

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

**Before
E.E. GEISER, L.T. BOOKER, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROBERT B. PENNINGTON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200800106
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 February 2007.
Military Judge: Col Steven Folsom, USMC.
Convening Authority: Commander, U.S. Marine Corps Forces
Central Command, MacDill Air Force Base, FL.
Staff Judge Advocate's Recommendation: LtCol G.W. Riggs,
USMC.
For Appellant: Maj Brian Jackson, USMC.
For Appellee: LT Duke Kim, JAGC, USN.

16 December 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to commit murder and kidnapping, and kidnapping itself, in violation of Articles 81 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 934. The military judge awarded confinement for 14 years, reduction to E-1, and a dishonorable discharge. His sentence as finally approved included confinement for 21 months, reduction to E-1, and a bad-conduct discharge from the U.S. Marine Corps.

In his sole assignment of error, the appellant claims that his sentence is inappropriately severe when compared with the

sentences of his conspirators. On considering the record of trial, the appellant's assignment of error, and the Government's answer, we conclude that the appellant's sentence was not inappropriately severe and that no other error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a radio operator for a squad of Marines deployed to Iraq. The senior Marine in the squad, a sergeant, devised a plan whereby the squad would kidnap a suspected insurgent leader in Hamdaniyah and then stage his death to look as if the Marines had been ambushed and forced to respond with deadly defensive force. The plan required the squad to obtain a shovel and an AK-47 from local residents and plant them in the vicinity of a known Improvised Explosive Device location (IED hole) to lend credence to the ambush story. Six Marines and their Navy corpsman ultimately agreed to the plan and executed it on 26 April 2006. Members of the squad had specific tasks allocated to them by the senior member of the squad.

The appellant was never intended to be a triggerman for the murder, and indeed he did not fire his weapon on the night in question. He did, however, use his rudimentary Arabic-language skills to deceive residents of Hamdaniyah to allow the squad to steal a shovel and an AK-47; help force the condemned Iraqi (not their original "target," but rather an Iraqi who had the misfortune to be a male of military age) from his home to the IED hole some distance away; help bind the doomed man with flex-ties about his legs; participate in radio traffic to higher headquarters concerning the "ambush" that his squad encountered; attempt to gag the man with a bandage; assist, after the man was murdered, in removing the flex-ties and positioning the shovel and weapon as if they were being used against the Marines; and tinker with physical evidence by removing Marines' fingerprints and replacing them with the dead man's. He also, as the Iraqi's body was being removed, desecrated the corpse by taking the man's arm and slapping him in the face with it.

As of the date of the convening authority's (CA) action in the appellant's case, 23 January 2008, all members of the squad had had their cases adjudicated. We have appended a summary of the charges and actions in their cases from the CA's action in the appellant's case.

Discussion

In reviewing a case for sentence appropriateness, this court is required to compare sentences in specific cases 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. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)(citations and internal quotation marks omitted).

The burden is upon the appellant to show why we should look to related cases, and if the appellant satisfies this burden, the Government must then establish a rational basis for the disparity. *Id.* It is only then that we may determine what sentence should be approved in a particular case.

The cases that the appellant invites us to compare to his are all closely related, as they involve a conspiracy and the offenses all arose from a common scheme or design. *See United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). We note at the outset that all these cases were referred for trial by general court-martial, thereby distinguishing our footing from that of the court in *Kelly*, where one co-actor had his offenses disposed of by nonjudicial punishment, another by general court-martial.

Three squad members, the Marine noncommissioned officers¹ (NCO) involved in the offenses, fully contested their cases before mixed panels of officer and enlisted members. The senior Marine, a sergeant, received a substantial sentence which, as of the date of the CA's action in the appellant's case, had not been made final through the action of the CA. The other two Marine NCO's, both corporals, received sentences from the panels that are considerably less than the appellant's.

We take this occasion to observe that a sentence is largely advisory until the CA takes his action under Article 60. For purposes of the appellant's assignment of error, therefore, we will consider only those adjudged sentences that gave the CA the same sort of latitude in approval and execution that the appellant's did. This is not meant in any way to criticize the members who heard the evidence and reached the findings and the sentence in the other two cases, nor is it meant to express a preference for sentencing by a military judge; it is merely a recognition that when we exercise our highly discretionary power in these sorts of cases, we are trying where possible to make a meaningful comparison.

The remaining NCO among the co-actors was a Navy hospital corpsman, then Hospitalman Third Class (HM3) Bacos. Petty Officer Bacos, consistent with his status under the law of armed conflict, did not fire any weapons during the course of the evening, although he was, again consistent with his status, equipped with small arms. Petty Officer Bacos offered some advice to the squad on what sort of medical supplies they should pack, and he stood guard during the events of 26 April. Petty Officer Bacos (by then serving as a Hospitalman Recruit due to his court-martial) testified in the presentencing proceedings against the appellant pursuant to his obligations in a pretrial

¹ This status of noncommissioned officer is significant not only because of the function within a particular unit, but also because the law recognizes that it sets one apart from junior service members; *see, e.g.*, Article 91, UCMJ.

agreement. As a result of that pretrial agreement, HM3 Bacos received a substantial reduction in his term of confinement and had his punitive discharge disapproved.

