

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

BEFORE

W.L. RITTER

J.F. FELTHAM

E.S. WHITE

UNITED STATES

v.

**James T. DIACONT
Seaman Apprentice (E-2), U. S. Navy**

NMCCA 200501425

Decided 20 March 2007

Sentence adjudged 25 March 2005. Military Judge: J.D. Bauer.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Submarine Group TWO, Groton, CT.

CAPT ALBERTO MUNGUIA, JAGC, USN, Appellate Defense Counsel
LT AIMEE SOUDERS, JAGC, USN, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of absence without leave, two specifications of wrongful use of cocaine, two specifications of wrongful distribution of cocaine, two specifications of wrongful use of heroin, one specification of wrongful distribution of heroin, one specification of conspiracy to wrongfully introduce cocaine onto an installation used by the armed forces, and one specification of conspiracy to wrongfully introduce heroin onto an installation used by the armed forces. The convening authority approved the adjudged sentence of confinement for 48 months, reduction to pay grade E-1, forfeiture of all pay and allowances for 48 months, and a dishonorable discharge, but suspended confinement in excess of 14 months pursuant to a pretrial agreement.

The appellant raises three assignments of error, claiming: (1) his sentence is inappropriately and disparately severe compared to the sentences in closely related cases; (2) the special court-martial convening authority was disqualified, as an accuser, from forwarding the charges to a general court-martial

convening authority "because of his poor judgement [sic] and mismanagement of military justice cases;" and (3) the staff judge advocate's recommendation (SJAR) and the court-martial order failed to report the results of companion cases.

We have carefully considered the record of trial, the appellant's assignments 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. See Arts. 59(a) and 66(c), UCMJ.

Whether the Special Court-Martial Convening Authority Was an Accuser

The appellant contends that his commanding officer, the special court-martial convening authority, was disqualified, as an accuser, from forwarding the charges in this case to the general court-martial convening authority. He argues:

Personal feelings of the Convening Authority improperly influenced the referral of charges and subsequent proceedings in this case. Early in the proceedings, the special court martial [sic] Convening Authority took a personal interest in Appellant's case. On 24 December 2005, he personally visited the Appellant [who was in pretrial confinement] and asked a series of questions, which showed little regard for his role as the Convening Authority. See Preliminary Inquiry Into Allegations of Improper Conduct Regarding the Administration of Military Justice Matters By Commanding Officer, Naval Submarine School From About July 2004 to December 2004, dated 17 Feb 05, attached as enclosure (2) to trial defense counsel 27 Aug 05 Request for Clemency.

Appellant's Brief of 8 Jun 2006 at 7-8.

The preliminary inquiry referenced in the appellant's brief indicates the special court-martial convening authority spoke to four pretrial confinees, including the appellant, on 24 December 2004. He said he would not discuss the specifics of their cases with them, then asked how they were doing, whether they had called their families recently, and what the command could have done to prevent the circumstances in which they then found themselves.

Article 1(9), UCMJ, defines an "accuser" as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused." The appellant contends that his commanding officer, who forwarded the charges to the general

court-martial convening authority, "did not approach this case with a neutral and detached attitude." Appellant's Brief at 9.

Though aware of a potential disqualification issue concerning the special court-martial convening authority, the appellant nonetheless failed to make a motion or objection regarding the issue at trial. Under these circumstances, our superior court has held that the issue may be waived. See *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994); *United States v. Jeter*, 35 M.J. 442, 447 (C.M.A. 1992). "Assuming, arguendo, that the [special court-martial convening authority] became an accuser, we hold that the failure of the [special court-martial convening authority] to forward the charges to the next higher level of command was a nonjurisdictional error, which was waived by the appellant's failure to raise it at his court-martial." *Shiner*, 40 M.J. at 157.

We hold that the issue was similarly waived by the appellant in this case. The appellant claims he was one of four pretrial confinees spoken to by the special court-martial convening authority on 24 December 2004. Therefore, although he was well-aware of the potential disqualification issue, he chose not to raise it at trial. We also note that there is no evidence the special court-martial convening authority showed any interest other than an official interest in this case. We view his 24 December 2004 visit with the appellant and other pretrial confinees as a routine expression of concern for members of his command, their families, and the command itself. There is nothing in this legitimate exercise of command authority to suggest personal animosity toward the appellant or the other confinees. We find no plain error and decline to grant relief.

Failure to Report Companion Cases in the Staff Judge Advocate's Recommendation and the Court-Martial Order

The appellant claims he was prejudiced by the failure of the SJAR, and the court-martial order, to report "the results of any disciplinary proceedings involving Seaman Recruit Timothy Mathis or CSSN Michael Aulizia and other others [sic] Submarine School students who used illicit drugs in August-September 2004." Appellant's Brief at 10. However, he concedes that his "trial defense counsel did not comment on the SJAR's failure to comment on what appear to be companion cases." *Id.*

The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C § 0151a(2)(Ch-3, 22 March 2004). "The requirement, however, is limited to those cases convened by the same convening authority." *United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000); *United States v. Swan*, 43 M.J. 788, 790 (N.M.Ct.Crim.App. 1995). "Where the record itself does not identify companion cases, it is incumbent upon the appellant to demonstrate that companion cases exist, and that those companion cases were referred to trial by the same convening authority."

