

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
C.L. REISMEIER, E.E. GEISER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRYAN A. TRIPPLER
INTERIOR COMMUNICATIONS ELECTRICIAN
THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200900362
GENERAL COURT-MARTIAL**

Sentence Adjudged: 6 May 2009.

Military Judge: LtCol Eugene H. Robinson, USMC.

Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.

Staff Judge Advocate's Recommendation: LCDR J.M. Levy, JAGC, USN.

For Appellant: CAPT Mary R. McCormick, JAGC, USN.

For Appellee: Capt Jonathan N. Nelson, USMC.

6 April 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of wrongful appropriation and two specifications of extortion in violation of Articles 121 and 127, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 927. The approved sentence was confinement for 24 months, reduction to the pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority (CA) approved the sentence and, pursuant to the pretrial agreement, suspended all confinement in excess of 18 months.

The appellant now asserts that the military judge failed to rule on the appellant's motion to consolidate for sentencing Specifications 1 and 2 of Charges II and Specifications 1 and 2 of Charge III. He also asserts that his sentence is disproportionate to sentences received by other servicemembers for similar offenses.¹

After carefully considering the parties' briefs and examining the record of trial, we are convinced that the findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

While walking through the female berthing area aboard the USS PORT ROYAL (CG 73), the appellant saw two computer data storage devices (thumb drives). The appellant took the thumb drives and inspected the contents on a computer in his home. He discovered that the thumb drives belonged to Information Systems Technician Second Class (IT2) G, his shipmate. IT2 G's thumb drive contained provocative photographs of her, photographs of her deceased father, and other personal information.

The appellant created a Facebook account under the name "John Adams" and a Yahoo electronic mail account under the title "JustDoAsISay@Yahoo.com" and electronically contacted IT2 G, threatening to publish the provocative photographs on the Internet and destroy the other materials if she did not pay him \$200.00. When IT2 G informed the appellant that she did not have \$200.00, he informed her that a "non-monetary solution" i.e., sexual intercourse, could be arranged in exchange for the thumb drive. The appellant was arrested by NCIS agents outside the hotel room the appellant had rented to conduct the exchange of the thumb drive for the money or sexual intercourse.

After the military judge accepted the appellant's guilty pleas and heard matters in extenuation and mitigation, trial defense counsel moved to consolidate Specifications 1 and 2 of Charge II and Specifications 1 and 2 of Charge III for sentencing. Record at 127. The Government, pursuant to the pretrial agreement, offered no objection to the motion. The military judge responded "very well" and asked both counsel if they were prepared to argue. *Id.* Neither counsel asked for clarification regarding the military judge's ruling and both stated they were prepared to argue. The appellant now contends that the military judge failed to rule on the motion and, as a consequence, the appellant should be granted a new sentencing hearing. We disagree.

¹ This assignment of error is raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

There is no dispute that the more prudent practice in addressing motions is for the military judge to state his ruling by using words such as "the motion is granted" or "the motion is denied." We are nevertheless convinced that, in the context of this court-martial, the military judge's use of the term "very well" signaled his granting of the motion. During his summation of a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference, the military judge stated that he was informed that the trial defense counsel would make a motion to consolidate Specifications 1 and 2 of Charge II and Specifications 1 and 2 of Charge III and that the Government, pursuant to a term of the pretrial agreement, would not oppose that motion. In his summation the military judge stated:

Counsel had indicated that they agreed the maximum sentence would be 6 years and 6 months. However, pursuant to an agreement between trial counsel and defense counsel, the Defense would be submitting a request to the Court at this proceeding to consolidate the two specifications under each of the offenses for which the accused is pleading guilty which would make the maximum sentence, as far as the confinement portion is concerned, that is, 3 years and 3 months.

Id. at 8.

Moreover, after reviewing the entire pretrial agreement with the appellant, to include paragraph 17(g) in which the Government agreed not to oppose appellant's request to consolidate for sentencing Specifications 1 and 2 of Charge II and Specifications 1 and 2 of Charge III, the military judge found the agreement to be in accord with appellate case law, not contrary to public policy of his own notions of fairness, and accepted the agreement. *Id.* at 58-60. Finally, the military judge awarded a period of confinement 15 months less than the 3 years, 3 months maximum authorized confinement.

In light of these facts and the context in which the military judge used the term, "very well," we are convinced that the military judge consolidated for sentencing Specifications 1 and 2 of Charge II and Specifications 1 and 2 of Charge III in accordance with the pretrial agreement and pursuant to the trial defense counsel's motion, and understood that the maximum period of confinement was 3 years, 3 months. Accordingly, we find that this assignment of error is without merit.

In his second assignment of error, the appellant alleges that his punishment is disproportionate to the punishment received by other similarly situated servicemembers. The appellant, however, has offered no evidence of other "closely-related" cases. The evidence adduced at court-martial indicates that no one other than the appellant participated in the wrongful appropriations and extortions of which the appellant was convicted. See *United States v. Kelly*, 40 M.J. 558, 570

(N.M.C.M.R. 1994) and *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (stating that a sentence disparity claim occurs where the appellant proves that two or more cases are "closely-related" and involve "highly disparate sentences"). Accordingly, this assignment of error is without merit.

Consolidation of Specification 1 & 2 of Charge II

When a wrongful appropriation of two or more articles is committed at substantially the same time and place, it is a single offense, even though the articles belong to different persons. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 46c(1)(h)(ii). The record of trial provides a clear description of events which shows the wrongful appropriation of the two thumb drives was a single event occurring at the same time and place. The owners of the thumb drives are the only facts that distinguish the wrongful appropriation specifications.

Pursuant to the authority of this court under Article 66(c) UCMJ, we grant relief by consolidating Specifications 1 and 2 under Charge II into a single specification as follows:

In that Interior Communications Electrician Third Class Bryan A. Trippler, U.S. Navy, USS PORT ROYAL, on active duty, did, on the island of Oahu, Hawaii, on or about 6 January 2009, wrongfully appropriate a thumb drive, the property of Information Systems Technician Second Class [G], U.S. Navy; and a thumb drive, military property, the property of the U.S. Navy, of a combined value of less than \$500.00.

The maximum permissible punishment is not affected by our action as the military judge had consolidated the specifications for sentencing purposes.

Conclusion

The findings as modified and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court