

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist JUSTIN R. COLBY
United States Army, Appellant

ARMY 20130274

Headquarters, Fort Carson
Timothy Grammel, Military Judge
Colonel John S.T. Irgens, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Payum Doroodian, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major John K. Choike, JA; Captain Scott L. Goble, JA (on brief).

28 January 2015

SUMMARY DISPOSITION

CAMPANELLA, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of desertion with intent to remain away permanently and one specification of desertion with intent to avoid hazardous duty, in violation of Article 85, Uniform Code of Military Justice, 10 U.S.C. 885 (2006) [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for fifteen months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence, except that he only approved nine months confinement.

This case is before us for review pursuant to Article 66, UCMJ. Appellant argues that he was subject to an unreasonable multiplication of charges for findings when he was convicted of two types of desertion for his single act of desertion. We disagree.

Appellant deserted his unit from approximately 3 July 2006 until 3 July 2012. He pleaded guilty to two violations of desertion for this single act. In Specification 1 of The Charge, appellant was charged with desertion with intent to remain away permanently from his unit. In Specification 2 of The Charge, appellant was charged with desertion with intent to avoid hazardous duty. Appellant provided a sufficient factual predicate to support both pleas of guilty – that is, he freely admitted he had the required intent for both offenses. The military judge treated the two offenses as one for sentencing purposes.

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” Rule for Courts-Martial [hereinafter R.C.M.] 307(c)(4). We consider five factors to determine whether charges have been unreasonably multiplied:

- (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?

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) (internal citation and quotation marks omitted) (internal alteration reflects the holding in *Quiroz* that “unreasonably” will be utilized instead of “unfairly”).

On balance, the *Quiroz* factors weigh in favor of the government. First, appellant did not object at trial. Second, while each specification is not aimed at different acts, each specification is aimed at separate and distinct intents. Put another way, there is no question that appellant deserted his unit with two distinct intents: 1) he deserted his unit with the intent to remain away permanently and 2) he intended to avoid hazardous duty by deserting. Third, these specifications do not exaggerate appellant's criminality. Quite the opposite, neither specification by itself fully covers appellant's criminal intent. The two specifications are necessary to

capture fully appellant's criminal intent. Further, we cannot reasonably conclude which offense should be dismissed as an unreasonable multiplication of charges, where each offense incompletely describes appellant's criminal intent. Fourth, the offenses do not unreasonably increase appellant's punitive exposure where the military judge treated the offenses as one for sentencing. Finally, we discern no evidence of government overreaching.

CONCLUSION

Upon consideration of the entire record, the findings and sentence as approved by the convening authority are AFFIRMED.

Senior Judge TOZZI and Judge CELTNIIEKS concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.
Clerk of Court