**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**First Lieutenant BRADLEY J. GIVENS**
**United States Air Force**

**ACM 35789**

**16 November 2005**

Sentence adjudged 3 September 2003 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Dismissal and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major James M. Winner, Major Jennifer K. Martwick, Major L. Martin Powell, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT



MATHEWS, Judge:

The appellant was convicted of several offenses arising from his illicit relationships with enlisted personnel and his efforts to thwart the Air Force's investigation into his misconduct. He was charged with, *inter alia*, two specifications of violating Air Force Instruction (AFI) 36-2909, ¶ 5.1.3, *Professional and Unprofessional Relationships* (1 May 1999), by engaging in sexual relationships with SSgt EM and A1C JH, in violation of Article 92, UCMJ, 10 U.S.C. § 892; and two specifications of

fraternizing with the same Staff Sergent (SSgt) EM and Airman First Class (A1C) JH, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The sentence approved consisted of dismissal from the service and confinement for 6 months.

*Appellant's Strategy at Trial and in Clemency*

At trial, the appellant moved to dismiss the fraternization specifications, contending they were multiplicious with the specifications alleging violations of AFI 36-2909. He argued that the AFI violations and fraternizations involved substantially the same conduct, *i.e.*, sexual relations with the named enlisted personnel. The military judge denied the motion.

The appellant, in an apparent effort to preserve the issue for appeal, thereupon pled guilty to the AFI violations but not guilty to the fraternization offenses. This strategy changed, however, during the appellant's providency inquiry. Midway through the inquiry, trial defense counsel renewed the multiplicity motion, informing the military judge that his ruling "could ultimately affect how we would be plead [*sic*] on the remaining specifications." When asked specifically if that meant the appellant might change his pleas, the trial defense counsel answered, "Possibly, yes, sir."

After further discussion with counsel, the military judge took a brief recess. Upon returning, the military judge announced that he would treat each AFI violation as multiplicious for sentencing purposes with the corresponding fraternization offense. The appellant then amended his pleas to both fraternization specifications, pleading guilty unconditionally. He did not change his pleas to any other offenses. The military judge accepted the amended pleas and, following a proper providency inquiry and litigation of an unrelated, contested specification, found the appellant guilty in accordance with those pleas.

During sentencing, the trial defense counsel argued that his client had taken responsibility "in full" for his actions by pleading guilty. Trial defense counsel used some variation on this theme no fewer than five times in argument, contending that by pleading guilty to all of the offenses involving his relationship with SSgt EM and A1C JH, the appellant demonstrated his potential for rehabilitation. The appellant and his counsel similarly argued in post-trial submissions for clemency to the convening authority that he had accepted "full responsibility" and thereby demonstrated his worthiness for clemency.

[1] The appellant was also charged with violating a lawful order not to discuss the investigation in his case with persons involved in it, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and obstruction of justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He pled guilty to these specifications and does not challenge them on appeal. He was further charged with, but acquitted of, attempting to fraternize with another enlisted woman, in violation of Article 80, UCMJ, 10 U.S.C. § 880.

*Appellant's Strategy on Appeal*

On appeal, however, the appellant seeks to resurrect his multiplicity motion, asking us to dismiss both fraternization specifications, or in the alternative, both specifications alleging violations of AFI 36-2909. Finding that this issue was waived by the appellant's pleas, we grant no relief. *See United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000).

Even if we did not find waiver, we would not find the challenged specifications to be multiplicious. Charges are multiplicious where there is evidence of a Congressional intent to prohibit punishment for the same offense under two statutes. *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993). Because evidence of such intent is often lacking, we find multiplicity where the elements of one are "necessarily included" in the other. *United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997); Rule for Courts-Martial 907(b)(3), Discussion. We apply these standards de novo. *United States v. Stanley*, 60 M.J. 622, 629 (A.F. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 388 (C.A.A.F. 2004).

We are unable to discern any intended prohibition of separate punishments for these offenses from the text of the Articles or contained in the *Manual for Courts-Martial (MCM)*.[2] Nor do the elements of one offense make up a subset of the charged offense. Although the parties agreed at trial that the underlying conduct was essentially identical, they also agreed that the fraternization specifications and the specifications alleging violations of AFI 36-2909 each involved elements not included in the other -- an analysis with which we concur. Finally, we note that inasmuch as the military judge treated the AFI violations as multiplicious for sentencing with the corresponding fraternization offenses, the appellant suffered no prejudice in the way these offenses were treated at his trial.

*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);

[2] In fact, the edition of the *MCM* in effect at the time of the appellant's trial suggests just the opposite. In addition to Article 134, UCMJ, regulations "may *also* govern conduct between officer and enlisted personnel" and violations may be punished under Article 92, UCMJ. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 83c(2) (2002 ed.) (emphasis added).

*United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court