UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant J. ABDUR-RAHIM SAAFIR
United States Air Force

ACM 36492

19 October 2007

Sentence adjudged 15 July 2005 by GCM convened at Rhein-Main Air Base and Ramstein Air Base, Germany. Military Judge: Adam Oler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 42 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted by general court-martial of 1 specification of attempted conspiracy, 14 specifications of conspiracy, and 14 specifications of violating a lawful general regulation, in violation of Articles 80, 81, and 92, UCMJ, 10 U.S.C. §§ 880, 881, 892. A military judge sentenced him to a dishonorable discharge, confinement for 42 months, and reduction to E-1. The convening authority, acting pursuant to the terms of a pre-trial agreement, approved the adjudged sentence, but suspended execution of that part of the sentence extending to

confinement in excess of 4 months for 38 months, with the suspended portion to be remitted at the end of that time unless sooner vacated.

The appellant raises two issues:

I. WHETHER SPECIFICATIONS 4, 5, 6, 7, 8, 10, 12, AND 15 OF CHARGE I, ADDITIONAL CHARGE I AND ITS SPECIFICATIONS, ADDITIONAL CHARGE III AND ITS SPECIFICATION, AND ADDITIONAL CHARGE IV AND ITS SPECIFICATION SHOULD BE DISMISSED DUE TO VIOLATION OF "WHARTON'S RULE";

II. WHETHER THE APPROVED SENTENCE IS INAPPROPRIATELY SEVERE.

We affirm in part.

Background

This case arises out of the appellant's efforts to cheat, and to help others cheat, on competitive examinations for promotion under the Air Force Weighted Airman Promotion System (WAPS). WAPS is the system the Air Force uses to promote its enlisted leadership. Airmen competing for promotion are awarded points based on a variety of factors, the most significant of which are the results of tests designed to measure an airman's knowledge of his specialty career field, the Air Force, and the military in general.

To protect the integrity of the promotion system, Air Force regulations prohibit the wrongful use of controlled promotion testing materials. Specifically, Air Force Instruction (AFI) 36-2605, *Air Force Military Personnel Testing System*, ¶ 5.7, states "Air Force members . . . will not . . . possess, reproduce, distribute, or communicate in any way the contents of CONTROLLED TEST MATERIAL unless authorized in this instruction."[1] (Emphasis in original.) Other provisions expand on this prohibition, making it illegal to copy or reproduce known or suspected test material, to question examinees about test content, or to "teach the test" by emphasizing information known or believed to be on a specific test. AFI 36-2605, ¶ 5.9.

The appellant was a career personnel specialist, with over 19 years of service at time of trial. As such, he was intimately familiar with the prohibitions on improper use of promotion testing material. Indeed, he told the military judge during the *Care*[2] inquiry

[1] The appellant's offenses occurred over a period of years, during which several different versions of the AFI were in effect. Excerpts of each are included in the record. The referenced prohibition remained the same throughout.
[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

that, given his years of experience working in personnel, he was probably more knowledgeable of the prohibitions than his attorneys.

Over a period of years, between February 2000 and May 2004, the appellant actively worked to thwart the prohibitions on improper use of controlled testing material by receiving, compiling, maintaining, and disseminating known or suspected test questions, often in concert with other airmen. Generally, the material was assembled by the appellant or others by "mirroring up" an exam, a process in which an examinee recreates test questions from memory shortly after taking the test, then passes the information to others who have not yet tested. On one occasion, the appellant was designated as a "Special Test Control Officer," giving him direct access to actual test materials, which he allowed another airman to copy. The appellant used the illicit material to study for his own promotion examinations and also gave it to others for their use. During the time period covered by the specifications of which he stands convicted, the appellant compromised more than 20 promotions tests.

The conspiracy and attempted conspiracy charges address the appellant's agreements with others to share WAPS testing material, in violation of AFI 36-2605.[3] The specifications alleging violations of Article 92, UCMJ, address the actual transfer of illicit materials to or from the appellant, also in violation of AFI 36-2605. Most of the Article 92 offenses target the completed objects of the charged conspiracy and attempted conspiracy offenses.

Wharton's Rule

The appellant asserts that several of the conspiracy offenses violate Wharton's Rule and that his conviction of those offenses must therefore be set aside. With one exception, we find no such violation.

