

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

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Casey R. SMELSER
Private First Class (E-2), U. S. Marine Corps**

NMCCA 200601230

Decided 20 March 2007

Sentence adjudged 18 April 2006. Military Judge: C.C. Hale. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Air Control Group 18, 1st Marine Aircraft Wing, Camp Foster, Okinawa, Japan.

LtCol JOHN HOGAN, USMCR, Appellate Defense Counsel
Capt GEOFFREY SHOWS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Chief Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of attempted robbery, violation of a general order, and assault, in violation of Articles 80, 92, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, and 928. The appellant was sentenced to confinement for 252 days, forfeiture of \$800.00 pay per month for 8 months, reduction to pay grade E-1, and a bad-conduct discharge. In accordance with the terms of the pretrial agreement, the convening authority suspended all confinement in excess of 60 days and otherwise approved the sentence as adjudged.

We have considered the record of trial, the appellant's assignments of error alleging that the convening authority erred by failing to note the results of a companion case in taking action on the appellant's court-martial and that the sentence received by the appellant is disparate in light of the results of the companion case. We conclude that the findings are correct in law and fact and that there was no error materially prejudicial

to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

On the evening in question, the appellant remained off-base in Okinawa, Japan, in violation of a general order prohibiting his liberty beyond 2400. He, Lance Corporal (LCpl) Saenz, and Private First Class (PFC) Jones departed the bar "Alabama's" at 0200, intending to take a taxi to "Gate 2 Street," an area just outside the base where other clubs and bars are located. On his own initiative, the appellant walked away from his companions and approached LCpl F, who was standing alone outside Alabama's. The appellant, who had never seen LCpl F before that moment, asked him to pay for a taxi to transport LCpl F, the appellant, LCpl Saenz, and PFC Jones to Gate 2 Street. When LCpl F declined, the appellant threatened to beat him and take LCpl F's wallet. The appellant did so while taking an aggressive stance with closed fists, intentionally trying to intimidate LCpl F into handing over the cab fare. The appellant informed LCpl F that, if he didn't pay for the taxi, he would forcefully take his wallet.

LCpl F pulled out his cell phone, stated that he was calling the staff duty officer (SDO), and began moving back toward the entrance to Alabama's. The appellant, as he pursued LCpl F with the intent to take the wallet by force, turned to warn LCpl Saenz and PFC Jones that LCpl F was calling the SDO so they could avoid getting into trouble. At that moment, LCpl Addams, who was not part of the appellant's group, jumped in front of the appellant and began beating LCpl F severely. The appellant urged the beating on by telling LCpl Addams to "kick his ass" and "hit him again." Other fights broke out around the group, as well. The appellant admitted during the military judge's inquiry into the providence of his pleas of guilty that the beating would have ended sooner but for his encouragement. The appellant also admitted that he would have completed the robbery but for the intervening actions of LCpl Addams.

In all, four Marines were referred for trial by court-martial: the appellant, LCpl Addams, LCpl Saenz, and PFC Jones. Prior to the appellant's trial, the charges against the other three Marines were withdrawn and sent to summary courts-martial. LCpl Addams' pretrial agreement, signed on 5 April 2006, attached to the record of trial by the Government in response to the appellant's motion to produce, indicates that he agreed to testify in the appellant's case and the case against LCpl Saenz in exchange for his case being sent to a summary court-martial. The appellant's pretrial agreement, signed on 6 April 2006, required him to testify in the cases of LCpl Addams, LCpl Saenz, PFC Jones, and LCpl F.

At the beginning of the appellant's court-martial, the trial counsel informed the military judge that the charges against LCpl Addams, LCpl Saenz, and PFC Jones, originally referred to special

courts-martial along with the appellant's charges, had been withdrawn and sent to a lower forum. Neither the staff judge advocate's recommendation (SJAR) nor the convening authority's action makes any mention of the disposition of charges against the remaining three Marines. The appellant failed to note any discrepancy in the SJAR and failed to mention the disposition of the charges against the other three Marines in his clemency submission to the convening authority.

Companion Case

The appellant claims that LCpl Addams' case was so closely related to his own that it should be deemed a companion case and noted in the convening authority's action in accordance with the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0151(a)(2)(22 Mar 2004).

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 committed, criminal conduct involving a concerted effort to achieve a common goal." *United States v. Swan*, 43 M.J. 788, 791 (N.M.Ct.Crim.App. 1995). Although a charge of conspiracy is not a prerequisite, there must be "a showing of some commonality of conduct such as to indicate trademark-like similarities of culpability." *Id.* We reiterate here the non-exclusive list of factors we use to determine if cases are closely related enough to be termed companion cases:

- (1) Did the offenses occur at the same time;
- (2) Did the cases involve the same victim(s), transactions, etc.;
- (3) Did the offenses occur at the same location;
- (4) Was there any commonality of intent among the accused, whether in the nature of a conspiracy or aiding-and-abetting, whether or not alleged;
- (5) Were events, conduct, transactions, etc. so intertwined that fundamental fairness requires that the cases be considered companion cases?

Id. at 791-92.

In the appellant's case, he acted alone in attempting to rob LCpl F. LCpl Addams was not even one of the group of Marines that the appellant had been with prior to the attempt. The appellant told the military judge that he did not know why LCpl Addams attacked LCpl F. The only commonality between the two offenders was the charge of assault, where the appellant was found guilty because he went beyond the realm of spectator in urging the assault to continue. In short, although the assault offense common to the appellant and LCpl Addams occurred at the

same time and location and involved the same victim, there is no evidence of commonality of intent, nor were the events so intertwined that fundamental fairness requires the cases be considered as companions.

Assuming, *arguendo*, that the cases are companion cases, we are satisfied that the convening authority was made aware of the different judicial treatment given the various offenders. The convening authority's action indicates that the record of trial was considered and the withdrawal of special court-martial charges and referral to a lower forum was noted by the trial counsel at the beginning of the record of trial. The convening authority, therefore, made an informed decision. *United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000). In any event, we find no possible prejudice flowing from any omission under the circumstances of this case. We once again reject the suggestion that guidance in the Manual of the Judge Advocate General creates a right which an appellant can enforce on appeal. *Swan*, 43 M.J. at 792.

Sentence Disparity

Having found the cases not to be closely-related, we need not address any disparity between them. *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982). Assuming, however, *arguendo*, that the cases were closely related, we would not find the punishment each received to be highly disparate. Where we find sentences to be highly disparate in closely-related cases, we must determine whether there is a rational basis for the differences between the sentences. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). The appellant bears the burden of demonstrating that cases are closely-related and that the sentences are highly disparate. *Id.* Here, the appellant was sentenced for assault, violation of a general order, and attempted robbery. LCpl Addams, on the other hand, was punished for assault, violation of a general order, and making a false official statement regarding the assault. The seriousness of the attempted robbery charge, involving the attempted taking of money from a victim through the threat of force, in and of itself, provides a rational basis for the appellant to receive more serious judicial treatment.¹

Conclusion

After reviewing the entire record, we conclude that the sentence is not highly disparate and 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 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

¹ We note that the other offenders all entered into their pretrial agreements before the appellant entered into his.

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

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court