

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

K.K. THOMPSON

E.B. STONE

UNITED STATES

v.

**Christopher A. BYARD
Cryptologic Technician Maintenance Third Class (E-4), U.S. Navy**

NMCCA 200602288

Decided 22 May 2007

Sentence adjudged 18 May 2006. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Activities, United Kingdom.

Capt SRIDHAR KAZA, USMC, Appellate Defense Counsel
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Chief Judge

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of indecent assault, one specification of kidnapping, and one specification of impersonating a law enforcement agent, all in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934. The appellant was sentenced to confinement for three years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, except for that part of the sentence adjudging forfeitures of \$1,273.50 pay per month for three months. The appellant raises in his sole assignment of error that the sentence is inappropriately severe.

We have examined the record of trial, the sole assignment of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sentence Appropriateness and Sentence Disparity

The appellant contends that his sentence is inappropriately severe. Although not assigned as a separate assignment of error, the appellant also asserts in his pleading that the adjudged sentence is disproportionate and unjust when compared with other cases the military courts have examined. Appellant's Brief of 16 Jan 2007 at 7. We decline to grant relief for either issue.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Regarding the seriousness of the offenses, the appellant faced a jurisdictional maximum of confinement for life without eligibility for parole, a dishonorable discharge, total forfeitures, and reduction to pay grade E-1. The appellant's crimes were serious and resulted in physical, as well as psychological injury to the victim, L.A.

On the evening of 18 November 2005, the appellant did not receive the desired attention of L.A. at the base club. In response, he maliciously deceived her into returning to his room under the false premise that he was a special agent with the Naval Criminal Investigative Service (NCIS) and that she was being investigated for the crime of adultery. L.A., who previously had an affair with a married Marine, believed the appellant was, in fact, an NCIS agent, and followed him to his room. The appellant then proceeded to hold L.A. captive in his room for four hours, during which time he watched her urinate, repeatedly inquired what she was willing to do in exchange for making the case go away, and touched her breasts, vagina, and buttocks without her consent. The appellant also put L.A. in a choke hold and wrestled her on the bed, causing bruising and abrasions to her arms and elbow.

L.A. suffered immense psychological harm. She feared that she was going to be raped or murdered, which had a very real and lasting effect on her life. During the incident, L.A. was extremely upset. She suffered panic attacks and pulled out her own hair, leaving it in the appellant's room to provide DNA evidence to authorities in the event she was murdered or taken from the room. Sergeant First Class Penrod testified at trial that after the incident, L.A. became very reclusive, fearing that she would run into the appellant, and found comfort in the security of the SCIF facility in which she worked. Record at 630. L.A.'s best friend, Ms. Becky Hewitt, testified that L.A. withdrew from activities she previously enjoyed, and suffered from panic attacks, nightmares, and insomnia. *Id.* at 495-96.

We are confident that the gravity of appellant's crimes warrants the sentence he received.

Regarding the second *Snelling* prong, "character of the offender," there was no compelling evidence presented at trial to warrant a reduction in the appellant's sentence. The appellant had served slightly over two years in the Navy when the incident happened. His supervisor testified at trial that he progressed from being a lackluster Sailor to being named Junior Sailor of the Third Quarter of 2005. However, this improved performance lasted for only a 6-month period, after which the appellant kidnapped and sexually assaulted L.A. Even during his improved period of performance, his supervisor described the appellant at trial as being "in the middle of the [E-4] pack." *Id.* at 521.

The appellant notes the "acute emotional and mental trauma" he faced at the time he committed the offenses. Appellant's Brief at 6. The appellant alleges he suffered this trauma when he discovered his girlfriend was impregnated as a result of being raped, and he broke off the relationship and turned to alcohol. Record at 635-37. Assuming these facts to be true, we are hard pressed to view the appellant's behavior as a positive reflection of his good character. We also do not view the appellant's calculated, malicious offenses against L.A. as "the impulsive actions of a young, intoxicated sailor," as alleged by the appellant in his brief. Appellant's Brief at 6.

Finally, our superior court has held that an accused should not receive a more severe sentence than otherwise generally warranted by...his acceptance or lack of acceptance of responsibility for his offense. *United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990). We note that, as of 23 August 2006, when the appellant provided a supplemental clemency letter to the convening authority, he took absolutely no responsibility for the offenses. Instead, he portrayed the night of the incident as a light-hearted date after the club closed, where he and L.A. watched a movie, had consensual, sexual activities, and where he ultimately cared for L.A. when she threw up as a result of intoxication. Appellant's Supplemental Letter to Clemency Request dated 23 Aug 2006 at 1-2. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offense. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Regarding the appellant's contention that the adjudged sentence is disproportionate and unjust when compared with other cases the military courts have examined, we disagree. We are not required to "engage in sentence comparison with specific cases 'except in those rare instances in which the appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Lacy*, 50

M.J. 286, 288 (C.A.A.F. 1999)(quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). When we compare sentences of companion cases, we initially determine if the cases are closely related, and if so, then we determine if the sentences are highly disparate. The appellant bears the burden of demonstrating that the cases are closely related and highly disparate. *Lacy*, 50 M.J. at 288. If the appellant meets this burden, the burden shifts to the Government to show a rational basis for the differences. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288.

We have previously held "that companion cases are those in which the several accused are charged with engaging in, or the facts establish that they have committed, criminal conduct involving a concerted effort to achieve a common goal. Although such cases need not be alleged as conspiracies, there need be a showing of some commonality of conduct such as to indicate trademark like similarities of culpability." *United States v. Swan*, 43 M.J. 788, 791 (N.M.Ct.Crim.App, 1995). The appellant failed to meet his burden of demonstrating that the cases he cites in his brief are closely related and highly disparate to his case. All of the cited cases, except for *Charlton*, are Army and Air Force cases, remote in time and unrelated to the appellant's case. Therefore, we find no merit in the appellant's argument and decline to offer relief.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge THOMPSON and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court