

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

**Before
J.A. MAKSYM, J.R. PERLAK, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**AHMED C. BURDEN
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000277
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 January 2010.

Military Judge: Col Daniel J. Daugherty, USMC.

Convening Authority: Commanding General, U.S. Marine Corps Forces, Special Operations Command, Camp Lejeune, CA.

Staff Judge Advocate's Recommendation: Maj R.R. Cheshire, USMC; **Addendum:** Col B.T. Palmer, USMC.

For Appellant: LCDR Edward T. George, JAGC, USN; Maj Kirk Sripinyo, USMC.

For Appellee: CDR Kimberly D. Hinson, JAGC, USN; Capt Mark V. Balfantz, USMC.

23 September 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of wrongful distribution of morphine pills in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for twenty months, forfeiture of all pay but not allowances, a fine of \$1890.00, reduction to the pay grade E-1, a reprimand, and a dishonorable discharge. Pursuant to a pretrial agreement, all confinement in excess of 12 months was suspended for the period

of confinement served plus six months; adjudged forfeitures were deferred then suspended for 12 months from the date of the convening authority's (CA) action; and, automatic forfeitures were deferred then waived for 6 months from the date of the CA's action.

We have examined the record of trial, the appellant's brief and assignment of error, the Government's answer, and the appellant's reply brief. We conclude that the findings and the 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.

Sentence Appropriateness

The appellant asserts that his adjudged sentence, specifically the dishonorable discharge and fine of \$1890.00 are inappropriately severe.¹

Dishonorable Discharge

The appellant cites to various unpublished cases from this court for comparison purposes to support his argument that a dishonorable discharge was a "grossly disproportionate" punishment for the crimes of which he stands convicted. We address the appellant's argument from two perspectives regarding sentence appropriateness: "closely related" cases and relative uniformity.

The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985) (appellant argued the military judge's sentencing pattern in drug cases was disproportionately severe in comparison to the army-wide sentencing pattern for such cases). We are not required to engage in comparison of specific cases "'except 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) (quoting *Ballard*, 20 M.J. at 283). "Closely related" cases are those that "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994); see also *Lacy*, 50 M.J. at 288. The burden is upon the appellant to make that showing. *Lacy*, 50 M.J. at 288. If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id.*

Here, the appellant cites seven cases decided by this court over the last fifteen years for comparison purposes. In four of

¹ The reprimand was not approved by the Convening Authority thus the appellant's argument as to it's propriety is moot. CA's Action of 27 Apr 2010.

the cases a dishonorable discharge was affirmed, while in the other three cases a dishonorable discharge was found to be inappropriately severe. Appellant's Brief of 6 Jul 2010 at 10-13. It is the later three cases that the appellant contends are similar to his case, and support his argument that the dishonorable discharge is not appropriate.

However, none of the three cases satisfy the "closely related" standard. In fact, the cases in which this court found a dishonorable discharge to be inappropriately severe involve offenses (bad checks, assaults, indecent assaults) that are otherwise completely unrelated to the appellant's crime of distributing morphine pills to an undercover agent on two separate occasions. The appellant has not shown there is a nexus between the cited cases and his case, and thus has not met his burden.

We recognize that it is within our discretion to consider and compare other court-martial sentences in reviewing a case for sentence appropriateness and relative uniformity. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). We also recognize that relative uniformity does not mean that a miscarriage of justice has occurred simply because in other cases decided by this court a dishonorable discharge was reduced to a bad-conduct discharge.

It is well-settled that a court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Our determination of sentence appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy and is the prerogative of the convening authority. *Healy*, 26 M.J. at 395.

A dishonorable discharge is a harsh punishment with serious ramifications, but in this particular case it is not a "grossly disproportionate" punishment. We reach that conclusion after careful consideration and examination of the record of trial, including documentary evidence and witness testimony regarding the appellant's character as a husband, father, and Marine. However, we balance that consideration against the nature of the offenses committed by the appellant. The distribution of drugs on two occasions for profit by a senior noncommissioned officer, notwithstanding the claimed underlying rationale for the misconduct, is clearly an offense of a military nature meriting severe punishment. RULE FOR COURTS-MARTIAL 1003(b)(8)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant faced a jurisdictional maximum punishment of 30 years confinement, a dishonorable discharge, total forfeiture of pay and allowances, and reduction to the lowest enlisted pay grade. After reviewing the entire record, we find the dishonorable discharge is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 298. Further sentence relief would amount to clemency. *Healy*, 26 M.J. at 396.

Fine

The appellant also asserts that the imposition of a fine was excessive, served no purpose, and was not clearly explained to the appellant as a potential lawful punishment. We disagree.

The adjudged fine was clearly not excessive, and was related to the appellant's sale of the morphine pills. It is also clear from the record that the military judge advised the appellant that the maximum punishment included a fine. Record at 10. Further, the sentencing limitation portion of the pretrial agreement, signed by the appellant on 20 October 2009, lists a fine as a permissible punishment. Appellate Exhibit II at 1. We find that the appellant was on notice that a fine was a permissible punishment.

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

For the Court

R.H. TROIDL
Clerk of Court