Base, Colorado. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 17 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jason M. Kellhofer.

Before

HEIMANN, ZANOTTI, and PLACKE
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

A military judge, sitting alone as a general court-martial, found the appellant guilty in accordance with his pleas of larceny, drawing checks without sufficient funds, bigamy, and dishonorably failing to pay debts, in violation of Articles 121, 123a, and 134, UCMJ, 10 U.S.C. §§ 921, 923a, 934 respectively. He was sentenced to a bad-conduct discharge, confinement for 17 months, reduction to E-1, and total forfeitures. The convening authority approved the findings and sentence.

Before this Court, the appellant raises two issues — whether the military judge committed plain error by not finding the larceny specifications of Charge I represent an unreasonable multiplication of charges because the underlying conduct constituted a single larceny; and whether the appellant's sentence in inappropriately severe.[1] Finding no error, we affirm the findings and sentence.

Background

During a six-week span of time between 6 March 2006 and 19 April 2006, the appellant wrote 24 bad checks to the Army and Air Force Exchange Service, the smallest at $99.98, the largest at $661, and most in the $300 range, and together totaling more than $7,800. When investigated for the checks, he claimed a series of expenses which far exceeded his earnings. According to the appellant, his financial downward spiral began with paternity litigation over his step-son, followed by custody and visitation litigation. He claimed to have tried to get financial aid, but was told that because the paternity litigation was against his wife, nothing could be done to assist him.[2] The appellant used his government charge card for additional income. When this was discovered, the appellant received non-judicial punishment, and automatic repayments to the government for the fraudulent use of the government credit card commenced. Because of this loss in pay, the appellant began to write the bad checks to keep his household afloat. The extra "cash-flow" notwithstanding, the appellant was evicted from his apartment, and his belongings were placed on the front lawn where they were subsequently stolen by passersby.

The appellant then applied for a loan at the Airman Family and Readiness Center. Because he believed that telling the truth would fail to result in a loan, he instead told the master sergeant who administered financial service programs that his home had been burglarized and his possessions were stolen. He claimed his checkbook was among the items taken, and as a result, the bank had placed his funds "on hold" until a new account could be set up. While the appellant had requested a single loan, the master sergeant was so taken by his story that he gave the appellant two grants, from separate agencies, instead of a loan. He issued two grants to keep the amounts within what he believed was his grant approval authorization. In reality, the master sergeant had grant approval authorization up to $500, so the total amount could have been issued in one grant. The appellant accepted the grants, understanding that repayment was not required. He did not

---

[1]The appellant raised this issue pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

[2]According to the appellant, just after arriving at Buckley Air Force Base, Colorado, litigation in Texas commenced. In that litigation, another man asserted paternity over the son thought to be between the appellant and his wife, CR. Having prevailed in the paternity action, the man began proceedings for custody of the six-year old boy. The appellant and his wife prevailed in that action. Ultimately the appellant's family incurred further additional expenses as a result of a court order that visitation was to take place in Texas. The boy's biological father failed in his duty to provide child support.

repay the money. He was charged with larceny for the two grants, one specification for each grant issued. He pleaded guilty and was convicted of the two specifications.

The appellant entered into a pre-trial agreement with the convening authority, a condition of which was that he waive all waivable motions. The military judge thoroughly examined this provision of the agreement with the appellant, advising that it "precludes this court or any other appellate court from having the opportunity to determine if you are entitled to any relief based upon such motions." At trial, the appellant did not raise a motion for relief due to unreasonable multiplication of charges. Nor did the military judge make a ruling *sua sponte* on the matter. The appellant now argues that this was plain error.

Discussion

This Court has recently held that an affirmative waiver of motions by the appellant pursuant to a pre-trial agreement (PTA) provision freely and voluntarily agreed to by the appellant eliminates the need for this Court to consider the claim of unreasonable multiplication of charges. *United States v. Gladue*, 65 M.J. 903, 905 (A.F. Ct. Crim. App. 2008). Accordingly, we affirm the findings.

