UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WOODY E. ROPER
United States Air Force

ACM 34068

24 January 2002

Sentence adjudged 23 March 2000 by GCM convened at Travis Air Force Base, California. Military Judge: David M. Brash.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Timothy W. Murphy and Major Stephen P. Kelly.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Scott J. Wilkov.

Before

BURD, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of conspiracy to commit larceny, larceny, and false swearing, in violation of Articles 81, 121, and 134, UCMJ, 10 U.S.C. §§ 881, 921, 934. The court-martial also found the appellant guilty, contrary to his pleas, of obstructing justice, in violation of Article 134, UCMJ. The sentence adjudged and approved was a bad-conduct discharge, confinement for 3 months, and reduction to E-1.

On appeal, the appellant renews two issues raised at trial: 1) Whether the military judge erred in ruling the charges were not unreasonably multiplied, and 2) Whether the

evidence is legally and factually sufficient to sustain the conviction for obstructing justice. We find error and take corrective action.

Unreasonable Multiplication of Charges

The appellant concocted a plan to defraud his insurance company, and recruited others to help him execute the crime. According to the plan, he drove his motorcycle to a bookstore in Richmond, California. Michelle Cain, the appellant's girlfriend (later his wife), and her friend, Jillian Harvey, drove Airman First Class (A1C) Keith Turner to the bookstore. The appellant surreptitiously slipped A1C Turner a key to the motorcycle. A1C Turner drove off with the motorcycle, and abandoned it in a distant apartment complex. Michelle Cain and Jillian Harvey followed him to the site, and gave him a ride home. Meanwhile, the appellant called the Richmond Police Department and falsely reported that his motorcycle was stolen.

The appellant later filed a claim against his insurance company for the alleged theft. To substantiate the loss, the appellant completed a vehicle theft questionnaire, and signed it under oath before a notary public, swearing that his statements were true. The insurance company duly paid the claim, and the appellant received proceeds from the settlement.

The appellant was charged with conspiring to commit larceny, larceny, and false swearing. At the outset of trial, the appellant moved to dismiss the false swearing charge. He argued that because the false swearing was the means by which the appellant completed the larceny, charging both offenses for what was essentially a single transaction constituted an unreasonable multiplication of charges. The military judge denied the motion. The appellant renews the argument on appeal. We agree with the military judge that there is no merit to this argument.

Unreasonable multiplication of charges is a concept derived from the policy in the Manual for Courts-Martial that, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial (R.C.M.) 307(c)(4) (Discussion); *United States v. Quiroz*, 55 M.J. 334, 337 (2001); *United States v. Quiroz*, 53 M.J. 600, 604 (N.M. Ct. Crim. App. 2000). The purpose of this policy is to "ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Morrison*, 41 M.J. 482, 484 n.3 (1995) (quoting *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994)).

This policy, however, does not mean that there cannot be more than one charge for each separate criminal transaction. Where Congress creates two distinct offenses, the assumption is that Congress intended that the violation of each statutory provision be separately charged and punished. *Ball v. United States*, 470 U.S. 856, 861 (1985) ("Congress does not create criminal offenses having no sentencing component"); *United*

States v. Albrecht, 43 M.J. 65, 67 (1995); *Morrison*, 41 M.J. at 483-84 (Congress intended separate punishment for separate offenses); *United States v. Teters*, 37 M.J. 370, 377-78 (C.M.A. 1993) ("[S]eparate offenses warranting separate convictions and punishment can be presumed to be Congress' intent"). Thus, an individual may be charged, convicted, and separately punished for both larceny and forgery, where the forgery was the means of accomplishing the larceny. *Albrecht*, 43 M.J. at 68; *Teters*, 37 M.J. at 377-78. *See also United States v. Oatney*, 45 M.J. 185, 189 (1996) (obstructing justice and communicating a threat are separately punishable); *Morrison*, 41 M.J. at 484 (willful disobedience and missing movement offenses arising from same incident were separately punishable).

Prosecutors have the discretion to charge offenses that most accurately describe the misconduct and most appropriately punish the transgressions. *Foster*, 40 M.J. at 144 n.4. There is no indication the prosecution attempted to needlessly "pile on" the charges in this case. To the contrary, the charges merely reflected the full extent of the appellant's misconduct in this case. We find no evidence that the false swearing offense was charged simply to increase the appellant's criminal exposure.

Legal and Factual Sufficiency—Obstruction of Justice

The appellant was also charged with obstructing justice. It was alleged that on divers occasions the appellant wrongfully endeavored to influence the testimony of Jillian Harvey as a witness by saying to her, "My Dad is coming to town to stay with me and will be hiring a lawyer and we will tell you what to say," "I do not want to bring anyone down with me; I am going to keep you out of this; if anyone wants to talk to you about this you do not have to talk to them," and "I am going to have Becky play you," or words to that effect.