Ortiz, 52 M.J. at 741 (footnote omitted); *United States v. Watkins*, 35 M.J. 709, 716 (N.M.C.M.R. 1992).

Neither the SJAR nor the court-martial order mentioned companion cases. Defense Exhibit B contains the results of trial of five special courts-martial, which the appellant claims were offered into evidence to demonstrate "the disparity in the sentences" during the sentencing phase of his court-martial. See Appellant's Brief at 10. It is clear from the record of trial that at least one of these cases, that of CSSN Aulizia, involved a co-conspirator of the appellant. However, the record does not contain any additional information about Culinary Specialist Seaman (CSSN) Aulizia's trial or the trials of the other four accused whose convictions are reflected in Defense Exhibit B. On appeal, the appellant has not offered any further information about these cases. Thus, we do not know if any of these five accused was referred to trial by the same officer who convened the appellant's general court-martial. Therefore, the appellant has not met his burden in proving that his case and any of the alleged companion cases was referred to trial by the same convening authority.

Assuming, *arguendo*, that one or more of these five courts-martial was referred to trial by the same convening authority, we find no harm to the appellant. "The purpose of this requirement [to note companion cases] is . . . to ensure that the convening authority makes an informed decision when taking action on an accused's court-martial." *Ortiz*, 52 M.J. at 741. Here, the convening authority specifically noted in the court-martial order that, prior to taking his action, he considered the record of trial, the results of trial, the two clemency petitions submitted by the appellant's trial defense counsel, the SJAR, and the addendum to the SJAR.

The results of the special courts-martial that the appellant claims were companion cases of his are all included in the record of trial, which the convening authority considered before acting on the appellant's case. Therefore, the failure to report the results of these other cases in the SJAR and the addendum to the SJAR, or to note them in the convening authority's action, did not prevent the convening authority from making an informed decision in the appellant's case. We also note that the appellant pled guilty pursuant to a favorable pretrial agreement, under which the convening authority suspended nearly three-fourths of the adjudged confinement. We thus find no error and, even assuming error, no prejudice to the appellant.

Sentence Severity/Disparity

Having concluded that the appellant has not met his burden in demonstrating the existence of companion cases, or, in the alternative, in demonstrating that he was prejudiced by not listing any of the alleged companion cases in the SJAR and court-martial order, we turn to the appellant's claim that his sentence

is inappropriately and disparately severe compared to the sentences in the cases he claims were closely related to his.

We review the appropriateness of a sentence based upon the "nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267-68 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). This requires us to balance the offenses against the character of the offender.

Sentence comparison is required when highly disparate sentences are adjudged in closely related cases. *United States v. Wach*, 55 M.J. 266, 267 (C.A.A.F. 2001); *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). To be closely related, "cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Where we find sentences to be highly disparate in closely related cases, we must determine whether there is a rational basis for the disparity. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). A disparity between sentences in closely related cases warrants relief when it is so great as to exceed "relative uniformity," or when it rises to the level of an "obvious miscarriage of justice or an abuse of discretion." *Swan*, 43 M.J. at 792 (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)).

Applying these criteria, we consider the cases of *United States v. CSSN Michael J. Aulizia*, U.S. Navy, and *United States v. ETSN Timothy J. Mathis*, U.S. Navy, both of which the appellant contends are closely related to his case. CSSN Aulizia was convicted, pursuant to his pleas, at a special court-martial of two specifications of absence without leave, two specifications of violating a lawful order by consuming alcohol while under the age of 21, one specification of being incapacitated for duty as a result of overindulgence in intoxicating liquor or drugs, one specification of wrongful use of heroin on divers occasions, and one specification of assault. He was sentenced to four months confinement, reduction to pay grade E-1, and a bad-conduct discharge. ETSN Mathis was convicted, pursuant to his pleas, at a special court-martial of one specification of wrongful possession of cocaine, one specification of wrongful use of cocaine, and one specification of wrongful distribution of cocaine on divers occasions. He was sentenced to seven months confinement, reduction to pay grade E-1, and a bad-conduct discharge.

We find the appellant has failed to meet his burden. Even if we were to assume, *arguendo*, that these sentences are highly disparate, we find the facts in each of the cases sufficiently different to explain and justify the different sentences. We note that CSSN Aulizia and ETSN Mathis were each convicted of fewer offenses than the appellant, particularly offenses involving controlled substances and their distribution.

The appellant was convicted of three absences without leave, one of which was terminated by apprehension. He was also convicted of wrongful use of cocaine and heroin, wrongful distribution of cocaine and heroin, and conspiring with CSSN Aulizia to introduce cocaine and heroin onto Naval Submarine Base New London, Connecticut. He testified during the providence inquiry that he used cocaine approximately 15 times, used cocaine with another Sailor while in an unauthorized absence status, and distributed cocaine to other Sailors. He also testified that he used heroin three times at or near Naval Submarine Base New London, and on divers occasions in New York City from approximately 1 September through 19 October 2004. Record at 65-66. Considering all the circumstances, including the appellant's evidence in extenuation and mitigation, we find that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *Snelling*, 14 M.J. at 268.

Conclusion

Accordingly, we affirm the findings of guilty and the sentence, as approved by the convening authority.

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court