

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES R. CLARKE
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200700229
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 10 October 2006.

Military Judge: LtCol Raymond Beal, USMC.

Convening Authority: Commanding Officer, Marine Corps
Security Force Company, Naval Submarine Base, Kings Bay,
GA.

Staff Judge Advocate's Recommendation: Col R.G. Sokoloski,
USMC.

For Appellant: LCDR M.E. Eversole, JAGC, USN.

For Appellee: Maj Robert M. Fuhrer, USMC; LT Justin E.
Dunlap, JAGC, USN.

11 March 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a special court-martial, of one specification of attempted burglary, one specification of conspiracy to commit burglary, and one specification of breaking and entering, in violation of Articles 80, 81, and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, and 929. The appellant was sentenced to confinement for 180 days and a bad-conduct discharge. The convening authority (CA), pursuant to a pretrial agreement, suspended all confinement in excess of 120

days for a period of 12 months and approved the remaining sentence as adjudged.

After carefully considering the record of trial, the appellant's three assignments of error,¹ and the Government's response, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

Admission of Specific Acts of Misconduct

The appellant's first assignment of error is that the military judge abused his discretion when he allowed testimony concerning specific acts of misconduct to be elicited during direct examination of a Government sentencing witness, and when he allowed that witness to give an opinion concerning the appellant's rehabilitative potential.

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. His ruling will not be overturned on appeal "absent a clear abuse of discretion." *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). A military judge's ruling on admissibility of evidence will only be overturned if it is "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). In conducting our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

RULE FOR COURTS-MARTIAL 1001(b)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), permits evidence of an appellant's rehabilitative potential to be considered by the court-martial to aid it in determining an appropriate sentence. After testimony related to rehabilitative potential has been admitted, R.C.M. 1001(b)(5)(E) allows for inquiry on cross-examination into "relevant and specific instances of conduct." R.C.M. 1001(b)(5)(F) states that "the scope of opinion testimony

¹ I. The military judge abused his discretion by allowing a sentencing witness to testify regarding specific acts of misconduct, and provide inappropriate opinion evidence regarding appellant's rehabilitative potential.

II. The military judge became a partisan advocate when he conducted the direct examination of the Government's only sentencing witness.

III. A sentence including a bad-conduct discharge is inappropriately and disparately severe when compared with the sentence in the co-conspirator's case.

permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination."

In this case, a Government sentencing witness, Gunnery Sergeant (GySgt) J, was asked by the trial counsel how he knew the appellant. GySgt J responded that he became acquainted with the appellant after the appellant was charged for driving under the influence (DUI) and underage drinking. Record at 90. The defense objection to this answer was overruled. The witness then continued to answer the same question and added that the appellant had also been drunk on duty at the barracks, resulting in his transfer to the witness' platoon. A defense objection to this testimony was also overruled.

We find that this testimony should have been excluded. R.C.M. 1001(b)(5) allows a witness with appropriate knowledge of an accused to state his opinion of that appellant's potential for rehabilitation, however it "does not permit a full, logical explanation of the witness' opinion except on cross-examination." *United States v. Aurich*, 31 M.J. 95, 96 (C.M.A. 1990). The limit of the rule is quite clear:

RCM 1001(b)(5) contemplates one question: "What is the accused's potential for rehabilitation?" - and one answer: "In my opinion, the accused has [good, no, some, little, great, zero, much, etc.] potential for rehabilitation." There are numerous adjectives which might describe an individual's potential. Of course, it is beyond cavil that such a witness must have a proper foundation for his assessment, but that may only be explored on cross-examination. *United States v. Kirk*, 31 MJ 84 (CMA 1990).

Id. (brackets in original). The witness clearly jumped the gun in response to the trial counsel's question and the military judge failed to sustain the appellant's proper objection.

However, this does not end our inquiry. We find that the error was harmless beyond a reasonable doubt, given the military judge's statement on the record that he could separate the "chaff from the wheat" regarding the evidence related to the appellant's rehabilitative potential. Record at 97. We presume that the military judge knows the law and acts according to it. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)(citation omitted). Further, we note that the appellant's service record contained references to his history of nonjudicial punishment and numerous counseling entries. Prosecution Exhibits 2, 3, and 4. We do not find that the military judge's error "substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). In light of these factors, we conclude that the error did not cause the appellant to suffer substantial prejudice. *United States v. Rhoads*, 32 M.J. 114, 116 (C.M.A. 1991). Accordingly, we decline to grant relief.

Military Judge's Role

The appellant's second assignment of error is that the military judge became a partisan advocate for the Government when he "conducted the direct examination of the Government's only sentencing witness." Appellant's Brief of 23 May 2007 at 1. During the testimony of GySgt J, the military judge sustained an objection from the appellant concerning the witness offering an improper opinion as to the appellant's moral fiber. Record at 92-93. Following this objection, the military judge asked the witness foundational questions concerning his observations of the appellant. Following this, the military judge inquired as to the appellant's rehabilitative potential. An objection for lack of foundation was overruled. Record at 97.

