

**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.

**TOBEE S. ROOD
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200700186
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 9 November 2006.

Military Judge: CAPT Salvador Dominguez, JAGC, USN.

Convening Authority: Commanding Officer, 1st Battalion, 3d Marines, 3d Marine Division, Marine Corps Base Hawaii, Kaneohe, HI.

Staff Judge Advocate's Recommendation: Maj T.L. Kelly, USMC.

For Appellant: CDR Kelvin Stroble, JAGC, USN.

For Appellee: LT Craig A. Poulson, JAGC, USN.

20 March 2008

OPINION OF THE COURT

COUCH, Judge:

After entering mixed pleas, the appellant was convicted by a special court-martial composed of officer members, of disobeying a lawful order of a superior noncommissioned officer, disobeying a lawful general order, and wrongful use of marijuana, in violation of Articles 91, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, and 912a. The appellant was sentenced to confinement for 12 months, reduction to pay grade E-1, forfeiture of \$785.00 pay per month for a period of 12 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial, the appellant's two assignments of error,¹ the Government's response, and the appellant's reply. 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.

Member's Challenge for Cause

During voir dire of the members, the appellant's civilian defense counsel posed the following question:

Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance? I will repeat the question. Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance?

Record at 104. In response, the senior member of the court-martial, Captain Ausbrooks, responded in the affirmative. Immediately thereafter, the military judge instructed the members that "[u]se of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary," but that the drawing of the inference was not required. *Id.* at 106. All of the members responded that they could follow the military judge's instruction.

During individual voir dire, Captain Ausbrooks was questioned further and asked what he meant by his response:

Member (Capt Ausbrooks): My opinion is that you are personally responsible for everything that goes into your body.

Civilian Counsel (CC): And my next question was, "Do you have a firmly held belief that a positive urinalysis is an absolute indicator to knowing use?" And you said that is the same question. Right?

Member: Yes. It appeared to be the same question.

CC: This belief that you are responsible for everything that goes into your body is a firmly held belief?

Member: I believe, yes.

¹ I. The military judge erred when he failed to grant the appellant's challenge for cause of Captain Ausbrooks.

II. The appellant's case is closely related to that of Private William A. Berry, III, USMC, and his sentence is inappropriately severe in comparison to the sentence received by Private Berry at a summary court-martial.

Id. at 108-09. The military judge later asked Captain Ausbrooks whether he could follow the court's instructions on "how you can evaluate a positive urinalysis in light of the inferences that I describe for you as a matter of law?" to which Captain Ausbrooks responded that he could. *Id.* at 110. The member also agreed that he would consider all of the evidence presented in the case prior to reaching a conclusion as to the guilt or innocence of the accused. *Id.* at 112.

The appellant's counsel challenged Captain Ausbrooks for cause, citing his "firmly held belief that a positive urinalysis is an indicator of guilt." *Id.* at 138. The military judge denied the challenge, and stated:

The court had the opportunity to carefully consider [Captain Ausbrooks'] responses to all of the questions regarding the urinalysis testing and the results therefrom. He, as well as the other members who responded to questions, advised the court that he would follow the court's instruction relative to the urinalysis testing, he would follow the instruction relative to permissive inferences, and would decide this case based on all of the evidence presented.

Id. at 139. The appellant exercised his peremptory challenge against Captain Ausbrooks, after stating he would have struck another member from the panel but for the military judge's denial of his challenge for cause against Captain Ausbrooks.

The appellant argues that it was reversible error not to excuse Captain Ausbrooks because of implied bias. Although the defense peremptorily challenged Captain Ausbrooks, the issue has been preserved for appeal. *United States v. Armstrong*, 54 M.J. 51, 55 (C.A.A.F. 2000); RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed).