A conspiracy to commit an offense and the subsequent commission of the substantive crime that is its immediate end do not merge upon completion of the latter, but may be separately charged and punished. *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975); *United States v. Crocker*, 18 M.J. 33, 36 (C.M.A. 1984). This principle is based on recognition that criminal conspiracies pose serious threats to civilized society, quite apart from the crimes that are their object. In *United States v. Rabinowich*, 238 U.S. 78, 88 (1915), the Supreme Court stated:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere

[3] The single attempted conspiracy offense arose out of the appellant's attempt to conspire with an airman who, unknown to the appellant, was working against him at the time as an Air Force Office of Special Investigations (AFOSI) informant.

commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices.

An exception to this general principle is Wharton's Rule, a judicial presumption which, in the absence of legislative intent to the contrary, precludes conviction of both the conspiracy and the completed substantive offense if the substantive crime, by its very nature, requires concerted action by two people. *Iannelli*, 420 U.S. at 783-84; *Crocker*, 18 M.J. at 37. The rule is captured in the *Manual for Courts-Martial (MCM)* guidance on conspiracy. *See MCM*, Part IV, ¶ 5.c.(3) and Appendix 23, ¶ 5.c.(3). Classic offenses falling within the purview of Wharton's Rule include dueling, incest, adultery, and bigamy. *Iannelli*, 420 U.S. at 782. Such offenses are "characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the intermediate consequences of the crime rest on the parties themselves rather than on society at large." *Id.* at 782-83.

The rule generally "applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity." *Id.* at 785 (emphasis in original) (*quoted in Crocker*, 18 M.J. at 38). In determining whether an offense requires concerted criminal activity, we must "look to the wording, definitions, and elements of the substantive law violated, rather than to the actual facts of the particular offense as charged." *United States v. Earhart*, 14 M.J. 511, 514 (A.F.C.M.R. 1982), *aff'd*, 18 M.J. 421 (C.M.A. 1984). Thus, if the substantive crime that is the object of the conspiracy can be committed without the criminal agreement of both parties, Wharton's Rule may not apply. *Id.* at 514-15. Accordingly, Wharton's Rule did not preclude conviction of both transfer of cocaine and conspiracy to transfer cocaine. *Id.* at 514-16. It also did not preclude conviction of conspiracy to violate a lawful regulation and violation of the same regulation. *United States v. Wood*, 7 M.J. 885 (A.F.C.M.R. 1979).[4]

Wharton's Rule also does not bar conviction of both conspiracy and the underlying substantive offense if the general characteristics attendant to classic Wharton's Rule offenses are not present. Thus, if there is no general congruence of the conspiracy agreement and the substantive offense, but the conspiracy extends over some

[4] We note that the Navy-Marine Corps Court, relying on this same restriction in two recent unpublished decisions, has similarly held that Wharton's Rule did not preclude conviction of conspiracy to distribute ecstasy and distribution of ecstasy (*United States v. Boyd*, 2007 CCA LEXIS 417 (N.M. Ct. Crim. App. 2007) or conviction of both conspiracy to wrongfully dispose of military property and wrongful disposition of the same military property (*United States v. Fritz*), 2006 CCA LEXIS 295 (N.M. Ct. Crim. App. 2006). *Cf. United States v. McClellan,* 49 C.M.R. 557 (A.C.M.R. 1974)(holding Wharton's Rule barred conviction of both conspiracy to transfer marijuana and transfer of marijuana to the same party.)

period of time before the substantive offense is committed, Wharton's Rule will not bar conviction of both offenses. *See Crocker*, 18 M.J. at 39 (holding that where the "concerted activity of the appellant and [his co-conspirator] extended over a period of several days," the appellant could be convicted and sentenced for both conspiracy to transfer cocaine and transfer of cocaine). Similarly, if the immediate consequences of the crime are not limited primarily to the co-conspirators, but significantly affect the larger society in which they operate, Wharton's Rule does not apply. *See Wood*, 7 M.J. at 887 (holding that Wharton's rule did not bar conviction of conspiracy to violate a regulation prohibiting black-market trade and actual black-market trade, because "[t]he societal harm attendant upon the violation of the regulation is not restricted to the parties to the agreement"); *United States v. Osthoff*, 8 M.J. 629, 630-31 (A.C.M.R. 1979) (holding that Wharton's rule did not bar conviction for conspiracy to distribute marijuana and distribution of marijuana because "[a]greements that accompany unlawful transfers of drugs tend to pose the kind of threats to society that the law of conspiracy seeks to prevent").

Applying these principles to the conspiracy and attempted conspiracy specifications and charges challenged by the appellant, we find that all but one fall outside the purview of Wharton's Rule.

As noted by the appellee in its response to the appellant's assignment of errors, the appellant was not convicted of any substantive offenses that correspond to the conspiracy offenses encompassed by Specification 10 of Charge I or the specifications of Additional Charge I. As a result, Wharton's Rule, by its own terms, does not apply and the appellant's challenge to those specifications fails.