"When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of [the] trial, [the] court-martial's legality, fairness, and impartiality were put into doubt" by the military judge's actions. *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001)(quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). While a military judge must maintain his "fulcrum position of impartiality," he can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further. *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995). We apply this test from the viewpoint of the reasonable person observing the proceedings. *Id.* (citations omitted). "Failure to object at trial to alleged partisan action on the part of a military judge may present an inference that the defense believed that the military judge remained impartial." *United States v. Foster*, 64 M.J. 331, 331. (C.A.A.F. 2007)(citations omitted).

First, we note that the appellant did not object to the military judge's questioning of GySgt J. On appeal the appellant describes the actions of the military judge as being an "advocate for the government" and argues that the "judge's conduct raises serious doubts regarding the fairness and the impartiality of Appellant's sentencing hearing." Appellant's Brief at 16. To the contrary, we find that the judge's questioning was not partial to the Government. The judge asked the witness a series of routine questions designed to lay the foundation for the witness to offer an opinion as to rehabilitative potential, and then elicited that opinion. Nothing during the military judge's questioning of the witness causes us to believe that a reasonable person would question the legality, fairness, or impartiality of the court-martial. Following the military judge's questions, the trial defense counsel cross-examined the witness and was able to impeach the witness concerning his lack of personal interaction with the appellant. We conclude that the military judge did not act as a partisan advocate and we decline to grant relief.

Sentence Disparity

The appellant's third assignment of error alleges that his sentence is inappropriately severe when compared to the sentence of his co-conspirator, Master-at-Arms Seaman Apprentice (MASA) Kyle W. Brown. We disagree.

MASA Brown was convicted of one specification of attempted robbery, one specification of conspiracy to commit burglary, and one specification of breaking and entering with intent to commit larceny. MASA Brown was sentenced to 150 days confinement and reduction to pay grade E-1.

The Government apparently concedes, and we find, that MASA Brown's case is closely related to the appellant's case. However, 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 sentence of MASA Brown.

Sentence comparison does not require sentence equation. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001)(citing *United States v. Ballard*, 20 M.J. 282 (C.M.A. 1985) and *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982)). The test is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment. *United States v. Lacy*, 50 M.J. 286, 289 (C.A.A.F. 1999). By exercising our authority to determine sentence appropriateness under Article 66(c), UCMJ, the goal is "to attain *relative* uniformity rather than an arithmetically averaged sentence." *Id.* at 288 (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982)(emphasis in original)).

We note that the two cases were brought by the same CA and were both guilty pleas before the same military judge. MASA Brown was awarded 150 days confinement and reduction to E-1. The appellant received 180 days confinement, and a bad-conduct discharge.

While there are differences between the appellant's sentence and MASA Brown's, on the whole we do not consider them to be "highly disparate." As our superior court has observed, "the military system must be prepared to accept some disparity in the sentencing of codefendants, provided each military accused is sentenced as an individual." *Durant*, 55 M.J. at 261 (citations omitted).

Even if we had found the sentences to be "highly disparate," considering the facts and circumstances of each case, we would also find that a rational basis exists for any disparity. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)(citing *Lacy*, 50 M.J. at 288). While MASA Brown had one prior NJP, the appellant's service record book reflects a string of misconduct

resulting in NJP and numerous formal counselings. Additionally, MASA Brown had numerous sentencing witnesses, both military and civilian, testify to his character and rehabilitative potential and argued strongly against a bad-conduct discharge. On the contrary, the appellant's counsel stated during his sentencing argument:

Now, with regard to a punitive discharge, we leave that again in the discretion of the Court. I think that Private Clarke has demonstrated that he's incompatible with further military service, and we know that whether you give him a bad conduct discharge or not, his command is going to get him out with an other than honorable discharge.

Record at 124-125. This followed an earlier statement from the same counsel that the best thing for the appellant was "to get him back to his family where they can take care of him. . . ." Record at 122. Additionally, the appellant was generally unable to present a strong case for rehabilitative potential. Finally, the military judge stated that while the sentence of MASA Brown may appear disparate, that the case in extenuation and mitigation presented by MASA Brown showed likelihood for rehabilitation, while the evidence in the appellant's case did not. Record at 126.

The appellant has not met his burden of showing that his sentence is highly disparate to the sentence in the companion case, and the record provides good and cogent reasons for any disparity that does exist. We conclude that the sentence approved by the CA is appropriate for this offender and his offenses, and decline to grant relief. *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); *Snelling*, 14 M.J. at 267.

Conclusion

We affirm the findings and the sentence as approved by the CA.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court