

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

**Before
J.K. CARBERRY, G.G. GERDING, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**VICTOR L. LEWIS
SEAMAN RECRUIT (E-1), U.S. NAVY**

**NMCCA 201100037
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 September 2010.

Military Judge: CAPT Carole Gaasch, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: LT Jentso J. Hwang, JAGC, USN; LT Daniel LaPenta, JAGC, USN.

For Appellee: CDR Kimberly D. Hinson, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

30 August 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiracy, one specification of possession of marijuana, two specifications of larceny, one specification of forgery, one specification of burglary, one specification of

possession of stolen identification documents, one specification of executing a scheme to defraud a financial institution, and one specification of falsely representing social security numbers of others, in violation of Articles 81, 112a, 121, 123, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, 921, 923, 929, and 934. The approved sentence included five years confinement, forfeiture of all pay and allowances, and a dishonorable discharge. Pursuant to the terms of the pretrial agreement, the convening authority suspended all confinement in excess of 54 months.

In his sole assignment of error, the appellant claims his sentence is inappropriately severe when compared to that of his co-conspirator, Fireman Apprentice (FA) Jones.¹ We disagree and find that no error materially prejudicial to the substantial rights of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Sentence Disparity and 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").

The appellant asserts that his sentence is highly disparate to the sentence awarded to his co-conspirator, FA Jones, whose case was referred to a special court-martial and whose approved sentence included confinement for 10 months, a \$500.00 fine,

¹ The appellant raises this error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

forfeiture of \$500.00 pay per month for 10 months, reduction to pay grade E-1, and a bad-conduct discharge. *United States v. Jones*, No. 201000423, unpublished op. (N.M.Ct.Crim.App. 19 Oct 2010).

We find that the appellant has demonstrated that his case is closely related to that of FA Jones and his adjudged sentence is highly disparate. It's clear that the appellant and FA Jones participated in a common scheme to defraud the Navy Federal Credit Union (NFCU) and for his offenses, FA Jones received significantly less confinement and a less severe characterization of discharge.

We find, however, that there is a rational basis for the sentence disparity. First, the appellant was a recidivist who had been convicted by a special court-martial for the same offense in June 2009. Shortly after his release from confinement in the Fall of 2009, he engaged in the same criminal conduct against the same victim. See Prosecution Exhibits 1 and 2, Stipulation of Fact and Results of Trial by Special Court-Martial. Second, the appellant was the person who hatched this scheme and engaged in the majority of the criminal conduct. Record at 227; PE 1. Third, the appellant pled guilty to stealing \$27,422.00. Fourth, FA Jones received the benefit of a lower maximum punishment at a special court-martial because he entered into a pretrial agreement with the convening authority to cooperate in the appellant's court-martial. Record at 173, 191-192.

Based on the foregoing, we are satisfied that a rational basis exists for the disparity in the sentences of the appellant and FA Jones. 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).

Promulgating Order

The appellant pled guilty to the specification under Charge II and to Specification 2 under Charge III by exceptions and substitutions. The results of trial and staff judge advocate's recommendation both accurately reflect the pleas and findings as to those offenses. Rule for Courts-Martial 1114(c), Manual for Courts-Martial, United States (2008 ed.) requires that the court-martial promulgating order set forth ". . . the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused's pleas; [and] the findings or other disposition of each charge and specification" The

promulgating order in this case fails to accurately reflect the pleas and findings for the two specifications noted above. We will order corrective action in our decretal paragraph.

Conclusion

The findings and sentence as approved by the convening authority are affirmed. The supplemental promulgating order will reflect that as to the specification under Charge II the appellant pled and was found guilty except for the words "one-half pound of marijuana, with the intent to distribute the said" and substituting therefor the words "3 grams of marijuana, a"; and that as to Specification 2 under Charge III the appellant

pled and was found guilty except for the figure "\$46,340" and substituting therefor the figure "27,422."

For the Court

R.H. TROIDL
Clerk of Court