

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

**Before
C.L. REISMEIER, B.L. PAYTON-O'BRIEN, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSE A. JIMENEZ
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100187
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 October 2010.

Military Judge: LtCol Paul L. Starita, USMCR.

Convening Authority: Commanding General, 3d Marine Division
(-)(Rein), Kaneohe Bay, HI.

Staff Judge Advocate's Recommendation: LtCol K.J. Estes,
USMC.

For Appellant: CDR Michelle M. Pettit, JAGC, USN.

For Appellee: CDR K.D. Hinson, JAGC, USN; Maj W.C. Kirby,
USMC; LT Benjamin J. Voce-Gardner, JAGC, USN.

29 November 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.**

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiracy to sell military property, selling military property, using 3, 4-methylenedioxymethamphetamine (ecstasy), buying stolen property, and receiving stolen property, in violation of Articles 81, 108, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C.

§§ 881, 908, 912a, and 934. The appellant was sentenced to confinement for seven years, reduction to pay-grade E-1, a \$200.00 fine, and a dishonorable discharge. The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, all confinement in excess of 24 months was suspended for 12 months.¹

In his initial pleading, the appellant avers that his approved sentence of a dishonorable discharge is unjustifiably severe based upon his pleas, youth, record of service, remorse, cooperation with law enforcement, and sentences awarded in related cases. After receipt of the initial pleadings, we specified additional issues as to whether certain testimony admitted during the presentencing phase was improper aggravation evidence; whether the admission of such evidence was plain error, and, what if any prejudice the appellant suffered? With the benefit of the parties' briefs on the initial and specified issues, we may now resolve the appellant's case.

Background

The appellant had a number of unrelated serious crimes that commenced in 2006 and spanned a three-year-period. The appellant's misconduct commenced in June 2006 with his use of ecstasy. From June 2006 until October 2009, the appellant unlawfully used ecstasy on five different occasions while in his barracks room. However, the appellant's drug use was not discovered until an investigation commenced into allegations of conspiracy, theft, sale and receipt of stolen Government property.

While on his first military deployment to Iraq in 2007-2008, the appellant received a pair of high-value night vision goggles (NVGs) from a fellow Marine, Lance Corporal (LCpl) Richard Bernal, who stole the NVGs from the armory in the course of his military duties. When gear inspections commenced toward the end of the deployment, the appellant became concerned he would be caught, so he gave the NVGs to another service member. The NVGs were never recovered.

In 2008, LCpl Abram stole an M-4 rifle from the military armory aboard Marine Corps Base, Kaneohe Bay, Hawaii. LCpl Abram approached the appellant and asked if he knew anyone who

¹ To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment, it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

might be interested in purchasing it. The appellant went about trying to find a buyer for the stolen M-4 rifle. The appellant contacted his best friend, Seaman (SN) Aguiar, who put the appellant into contact with a civilian, who the appellant believed was a member of a criminal gang enterprise. This civilian put the appellant into contact with another civilian to whom the rifle was ultimately sold for \$1600.00. The appellant was paid \$200.00 by LCpl Abram as a "finder's fee" in accordance with an agreement they had.

In an unrelated transaction, while on his second deployment to Iraq in 2009, during a conversation focused on firearms, the appellant was informed by a fellow Marine, LCpl John Frimml, that he had two "clean" Glock pistols. The appellant understood the "clean" pistols to which LCpl Frimml referred were stolen government property. The appellant agreed to purchase both pistols for \$600.00. After they returned from deployment, the appellant went to the bank, withdrew money, and ultimately purchased both stolen pistols from LCpl Frimml for \$600.00.

During the presentencing phase of the court-martial, the Government presented the testimony of Detective Theodore Coons from the Honolulu Police Department. Detective Coons testified essentially that there had been a homicide in March 2009 in Honolulu in which a military assault-type rifle was used. As a result of this homicide, there was a general sense of insecurity from business-owners and the public in the downtown Honolulu area. Another negative impact on the Honolulu community was the increased expense for an added police presence in the city following the incident. The detective acknowledged that the homicide weapon was never recovered and the names of the appellant's co-actors were never connected with this homicide. We note that the defense counsel did not object to Detective Coons' testimony, but conducted cross examination to highlight that there was never a connection made between the homicide weapon and the appellant. The military judge conducted his own examination of the detective in an attempt to ferret out the specifics of the shell casing and projectile ballistics. His questioning focused on whether the specific rounds utilized during the homicide could have come from an M-4 rifle. Additionally, the military judge asked questions concerning the identity of the homicide suspects, as well as the nature of the gang activities of the civilian co-actors.