With the exception of Additional Charge IV and its specification, the appellant's challenge to the remaining specifications enumerated in his assignment of errors also fails. First, the corresponding substantive offenses of which the appellant was convicted all involved violation of a lawful general regulation. That substantive offense is the type that can be committed by the appellant alone. It does not require "concerted criminal activity," by "a plurality of agents". *Iannelli*, 420 U.S. at 785. As a result, Wharton's Rule does not apply and conspiracy to violate the regulation may be separately charged and punished. *Wood*, 7 M.J. at 887. The same holds true even if we consider the nature of the regulatory violation, *i.e.,* the prohibited distribution of controlled testing material. As recognized in cases addressing "distribution" or "transfer" offenses in other contexts, criminal prosecution of the distributor does not depend on the criminal culpability of the person receiving the illicit material. *Earhart*, 14 M.J. at 516. The same applies here.

Second, the challenged offenses do not evidence the general characteristics of classic Wharton's Rule offenses. There is no "general congruence" of the conspiracy agreements and corresponding substantive offenses. *Iannelli*, 420 U.S. at 782. The appellant entered into a detailed stipulation of fact setting out the circumstances of the

challenged offenses and provided further details during the *Care* inquiry. Based on the stipulation of fact and the appellant's own testimony, it is clear that the challenged conspiracies in all cases but one extended over a period of time, both before, and sometimes after, the actual distributions charged. Further, in most cases, more than one distribution was made in furtherance of the conspiracy. Extension of the conspiracies over a period of time supports separate conviction and punishment of the conspiracies and the completed substantive offenses. *Crocker*, 18 M.J. at 39.

In addition, unlike classical Wharton's Rule offenses, the immediate consequences of the offenses here at issue are not limited primarily to the appellant and his co-conspirators. Discipline is the essence of an effective military. By actively conspiring with other airmen to violate lawful general regulations governing Air Force activities, the appellant and his co-conspirators directly undermined that discipline. Beyond that broad impact, the appellant's crimes also detracted from the integrity of the Air Force promotion process, a process that is extremely important to the quality and morale of the Air Force enlisted corps. The tests are designed to ensure that only the most qualified airmen are promoted to senior levels of leadership. Compromising the testing process increases the likelihood that less qualified airmen might be promoted over more qualified airmen, potentially damaging the reputation of the enlisted corps in the eyes of members and non-members alike.

Test compromises also have a significant impact on those who would otherwise have been promoted. Government witnesses testified that individuals wrongly denied promotions because others cheat on exams suffer a loss of recognition and pay. The potential financial impact is amplified over the years because a missed promotion negatively impacts the timing of later follow-on promotions to even higher grades. Loss of a promotion opportunity also makes the individual concerned less eligible for greater positions of responsibility, which in turn may make him less competitive for future promotions.

The appellant's offenses also had a significant impact on personnel at the installation to which he was assigned. The appellant was the only test control officer at Rhein-Main Air Base, Germany, and was removed from that position when his crimes were discovered. His removal forced other airmen scheduled for promotion testing (about 140 personnel) to travel 80 miles to another base to complete their tests.

While we conclude from the above that Wharton's Rule does not bar the appellant's conviction for the bulk of the challenged charges and specifications, we reach a different determination as to Additional Charge IV and its specification. That offense addresses a purported conspiracy between the appellant and one of his subordinates, Technical Sergeant (TSgt) D, while the two were stationed at Rhein-Main Air Base. Additional Charge V and its specification address the appellant's fulfillment of the object of that conspiracy by providing controlled testing material to TSgt D.

The gist of the offenses involving TSgt D, as detailed in a stipulation of fact and the appellant's *Care* inquiry testimony, is that the appellant allowed TSgt D to copy test material while he and the appellant were transporting it from Ramstein Air Base, Germany, to Rhein-Main Air Base. While the two airmen were driving back from Ramstein with the test materials, TSgt D indicated he was worried about his own upcoming promotion test. When the appellant expressed confidence that TSgt D would do fine, TSgt D responded by simultaneously grabbing a test booklet from the back of the car and saying "I'll be all right if you let me look at this testing booklet." The appellant said "Okay" and TSgt D proceeded to copy down more than 70 questions, while the appellant did nothing to stop him.

