

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

**Before  
L.T. BOOKER, J.K. CARBERRY, B.G. FILBERT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JESSE W. DOWELL  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000216  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 26 January 2010.

**Military Judge:** Maj Glen R. Hines, USMC.

**Convening Authority:** Commanding Officer, 8th Marine Regiment, 2d Marine Division, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** Col W.G. Perez, USMC.

**For Appellant:** CAPT Frederic E. Matthews, JAGC, USN.

**For Appellee:** CDR Christopher L. Vanbrackel, JAGC, USN.

**5 October 2010**

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**OPINION OF THE COURT**  
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**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 special court-martial convicted the appellant, pursuant to his pleas, of conspiracy, violation of a lawful general order, and obstruction of justice in violation of Articles 81, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 934. The appellant was sentenced to confinement for 90 days, reduction to pay grade E-1, forfeiture of \$964.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant's submission asserts his approved sentence is highly disparate to the sentence awarded in the case of his co-conspirator and co-actor, Lance Corporal (LCpl) Green. In support of his position, the appellant attached the record of trial of LCpl Green. He asks that we reassess the sentence and approve a sentence that does not include a bad-conduct discharge.

After carefully considering the record of trial and the pleadings of the parties, 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.

### **Sentence Appropriateness**

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). 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). The burden is upon the appellant to make that showing. *Id.* If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id.* "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 (examples of closely related cases include co-actors in a common crime, service members involved in a common or parallel scheme, or "some other direct nexus between the servicemembers whose sentences are sought to be compared").

On 12 November 2009, the appellant was serving restriction in his barracks room onboard Camp Lejeune, North Carolina. The appellant's roommate, LCpl Joshua Green, and Corporal (Cpl) Sean O'Malley came to the appellant's room after being out in town. Cpl O'Malley produced and smoked PCP in the presence of the appellant and LCpl Green. Neither Marine reported the illegal conduct by Cpl O'Malley. All three Marines eventually fell asleep in the appellant's room. The next morning, the appellant and LCpl Green discovered that Cpl O'Malley was dead. To cover up their involvement in the death, they decided to transport Cpl O'Malley's body to his room and put him in his own bed. LCpl Green carried Cpl O'Malley's body to his barracks room, while the appellant retrieved the room key from Cpl O'Malley's pants and unlocked the door. They then put Cpl O'Malley's body in his bed. Record at 25-31; Prosecution Exhibit 2 at 1-2.

Later that same day, the appellant and LCpl Green were interviewed by Naval Criminal Investigative Service (NCIS) agents. The appellant admitted his involvement in the events

surrounding the death and cover-up. Prosecution Exhibit 1, at 1. LCpl Green initially lied to the NCIS agents about his knowledge and role in Cpl O'Malley's drug use, but later admitted his culpability. Green Record of Trial, Prosecution Exhibits 2 and 4.

LCpl Green went to trial after the appellant and was convicted at special court-martial, pursuant to his pleas, of conspiracy, violation of a lawful general order by failing to report Cpl O'Malley's drug possession and use, making a false official statement by lying to NCIS agents and obstruction of justice. He was sentenced by the military judge to six months confinement, forfeiture of \$1,282.00 pay per month for six months, and reduction to pay grade E-1. His sentence did not include a punitive discharge.

Applying the first step in the *Lacy* analysis, we agree with both the Government and the appellant that the appellant's case is closely related to LCpl Green's. The two Marines were co-conspirators and co-actors in a common scheme to move Cpl O'Malley's body to his barracks room to avoid getting in trouble. See *Lacy*, 50 M.J. at 288.

Turning to the second part of the *Lacy* analysis, we do not find the sentences in the two cases to be highly disparate. We reach this conclusion in part because the sentences are not so different to be outside "a range of acceptability and range of relative uniformity." *Lacy*, 50 M.J. at 287. While the appellant did receive a bad-conduct discharge and LCpl Green did not, it is also true that LCpl Green's adjudged sentence included two months more confinement and more than twice the forfeitures of pay as the appellant.

It is also evident to us that there are good and cogent reasons to explain the differences in the sentences. The two Marines played almost identical roles in the events surrounding the death of Cpl O'Malley and the attempted cover-up. Both were present when Cpl O'Malley used the PCP, both failed to report the illegal drug use and the two conspired and acted together to move the dead body to avoid getting in trouble. However, at the time he let Cpl O'Malley smoke PCP in his barracks room, the appellant was restricted to the barracks as part of his nonjudicial punishment for an attempted larceny. PE 6. Additionally, the appellant presented no extenuation and mitigation case at his court-martial outside of his unsworn statement. Record at 45-46. In contrast, LCpl Green presented numerous character letters and photographs, as well as medical records documenting his mental health difficulties. Green Record of Trial, Defense Exhibits A, B, and C.

The primary reason the appellant claims the sentences are disparate is that LCpl Green was convicted of lying to NCIS

agents about Cpl O'Malley's drug use and the appellant was not.<sup>1</sup> Given the individualized evidence presented in the two cases as noted above, we do not find this difference demonstrates that the sentences exceeded "relative uniformity." *Lacy*, 50 M.J. at 287. Because the appellant has failed to carry his burden to show sentence disparity, our analysis under sentence disparity need go no further.

We are also satisfied the appellant's sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

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

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<sup>1</sup> We note at the outset that LCpl Green initially failed to tell NCIS agents about the drug use, but a few hours later told the agents the truth. Green Record of Trial, PE 2 and 4.