Then, during sentencing argument, without objection from the defense, the Government made reference to the Honolulu homicide by stating the following:

And as Captain [K] said, weapons don't kill people, people kill people. But people, the easiest way to kill a person perhaps is with an assault rifle that can go on burst. And there was evidence today that, in fact, someone did die from an assault rifle in Honolulu just a few short months after Corporal Jimenez sold this weapon.

Record at 145.

Sentencing Testimony

The appellant argues that the military judge committed plain error when he allowed the presentencing testimony of Detective Coons concerning the March 2009 homicide which was not directly correlated to the offenses to which he pleaded guilty, in violation of RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURT-MARTIAL, UNITED STATES (2008 ed.). He argues that the testimony concerning this homicide and the weapon used by the offenders in the homicide did not "directly" result from or relate to his offenses, are "independent, intervening events" and do not, therefore, constitute proper evidence in aggravation. The Government responds that there was no plain error and, even if there was error, there was no prejudice to the appellant's fundamental rights.

The appellant did not object to this testimony at trial, thereby forfeiting the issue on appeal absent plain error. R.C.M. 801(G). In order to prevail on a plain error analysis, the appellant must demonstrate that: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to his substantial rights. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). The appellant has the burden of persuading the court that all three prongs have been met. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim. *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

The appellant is correct that evidence of the March 2009 homicide in Honolulu should not have been admitted as evidence in aggravation because it was not "directly relating to or resulting from" the offenses to which the appellant was found guilty. R.C.M. 1001(b)(4). The fact that a crime occurred in

Honolulu in which a military assault-type rifle was used, a crime committed by persons unconnected to the appellant, using a weapon never connected to the appellant, did not qualify as proper evidence in aggravation. *Hardison*, 64 M.J. at 281-82.

However, the admission of the evidence and the argument of trial counsel concerning the homicide do not rise to the level of plain error. When the issue of plain error involves a judge-alone trial, as it does here, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly; is presumed capable of filtering out inadmissible evidence; and is presumed not to have relied on such evidence. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). We are confident that the admission of this evidence did not alter the appellant's sentence or result in any other material prejudice to the appellant. The testimony was brief, defense counsel minimized the testimony through cross-examination, and the military judge even clarified the evidence through his own questioning of the witness. Furthermore, trial counsel made only brief mention of the homicide during sentencing argument. While it would have been preferable for the military judge to state on the record that he disregarded the evidence of the March 2009 homicide and the trial counsel's argument concerning the homicide, there is no requirement for him to state as such. *See United States v. Erickson*, 65 M.J. 221, 224-25 (C.A.A.F. 2007) (rejecting argument that the military judge must act to cure misconduct in military judge alone case). We are confident that the admission of this evidence did not alter the appellant's sentence or result in any other material prejudice to him.

Sentence Severity

The appellant contends that a dishonorable discharge is inappropriately severe when compared to sentences awarded in two closely related cases. He asserts he is young, took responsibility for his actions by pleading guilty, cooperated with investigators (by reporting drug offenses committed by other military members, performing controlled buys, and wearing a wire intercept), showed remorse, and has a good record of service. The appellant requests that we approve a bad-conduct discharge vice a dishonorable discharge. We disagree and decline to grant relief.

Regarding the appellant's contention that a dishonorable discharge is unjustifiably severe when compared the sentences of LCpl Frimml and LCpl Bernal for their own, separate offenses, we

disagree.² We are not required to "engage in sentence comparison with 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 *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). An appellant alleging sentence disparity bears the burden of demonstrating that any cited cases are "closely related" and that the sentences are "highly disparate." *Id.* If the appellant meets this burden, the burden shifts to the Government to show a rational basis for the differences. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288. Sentence comparison does not require sentence equation. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). The test in sentence disparity cases is "not limited to a narrow comparison of the relative numerical values of the sentences at issue, but may also include consideration of the disparity in relation to the potential maximum punishment." *Lacy*, 50 M.J. at 289.