Military judges are to follow the liberal-grant mandate in ruling on challenges for cause. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). We review a denial of a challenge for cause based on actual bias for abuse of discretion. *Armstrong*, 54 M.J. at 53. We accord less deference to a military judge's denial of a challenge for cause based on implied bias. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). Our task in evaluating a claim of implied bias involves application of an "objective standard" to the stated reasons for disqualification of the member that is not dependent on the military judge's credibility determination. *Daulton*, 45 M.J. at 217. We simply ask how the public would perceive the fairness and impartiality of the proceeding with the challenged member serving on the panel in light of the reasons for the supposed implied bias. *United States v. Dinatale*, 44 M.J. 325, 328 (C.A.A.F. 1996); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). "Implied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position

would be prejudiced [i.e. biased].'" *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)(quoting *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999)). The standard of review to be applied to such a challenge is less deferential than abuse of discretion but more deferential than *de novo*. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Generally, implied bias should rarely be used as the reason for granting a challenge for cause in the absence of actual bias. *Id.*

In this case, we find that the military judge did not abuse his discretion in denying the defense challenge against Captain Ausbrooks based on implied bias. The beliefs he articulated in response to the defense counsel's questions were objectively reasonable for an average citizen not versed in the nuances of criminal law. Further, Captain Ausbrooks' responses clearly evinced his willingness to follow the court's instructions on the law regarding permissible inferences in the context of a drug urinalysis case. In light of our review of the record, we are satisfied that his responses are "not an indication of a bias or prejudice that would not yield to proper instruction or create an appearance of unfairness" of the appellant's court-martial. *United States v. Townsend*, 65 M.J. ____ , No. 07-0229/NA, slip op. at 11 (C.A.A.F. Feb. 5, 2008); *see also Dinatale*, 44 M.J. at 328. We conclude that the military judge did not commit error in denying the appellant's challenge for cause of Captain Ausbrooks on the grounds of implied bias.

Sentence Disparity

The appellant's second assignment of error alleges that his sentence is inappropriately severe when compared to the sentence of a co-actor, Private William A. Berry, III, U.S. Marine Corps. We disagree.

Pursuant to a pretrial agreement, Private Berry pled guilty before a summary court-martial to violations of Article 92 and 112a, UCMJ. He was sentenced to confinement for 30 days, forfeiture of \$424.00 pay for 1 month, and reduction to pay grade E-1. Appellate Exhibit XXIII. The appellant was offered a similar pretrial agreement as Private Berry, but declined. Record at 425; Defense Exhibit C.

In deciding whether an appellant's sentence is inappropriately severe in relation to that of a companion case, we examine three questions of law: "(1) whether the cases are closely related . . .; (2) whether the cases resulted in 'highly disparate' sentences; and (3) . . . whether there is a rational basis for the differences between [these] . . . cases." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001)(quoting *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)).

The Government apparently concedes, and we find, that Private Berry'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 received by Private Berry.

Sentence comparison does not require sentence equation. *Id.* (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. *Lacy*, 50 M.J. at 289. 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)).

While there are differences between the disposition of the appellant's case and that of Private Berry, 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). The appellant has failed to provide any evidence of "discriminatory or otherwise illegal prosecution or referral" which would lead us to apply our broad discretion to decide whether or not to remedy this disparity. *United States v. Noble*, 50 M.J. 293, 295 (C.A.A.F. 1999). As this case reflects, charging decisions by commanders in consultation with their trial counsel, as well as referral decisions by convening authorities after advice from their staff judge advocates, can certainly lead to differences in sentencing. *Durant*, 55 M.J. at 261.

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). Private Berry negotiated a pretrial agreement wherein he agreed to plead guilty and testify against the appellant. By contrast, the appellant elected to fully contest his charges, which included the more serious offenses of disobeying the order of a superior noncommissioned officer, assault, and communicating a threat. Despite the appellant's acquittal of the assault and communicating a threat offenses, his punitive exposure on his remaining offenses was greater because they were disposed of at a special vice a summary court-martial. We also note that the appellant had a history of prior misconduct, which resulted in nonjudicial punishment for disrespect to a noncommissioned officer, resisting apprehension, destruction of Government property, and drunk and disorderly conduct. Prosecution Exhibit 1 at 8-9. Given the appellant's disciplinary record and rejection of a pretrial agreement that

would have had his case referred to a summary court-martial, the convening authority's decision to refer his case to a special court-martial is objectively reasonable.

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 convening authority 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 convening authority.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court