

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Joshua W. GONZALES  
Private First Class (E-2), U.S. Marine Corps**

NMCCA 200602466

Decided 15 August 2007

Sentence adjudged 14 July 2006. Military Judge: D.A. Winklosky. Staff Judge Advocate's Recommendation: Capt W.J. Schrantz, USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 2d Marines, 2d Marine Division, Camp Lejeune, NC.

Maj BRIAN JACKSON, USMC, Appellate Defense Counsel  
CAPT DANIEL R. LUTZ, JAGC, USN, Appellate Government Counsel  
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A military judge sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of larceny and housebreaking, in violation of Articles 121 and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 930. The appellant was sentenced to confinement for 100 days, reduction to pay grade E-1, forfeiture of \$849.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 30 days, pursuant to the pretrial agreement.

We have considered the record of trial, the appellant's two assignments of error,<sup>1</sup> and the Government's response. We

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<sup>1</sup> I. WHETHER THE APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE AND DISPARATE TO THE CO-CONSPIRATORS WHO EACH RECEIVED SIGNIFICANTLY LIGHTER SENTENCES.

conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### **Disparate Sentence and Sentence Appropriateness**

The appellant's charges stem from an incident which occurred on 1 February 2006 while on a routine vehicle security patrol in Hit, Iraq. When a halt was called during the patrol, the appellant and four other Marines walked approximately 75 meters to an Iraqi store, broke into the store, and stole cigarettes and lighters. The appellant stole two cartons of cigarettes worth about \$10.00. Two of the Marines who perpetrated the crime with the appellant, Lance Corporal (LCpl) Chunn and LCpl Correnti, were punished at special courts-martial and received similar confinement time, but neither received a punitive discharge.<sup>2</sup> A third Marine involved in this incident, LCpl Wojtowich, received 60 days restriction, reduction to pay grade E-1, and forfeiture of \$849.00 for one month at a summary court-martial. Record at 146. It appears that each Marine was charged with committing the same offenses. The appellant avers that he received a sentence disparate to that of his co-actors because he was the only one to receive a bad-conduct discharge. After comparing his sentence to that of his three co-actors, the appellant urges this court to use its Article 66, UCMJ, power and disapprove that part of the sentence which extends to a bad-conduct discharge.

Sentence comparison is only required in closely related cases involving highly disparate adjudged sentences. *United States v. Wacha*, 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). We agree with the appellant's contention that his case is closely related to those of LCpl's Chunn, Correnti, and Wojtowich as they were co-actors involved in a common crime and his sentence, which included a bad-conduct discharge, was more severe than the sentences awarded to his co-actors.

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II. WHETHER THE TRIAL DEFENSE COUNSEL'S UNEXPLAINED FAILURE TO SUBMIT ANY MATTERS IN CLEMENCY TO THE CONVENING AUTHORITY ON APPELLANT'S BEHALF CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

<sup>2</sup> The convening authority's action lists the companion cases to the case *sub judice* and reflects that LCpl Chunn received confinement for 120 days, forfeiture of \$849.00 pay per month for four months, and reduction to pay grade E-1. LCpl Correnti was sentenced to confinement for 100 days and reduction to pay grade E-1.

A disparity between the 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." *United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995) (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)(internal quotation marks omitted)). The appellant must establish not only that he received a different sentence than individuals involved in closely related cases, but that his sentence was "highly disparate." *Lacy*, 50 M.J. at 288. Of the four Marines punished for this incident, the appellant was the only one who received a punitive discharge. A bad-conduct discharge is arguably the most severe form of punishment authorized at a special court-martial. We find that the appellant has met his burden to establish that his sentence was highly disparate as compared to his co-actors. The Government must now show that there is a rational basis for the disparity. *Id.*

The facts of this case suggest that each Marine involved in this incident shared the same level of culpability, notwithstanding the fact that LCpl Correnti was the mastermind and the appellant provided the bolt cutters used to gain entry into the store. Although, we do not see the appellant's criminality as more culpable than the other co-actors, we find the Government has shown there is a rational basis for this disparity in sentences.

As part of the case in aggravation against the appellant, the trial counsel submitted Prosecution Exhibits 1 and 2 which included, *inter alia*, documentation reflecting that the appellant had been awarded nonjudicial punishment(NJP) on two occasions and also had a conviction at a summary court-martial.<sup>3</sup> This significant disciplinary history warranted the harsher punishment the appellant received. The record before us, provides sufficient support to find a rational basis for the disparity in sentences.

Additionally, the appellant contends that the sentence which includes a bad-conduct discharge is inappropriately severe. Based on our review of the record of trial, and the

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<sup>3</sup> The Government's Answer of 21 February 2007 at page 4 indicates the military judge, in aggravation, considered that the appellant had a conviction at a summary court-martial and was awarded NJP on three occasions. This is not correct because the appellant's 9 Aug 2006 NJP occurred after his court-martial (but before the convening authority's action) and therefore could not have been considered by the military judge.

appellant's military record, we have determined that the sentence approved by the convening authority is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Accordingly, we decline to grant relief.

### **Failure to Submit Clemency Matters**

The appellant's final assignment of error contends that the trial defense counsel was ineffective in his post-trial representation because he did not submit clemency matters to the convening authority on the appellant's behalf. We disagree.

Mere failure to submit a clemency petition, by itself, does not automatically establish deficient representation. *United States v. Cobe*, 41 M.J. 654, 655 (N.M.Ct.Crim.App. 1994)(citing *United States v. Robertson*, 39 M.J. 211, 218 (C.M.A. 1994)). This court announced that future claims of inadequate representation based on failure to exercise post-trial rights would not be seriously entertained without an affidavit from the appellant stating how counsel's inaction contrasted with his wishes. *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003). Further, this court said if the claim involved counsel's failure to submit matters for consideration, the appellant must detail the content of the matters that would have been submitted. *Id.*

In this case, the appellant fails to rebut the presumption of competence with respect to the lack of a clemency submission. First, the appellant has neither submitted an affidavit, nor pointed to any other evidence, that counsel's failure to submit clemency matters was contrary to his wishes. The appellant speculatively contends the fact that the trial defense counsel did not submit any clemency matters "could only lead the convening authority to conclude that the appellant no longer wanted to serve his country and wanted out." Appellant's Brief of 12 Feb 2007 at 13-14. We draw no such conclusion.

The appellant's brief highlights the fact that he had significant combat experience and that his average proficiency/conduct marks were 4.2/4.1. *Id.* The appellant also suggests that the trial defense should have highlighted to the convening authority his unsworn statement at trial which manifested his desired to remain on active duty. Record at 201. The appellant's brief offered no additional evidence that the trial defense counsel neglected to bring to the convening

authority's attention. The foregoing information was contained in the record of trial which the convening authority considered before acting. The appellant has failed to demonstrate that his trial defense counsel was ineffective by not submitting clemency matters on the appellant's behalf. We find this assignment of error to be without merit.

### **Conclusion**

We affirm the findings and sentence as approved by the convening authority.

Senior Judge GEISER and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL  
Clerk of Court