Jillian Harvey testified at trial, albeit reluctantly. She indicated that she told the appellant she would not lie to investigators, and thereafter the appellant made statements to her substantially similar to those charged. She specifically recalled the statement about "having Becky play you," because it had "an emotional impact on her." On cross-examination, Ms. Harvey admitted that the appellant did not threaten, coerce, scare, bribe, or manipulate her. She also indicated that no one ever tried to get her to testify falsely.

Trial defense counsel moved for a finding of not guilty under R.C.M. 917, but it was summarily denied. The members found the appellant guilty of obstructing justice on one occasion by saying, "I am going to have Becky play you." The appellant now maintains the evidence is legally and factually insufficient to support this finding. We agree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we will approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). This is the test we apply in this case. *But see United States v. Nazario*, 56 M.J. 572 (A.F. Ct. Crim. App. 2001); *United States v. Washington*, 54 M.J. 936, 941 (A.F. Ct. Crim. App. 2001) (indicating Congress intended this Court to employ a preponderance of the evidence test in determining the factual sufficiency of the evidence).

The offense of obstructing justice is made punishable under Article 134, UCMJ. In order to prove the offense, the government must show:

(1) That the accused wrongfully did a certain act;
(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal charges pending;
(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and
(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 96(b) (2000 ed.). Although the elements of the offense do not make it clear, case law requires that the act must be one "which produces or which is capable of producing an effect that prevents justice from being duly administered." *United States v. Smith*, 39 M.J. 448, 452 (C.M.A. 1994) (quoting *United States v. Howard*, 569 F.2d 1331, 1335 (5th Cir. 1978)). In other words, there must be some connection between the act and the intended effect. *Cf. United States v. Wood*, 6 F.3d 692, 697 (10th Cir. 1993) (natural-and-probable-effect test).

The appellant was charged with endeavoring "to influence the testimony of Jillian Harvey." The sole act found by the court-martial was that the appellant said to Jillian Harvey, "I'll have Becky play you," apparently meaning that Becky would pretend to be Jillian Harvey when talking to investigators. However, it does not appear that the act of making this communication to Ms. Harvey would produce the requisite effect—the obstruction of the administration of justice. If the appellant had made this statement to Becky, the offense would be complete, but there was no evidence that ever occurred. Instead, the statement in question was simply an announcement of his intention to commit the offense in the future.

We find that the simple statement of his intent to have "Becky" represent Ms. Harvey—without more—cannot reasonably be construed as evincing an intent to affect Ms. Harvey's testimony. The government argues that the appellant "must have verbalized his plan in order to obtain Ms. Harvey's cooperation." While that is possible, it is speculative; nothing in the evidence presented at trial indicates that was the case. To the contrary, to the extent that the utterance reveals a plan, it would not have required Ms. Harvey's active participation.

We find the evidence legally and factually insufficient to support the conviction for obstructing justice. We will take formal action to dismiss the affected findings in our decretal paragraph.

Sentence Reassessment

Having set aside the finding of guilt for a specification, it is necessary for this Court to reassess the sentence. We must determine an appropriate sentence for the offenses of which the appellant stands convicted—conspiracy to commit larceny, larceny, and false official statement. Article 66(c), UCMJ.

There is a conflict of opinion concerning the authority of this Court to reassess sentences. The language of Article 66(c), UCMJ, its legislative history, and the decision of the Supreme Court in *Jackson v. Taylor*, 353 U.S. 569 (1957), give this Court the responsibility and unfettered authority to reassess a sentence, even after modifying the approved findings. On the other hand, our superior court holds that the service courts may only reassess a sentence after a finding of prejudicial error if the court was convinced that the sentence, as reassessed, is not greater than the sentence that the original court-martial would have imposed. *United States v. Eversole*, 53 M.J. 132 (2000); *United States v. Taylor*, 47 M.J. 322, 325 (1997); *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). In *United States v. Sills*, 56 M.J. 556, 571 (A.F. Ct. Crim. App. 2001), *set aside on other grounds*, No. 02-0048/AF (15 Jan 2002), we analyzed these conflicting precedents, and concluded we are bound by the will of Congress and the decision of the Supreme Court. While the *Manual for Courts-Martial* gives this Court the authority to order a new hearing on sentence, it does not require us to do so. R.C.M. 810(a)(2) and 1203(c)(2).

We now reassess the sentence. Exercising our authority under Article 66(c), UCMJ, we find that an appropriate sentence for the remaining offenses is a bad-conduct discharge, confinement for 75 days, and reduction to E-1.

Even applying the more restrictive tests established by our superior court in *Sales* and its progeny, we reach the same result. The maximum possible punishment for the

offenses now before this Court was a dishonorable discharge, confinement for 13 years, forfeiture of all pay and allowances, a fine, and reduction to E-1. Considering the gravity of the crimes, the appellant's sentence was unusually light, perhaps due to the support the appellant received from his family. We are satisfied that, without the error below, the sentence imposed by the court-martial would not have been less than a bad-conduct discharge, confinement for 75 days, and reduction to E-1.

Conclusion

The findings of guilt for the Specification of the Additional Charge, and the Additional Charge, are set aside. The findings, as modified, and the sentence, as reassessed, 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator