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

BEFORE

D.A. WAGNER **V.S. COUCH** **E.B. STONE**

UNITED STATES

v.

Eduardo P. PALOMARES
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200602496 Decided 23 August 2007

Sentence adjudged 2 August 2006. Military Judge: J.A. Wynn. Staff Judge Advocate's Recommendation: LtCol K.J. Brubaker, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Division (-)(Rein), Okinawa, Japan.

Maj RICHARD BELLISS, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

A general court-martial comprised of officer members convicted the appellant, pursuant to his plea, of one specification of wrongful use of diazepam (the generic name for Valium), a Schedule IV controlled substance, on divers occasions and while receiving special pay under 37 U.S.C. § 310, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was acquitted of seven specifications of wrongful distribution of diazepam. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but in an act of clemency, suspended all confinement in excess of nine months.

After considering the record of trial, the appellant’s sole assignment of error and reply brief, the Government’s response, the convening authority’s actions in companion cases (appended to the record by motion of the Government), and the oral argument of counsel, 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.

The appellant's two assignments of error contend that (1) the military judge committed plain error by allowing the testimony of the appellant's company commander to testify about matters in aggravation that did not directly relate to the appellant's misconduct, and (2) the appellant's sentence is unjustifiably severe when compared with similar offenses by other members of his command. The appellant alternatively seeks relief under Article 66(c), UCMJ, for sentence severity. For the reasons discussed below, we disagree and decline to grant relief.

Sentencing Evidence

The appellant served in an infantry battalion deployed to Afghanistan and engaged in combat operations at the time of his offenses. While his platoon was assigned to provide a guard force, the appellant admitted to purchasing four pills of Valium from a local Afghani boy, and ingesting the pills on two separated occasions in order to help him sleep.

The Government called the appellant's company commander during the presentencing phase of trial, and the trial defense counsel did not object to his testimony. He testified about the nature of his unit's combat operations in Afghanistan, and described the difficult nature of their responsibilities at the time of the appellant's offenses. The company commander related how the illegal use of Valium by the appellant and other members of his unit complicated the "relief in place" by a subsequent company who replaced them in the area of operations. He testified that the company had been briefed about the security ramifications of illegal drug use, and the threat posed by local children as potential intelligence collection agents for the enemy.

Finally, the witness testified that while the company was lauded by higher authority for their exceptional combat performance, it was singled out and subjected to a unit-wide urinalysis and search of personal gear immediately upon their return to Kaneohe Bay, Hawaii. This event was directly related to the Valium use of the appellant and other Marines, and delayed the reunification of the whole company with their family members by at least six hours. The company commander testified that his company's morale suffered significantly as a result.

In the absence of a defense objection, we review a claim of erroneous admission of evidence for plain error. *United States v. Powell,* 49 M.J. 460, 463-65 (C.A.A.F. 1998); *United States v. Hays,* 62 M.J. 158, 166 (C.A.A.F. 2005). Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v.*

Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007)(citing *Powell,* 49 M.J. at 463-65). The appellant has the burden of persuading the court that the three prongs of the plain error test are satisfied. *Id.* (citing *United States v. Scalo,* 60 M.J. 435, 436 (C.A.A.F. 2005)).

RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) allows the trial counsel to present evidence of aggravating circumstances "directly relating to or resulting from the offenses of which the accused has been found guilty." Such evidence includes the "significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." *Id.* Our superior court has held that the meaning of "directly related" under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted. *Hardison,* 64 M.J. at 281.

Even though the appellant was not the only Marine within the unit who wrongfully used Valium while in a combat zone, we are satisfied that his offense still had an unnecessary and deleterious impact on the mission, discipline, and efficiency of the command. Evidence of the operational circumstances surrounding the appellant's drug use, and the subsequent treatment of the other members of his unit in uncovering it, are directly related to and resulting from his offense. We conclude that the testimony of the company commander was admissible evidence in aggravation under R.C.M. 1001(b)(4), and are confident that the probative value of the evidence was not outweighed by its likely prejudicial impact. *Id.* (citing *United States v. Wilson,* 35 M.J. 473, 476 n.5 (C.M.A. 1992)). We hold that the military judge did not commit plain error by allowing the testimony of the company commander.

Sentence Disparity

The appellant's second assignment of error alleges that his sentence is inappropriately severe when compared to the sentences of other Marines and a Sailor from the same unit convicted for similar misconduct.

We are required to engage in sentence comparison only "in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Sothen,* 54 M.J. 294, 296 (C.A.A.F. 2001)(quoting *United States v. Ballard,* 20 M.J. 282, 283 (C.M.A. 1985)). The appellant has the burden of demonstrating that any cited cases are "closely related" to the appellant's case, and that the sentences are "highly disparate." *Id.* (citing *United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999)). If the appellant meets that burden, the burden shifts to the Government to show a rational basis for the disparity. *Id.* Sentence comparison does not require sentence equation. *United*

States v. Durant, 55 M.J. 258, 260 (C.A.A.F. 2001)(citing *Ballard* and *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982)).

The Government apparently concedes, and we find, that the companion cases cited by the appellant are in fact closely related to the appellant's case. Turning to sentence disparity, we note that three Marines - - Lance Corporal (LCpl) Comey, Private First Class (PFC) Carruth, and LCpl Machado - - each pled guilty at special courts-martial before a military judge alone, pursuant to pretrial agreements, to single specifications of wrongful use of Valium on divers occasions while receiving special duty pay.[1] In each case, the convening authority approved sentences that included confinement (six months for Comey and Carruth and 150 days for Machado), reduction to pay grade E-1, a fine of $5000.00, and a bad-conduct discharge. A fourth Marine, LCpl Peters, pled guilty to both use and distribution of 300 pills of Valium, and the convening authority approved his sentence of 24 months confinement, reduction to pay grade E-1, a $5000.00 fine, and a bad-conduct discharge. The lone Sailor, Hospitalman Third Class (HM3) Figueroa, pled guilty at a summary court-martial to a single use of Valium, and testified against the appellant at trial.

We note that the appellant is the only Marine who did not receive a $5000.00 fine, although he did receive three months more confinement than Comey and Carruthers, and was convicted at a general court-martial. The appellant's sentence to 9 months confinement is considerably less than the 24 months confinement awarded to Peters. We also note that the appellant was sentenced by officer members, while the other Marines were sentenced by a military judge alone. We presume that HM3 Figueroa's case was resolved at a summary court-martial due to his single use and in exchange for his testimony against the appellant at a contested court-martial.

Based upon our review of the record, we find that the appellant has not met his burden of demonstrating that his sentence is highly disparate when compared with the sentences of the companion cases. Having failed to show a high disparity in his sentence, the appellant is not entitled to a further examination of the reasons for any differences in the sentences. *Lacy,* 50 M.J. at 289.

We conclude that the sentence approved by the convening authority is appropriate for this offender and his offense. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982). Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for, and in this case previously exercised by, the convening authority. *Healy*, 26 M.J. at 395-96.

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[1] The appellant did not cite LCpl Machado's case in his assignment of error.

Conclusion

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

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge WAGNER and Judge STONE participated in this case prior to detaching from the court.