In *Gladue,* the appellant raised multiplicity and unreasonable multiplication of charges as bases for relief for the first time on appeal. The appellant there entered into a PTA with the convening authority, which contained a condition that the appellant waive all waivable motions. The military judge examined the appellant's understanding and agreement to each provision of the PTA, and as to the relevant provision, "the appellant acknowledged that he 'freely and voluntarily' agreed to this term 'in order to receive . . . a beneficial pretrial agreement.'" *Gladue,* 65 M.J. at 904. The motions for relief on the grounds of multiplicity and unreasonable multiplication were not expressly discussed, though other motions had been. However, the appellant acknowledged that the PTA provision meant that neither the trial court nor "any appellate court" would determine whether he was entitled to relief on the waivable motions, including not only the motions listed by trial defense counsel as having been discussed with the appellant, but "any other waivable motions." *Id.*[3]

The appellant's case cannot be distinguished thus far from *Gladue,* with the exception that trial defense counsel stated that he intended to raise no motions on findings. Nevertheless, we find as a matter of fact, as we did in *Gladue*, that the appellant has freely and voluntarily relinquished his right to have this Court consider the waivable motion of unreasonable multiplication of charges. We again state that the test is whether the PTA provision is freely and voluntarily agreed to, and does not turn on

[3] In *Gladue,* we held that this issue is waivable. *United States v. Gladue,* 65 M.J. 903, 905 (A.F. Ct. Crim. App. 2008). The appellant does not argue otherwise.

whether the particular waivable issue was "expressly relinquish[ed]." *Gladue*, 65 M.J. at 905. Once we conclude that the appellant has freely and voluntarily agreed to waive the issue, our review is complete but for a finding of "extreme or unreasonable 'piling on' of charges," *Id.* (quoting *United States v. Butcher,* 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), the presence of which would require us to make a plain error review, though limited to whether the charged offenses are "facially duplicative" as outlined in *United States v. Lloyd,* 46 M.J. 19, 23 (C.A.A.F. 1997).

We are satisfied the specifications in Charge I are neither extreme nor an "unreasonable piling on" of charges, despite Rule for Courts-Martial 307(c)(4), which states "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." The Court of Appeals for the Armed Forces has endorsed a five-part test to examine whether the government has unreasonably multiplied the charges. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001); United *States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). The factors are to be balanced, with no single factor governing the result. *Pauling*, 60 M.J. at 95. The factors are (1) did the appellant object at trial; (2) is each charge and specification aimed at distinctly separate 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; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *Quiroz,* 55 M.J. at 338.

Balancing these factors, we conclude that the only factor substantially met is (2), whether each specification of Charge I is aimed at distinctly separate acts. We are satisfied that the others remain unmet. First, the maximum sentence changes only with respect to the length of confinement—to 8.5 years from 9 years as the appellant was advised based on the specifications as charged—a difference of just six months. Secondly, the government exercised reasonable discretion with respect to the single specification in Charge III—rather than splitting the numerous bad checks into multiple specifications and thereby increasing the confinement six months for each additional specification.[4] *See Manual for Courts-Martial, United States*, (MCM) Part IV,¶ 49(e) (2008 ed.).[5] Finally, these specifications are the least aggravating for sentencing purposes. Again, Charge III contains a single specification for 24 bad checks totaling more than $7,800, and Charge II includes the specifications of bigamy and dishonorable failure to pay just debts.

We have considered the appellant's second assignment of error and find it to be without merit. The appellant's sentence, based on this record, is not inappropriately severe.

---

[4] The record demonstrates the appellant wrote one check in an amount over $500; the remaining 23 were all less than $500.

[5] While the Manual for Courts-Martial was updated in 2008, the maximum punishment for the appellant's offenses is the same today as it was under the former manual that was in effect at the time of the appellant's court-martial.

Conclusion

The 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 findings and sentence are

AFFIRMED.

Judge PLACKE did not participate.

OFFICIAL

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