The remaining three Marines in the squad were equal or junior to the appellant in grade. Each of them pleaded guilty to a conspiracy to obstruct justice, an offense which has a maximum sentence of 5 years, and to aggravated assault, an offense which has a maximum sentence of 8 years (10 if grievous bodily harm is actually inflicted with a firearm). Each of those three Marines, therefore, faced a maximum confinement of 15 years (for the most serious form of aggravated assault) on the basis of his pleas, compared to the maximum punishment of life without eligibility for parole faced by the appellant. One of them, Private First Class (PFC) Jodka, testified against the appellant during the presentencing proceedings.

Because those three Marines were convicted of offenses carrying substantially lower maximum sentences, it is tempting to conclude that their cases do not provide a useful basis for comparison. We note, however, that all Marines participated in the events of 26 April, and that the sentence disparities really resulted from the decision to accept a plea to a lesser offense. This sort of charging/referral decision "can certainly lead to differences in sentencing," *United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001), so we must give some attention to possible reasons behind the dispositions.

One piece of information that we do not have regarding the referral decision or the Government's motivation to accept a plea is the state of the evidence against the other members. We do have a detailed admission, Prosecution Exhibit 2, from the appellant, and that might have formed a basis for some negotiations. As noted, PFC Jodka testified against the appellant during his sentencing proceedings. Neither Lance Corporal (LCpl) Shumate nor LCpl Jackson testified against the appellant. According to the appellant's clemency submission, all three of these Marines entered into their agreements before the appellant did and all three had minor roles leading up to the murder in comparison to the appellant's. We note further that the appellant's extensive combat experience prior to this tour made him a leader in his squad, irrespective of his pay grade, and we are satisfied that all these factors combined to allow the less experienced junior Marines to negotiate dispositions different from the appellant's.

We also do not have before us the prior disciplinary records of the three junior Marines. We note that the appellant had been punished by a summary court-martial for carnal knowledge two years before these offenses occurred, a further component of a rational basis for sentence disparity.

We are mindful of, and sympathetic to, the trauma that the appellant had suffered and observed in previous combat tours to

Iraq. His heroism in those previous tours was not unremarked by the CA, but it is the CA, not this court, who holds the clemency power. For us to reduce his sentence even further than that which was approved by the CA would be to engage, improperly, in an act of clemency. See *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

Conclusion

The appellant participated in the planning and execution of a ruthless murder of a noncombatant in circumstances that brought discredit to him, his unit, his service, and his nation. The military judge who announced the sentence and the CA who acted upon the results of trial considered all the information placed before them to come up with a sentence that is appropriate for this offender and his offenses. Exercising our authority under Article 66, we conclude that the approved sentence is one that should be affirmed, and accordingly we affirm the findings and the sentence as approved by the CA below.

Senior Judge GEISER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix

Sgt Hutchins: Guilty of conspiracy to commit murder, kidnapping, larceny, and false official statement; Guilty of making a false official statement; Guilty of larceny; Guilty of unpremeditated murder. All guilty findings were contrary to pleas. The mixed panel sentenced Sgt Hutchins to confinement for 15 years; reduction to E-1; reprimand; and a dishonorable discharge. CA's action in this case was pending on 23 January 2008.

Cpl Magincalda: Guilty of conspiracy to commit murder, kidnapping, false official statement, housebreaking, and larceny; Guilty of wrongful appropriation; Guilty of housebreaking. All guilty findings were contrary to pleas. The mixed panel sentenced Cpl Magincalda to confinement for 448 days and reduction to E-1. CA's action in this case was pending on 23 January 2008.

Cpl Thomas: Guilty of conspiracy to commit murder, kidnapping, larceny, housebreaking, and false official statement; Guilty of kidnapping. All guilty findings were contrary to pleas. The mixed panel sentenced Cpl Thomas to reduction to E-1 and a bad-conduct discharge. CA's action in this case was pending on 23 January 2008.

HM3 Bacos: Pursuant to pleas and protected by a pretrial agreement (PTA), Guilty of conspiracy to kidnap and make a false official statement; Guilty of kidnapping. The military judge adjudged a sentence of confinement for 10 years; forfeiture of all pay and allowances; reduction to E-1; and a dishonorable discharge. CA's action: Pursuant to terms of the PTA, disapproved confinement in excess of 11 months, 15 days, disapproved punitive discharge, disapproved forfeitures.

LCpl Shumate: Pursuant to pleas and protected by a PTA, Guilty of conspiracy to obstruct justice; Guilty of aggravated assault. The military judge adjudged a sentence of confinement for 8 years; forfeiture of all pay and allowances; reduction to E-1; and a dishonorable discharge. CA's action: Pursuant to terms of the PTA, approved confinement adjudged (and suspended confinement exceeding time served), approved reduction to E-1, disapproved punitive discharge, disapproved forfeitures.

LCpl Jackson: Pursuant to pleas and protected by a PTA, Guilty of conspiracy to obstruct justice; Guilty of aggravated assault. The military judge adjudged a sentence of confinement for 9 years; forfeiture of all pay and allowances; reduction to E-1; and a dishonorable discharge. CA's action: Pursuant to terms of the PTA, approved confinement adjudged (and suspended confinement exceeding time served), approved reduction to E-1, disapproved punitive discharge, disapproved forfeitures.

PFC Jodka: Pursuant to pleas and protected by a PTA, Guilty of conspiracy to obstruct justice; Guilty of aggravated assault.

The military judge adjudged a sentence of confinement for 5 years; forfeiture of all pay and allowances; reduction to E-1; and a dishonorable discharge. CA's action: Pursuant to terms of PTA, approved confinement adjudged (and suspended confinement exceeding 18 months), approved reduction to E-1, disapproved punitive discharge, disapproved forfeitures.