Based on the above, and in particular the appellant's verbal "Okay" before TSgt D proceeded to copy the test questions, the agreement between the two satisfies the technical requirements of a conspiracy. However, unlike the other challenged offenses, the conspiracy agreement here did not extend over any appreciable separate period of time, but was almost instantaneous with the substantive offense. This general congruence of the conspiracy agreement and the corresponding substantive offense is the type of situation at which Wharton's Rule is aimed. This is not to say that conspiracy cannot ever be separately charged when the agreement occurs close in time to the completed substantive offense. However, under the unique circumstances of this case, and having considered all of the factors outlined above, we conclude that Wharton's Rule applies and that the appellant's conviction of Additional Charge IV and its specification must be set aside.

Sentence Reassessment

Having determined to set aside Additional Charge IV and its specification, we must also determine whether to order a rehearing on sentence. If we can determine to our satisfaction that "absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" and we may reassess the sentence accordingly. *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). "If the error at trial was of constitutional magnitude, then we must be satisfied beyond a reasonable doubt that the reassessment cured the error." *Moffeit*, 63 M.J. at 41 (citing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)).

Applying this analysis, and after careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Additional Charge IV and its specification, the military judge would have rendered a sentence of no less than that adjudged at trial. The affected specification was only one of 29 offenses of which the appellant was convicted and the military judge in any event properly considered the full extent of the appellant's conduct vis-à-vis TSgt D in connection with the substantive

offense addressed in Additional Charge V and its specification. Given these same factors, we are also satisfied that the absence of Additional Charge IV and its specification would have had no impact on the action taken by the convening authority under the terms of the pre-trial agreement. We reassess the sentence accordingly.

Unreasonable Multiplication of Charges

Although not raised by the appellant, we have also considered whether charging both the conspiracies and the corresponding substantive offenses represents an unreasonable multiplication of charges by the government. Applying the factors set forth by our sister service in *United States v. Quiroz*, 57 M.J. 583 (N. M. Ct. Crim. App. 2002), we conclude they do not.

Sentence Appropriateness

The appellant asserts that portion of his sentence extending to a dishonorable discharge is inappropriately severe. He invites comparison of his sentence to the punishments received by 10 of his co-conspirators for their WAPS cheating offenses and emphasizes his own years of exemplary military service.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004). Although we generally consider sentence appropriateness without reference to other sentences, we are required to examine sentence disparities in closely related cases. *Christian*, 63 M.J. at 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)). Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "An appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.*

Applying the above, we accept the appellant's assertion that the cases to which he draws our attention are "closely related." All of the cited cases involve co-conspirators named in the specifications of which the appellant stands convicted, all involve

allegations of WAPS cheating, and the specifications for most of the other individuals actually reference the appellant by name.[5] However, the materials proffered by the appellant in support of this issue, viewed in conjunction with the evidence of record, establish on their face that the punishments received are either not highly disparate or that there is a reasonable basis for any perceived disparity.

Although the appellant is the only individual whose sentence included a dishonorable discharge, two of the other individuals were sentenced to bad-conduct discharges and the sole officer was sentenced to a dismissal. Further, three of the other individuals received either significant forfeitures or a fine. The appellant's sentence included neither. Most significant however is the difference in the magnitude of the appellant's offenses when compared with those of the co-actors highlighted by the appellant. The sheer number of offenses of which the appellant was convicted dwarf the number of offenses listed for any individual co-actor. We also find it significant that the appellant's offenses involved a total of 15 different other airmen, not just the 10 highlighted by the appellant, and extended over a period of years. Finally, it is clear from the stipulation of fact and the appellant's testimony during the *Care* inquiry that he played a central role in the WAPS test cheating offenses at issue.

Considering the gravity of the appellant's offenses, and weighing the length and quality of the appellant's 19 years of military service, the approved sentence is not unduly harsh. There is no doubt the appellant had a long and distinguished military career and was the recipient of numerous distinguished performance awards. However, the appellant's criminal violations were many, extended over a period of several years, and significantly undermined the integrity of the WAPS testing system, compromising more than 20 promotion tests. We also note, and suspect the military judge and convening authority did also, that some of the prestigious awards won by the appellant, and highlighted by the defense both at trial and on appeal, encompass parts of the same performance periods during which his offenses occurred and actually laud him for protecting the very WAPS testing system he was cheating.

Conclusion

Additional Charge IV and its specification are set aside and dismissed. The findings, as amended, and the sentence, as reassessed, are correct in law and fact and no error prejudicial to the appellant's substantial rights occurred. Article 66(c), UCMJ, 10

[5] One of the cases cited by the appellant involved an acquittal. It is therefore not relevant to the issue of sentence appropriateness.

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

AFFIRMED.

Judge BRAND did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court