Applying the first step in the *Lacy* analysis, we find the cases of the appellant, LCpl Frimml and LCpl Bernal are closely related. Both LCpl Frimml and LCpl Bernal were involved with the appellant in various activities with the theft and wrongful disposition of government property, albeit in separate unrelated offenses. The appellant was involved in separate schemes, first with LCpl Bernal to receive a pair of stolen NVGs, and then with LCpl Frimml to buy two stolen Glock pistols.

As to the second *Lacy* factor, the appellant pled guilty to multiple crimes involving a conspiracy to sell a stolen military assault rifle, wrongful disposition of stolen military property, drug use, wrongful receipt of stolen property, and buying stolen property. Only one of the appellant's offenses involved LCpl Bernal, the wrongful receipt of stolen NVGs, and only one of the appellant's offenses involved LCpl Frimml, the wrongful receipt of the stolen Glock pistols. LCpl Bernal and LCpl Frimml each

² LCpl Frimml and LCpl Bernal were both tried by general court-martial. We note they were sentenced by a military judge who did not sentence the appellant. LCpl Frimml was found guilty of wrongfully selling military property (two Glock pistols), larceny of military property (two Glock pistols), and wrongfully bringing firearms into the United States in violation of 18 U.S.C. § 922(l). He was sentenced to confinement for 200 days, reduction to E-1 and a \$1,200.00 fine. LCpl Bernal was found guilty of dereliction of duty, false official statement, wrongful disposition of military property (NVGs), wrongful use of oxycodone, wrongful use of hydrocodone, wrongful use of morphine, larceny of military property (NVGs), and obstruction of justice. He was sentenced to confinement for 18 months, reduction to E-1 and a bad-conduct discharge. Clemency Request of 8 Mar 2011.

played a limited role in the appellant's crime spree. LCpl Bernal went to a court-martial on a number of charges, most of which were unrelated to the appellant. Moreover, the appellant faced a maximum sentence of 34 years of confinement,³ but was only sentenced to seven years of confinement (with a 24 month cap under the terms of the pretrial agreement). This sentence to confinement is "relatively short compared to the maximum confinement." See *Lacy*, 50 M.J. at 289. Thus, the significant differences in criminal conduct between the appellant and the other two offenders, and the appellant's relatively short confinement sentence, lead us to conclude the appellant's sentence was not highly disparate.

Assuming *arguendo* that the appellant's sentence is highly disparate, there are good and cogent reasons to explain the differences in the sentences. While LCpl Bernal and LCpl Frimml were involved with the appellant in the wrongful receipt of stolen NVG's and the purchase of stolen Glock pistols, respectively, neither Marine was involved in the appellant's separate conspiracy and wrongful disposition of the stolen M-4 assault rifle. After learning that a fellow Marine had stolen a rifle from his place of duty and needed help disposing of it, the appellant acted as a "go-between" to set up the illegal sale of the stolen rifle. Not only did the appellant negotiate the sale of this stolen weapon, but he actually delivered the weapon to an off-base location directly into the hands of an individual he suspected was involved in gang activity. The appellant's role was far more involved than that of a mere bystander, and he received a monetary benefit for his participation. We have no difficulty concluding that a rational basis exists for any disparity in the appellant's sentence.

While a dishonorable discharge is a harsh punishment with serious ramifications, in this particular case it is not an "unjustifiably severe" punishment. We reach that conclusion after careful consideration and examination of the record of trial, including the evidence and the testimony regarding the appellant's role in assisting law enforcement as an informant and with controlled buys after his own offenses came to light. However, we balance that consideration against the nature of the offenses committed by the appellant. We are satisfied that the appellant's sentence is appropriate to this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F 2005).

³ The maximum punishment was reduced by the military judge's dismissal due to an unreasonable multiplication of charges of the specification under Charge II and Specification 2 under Charge IV.

Conclusion

After carefully considering the record of trial and the pleadings of the parties, 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. Accordingly, we affirm the findings and the sentence as approved by the convening authority.

Chief Judge REISMEIER and Judge MODZELEWSKI concur.

For the Court

R.H. TROIDL
Clerk of Court