

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ZACHERY B. LEININGER
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100255
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 January 2011.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding General, 1st Marine
Aircraft Wing, Marine Corps Air Station, Iwakuni, Japan.

Staff Judge Advocate's Recommendation: Col J.R. Woodworth,
USMC.

For Appellant: CDR Howard Liberman, JAGC, USN.

For Appellee: CAPT Martin A. Grover, JAGC, USN; LT Benjamin
J. Voce-Gardner, JAGC, USN.

22 December 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, consistent with his pleas, of one specification of wrongful use of ecstasy on divers occasions and one specification of wrongful distribution of ecstasy on divers occasions, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The military judge sentenced the appellant to 22 months confinement and a

dishonorable discharge. The convening authority (CA) approved the findings and sentence as adjudged and ordered it executed,¹ but, in accordance with a pretrial agreement, suspended all confinement in excess of 10 months for the period of confinement served plus six months.

The appellant has submitted one assignment of error, asserting that the sentence he received was disproportionately severe when compared with closely related companion cases.

We have examined the record of trial, the appellant's assignment of error, and the pleadings. 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.

Background

The appellant was a motor transport Marine stationed aboard Marine Corps Air Station, Iwakuni, Japan. He became involved in the use and distribution of ecstasy to and with other Marines. On the record during the providence inquiry, and similarly in a pretrial written stipulation entered into evidence at trial, the appellant admitted to wrongfully using 3,4-methylenedioxy-methamphetamine, "ecstasy," several times in the barracks during the charged period. He likewise admitted to working as a middle man, acquiring the same drug from other Marines, then distributing the ecstasy to several other Marines approximately 25 times. He faced a maximum of 20 years confinement for his offenses. The CA, in taking his action, specifically stated that he had considered six companion cases, at least one of which was then still pending court-martial, but granted no additional relief to the appellant beyond the terms of the pretrial agreement.

Sentence Disparity

In his sole assignment of error, the appellant avers that his sentence was disproportionately severe compared to six companion cases. Having ordered production of the results of trial in these cases, and having considered them in the context of appellant's assigned error and applicable case law, we disagree.

¹ To the extent that the CA'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)

This court reviews the appropriateness of a sentence *de novo*. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We engage in a review that gives "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

This court is 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 demonstrate 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 also may include consideration of the disparity in relation to the potential maximum punishment." *Lacy*, 50 M.J. at 289.

Assuming without deciding that the six companion cases are closely related under *Lacy*, we then must decide if the sentences in those cases are "highly disparate." *Id.* at 288. Having carefully examined the convictions and sentences in these cases, we find that the appellant has not met his burden to prove that his sentence is "highly disparate" from the companion cases. *Id.* Five of these seven appellants went to general courts-martial, two to special courts-martial. Those entering guilty pleas at general courts-martial received sentences ranging from a low of 22 months in the appellant's case, up to seven years in the case of another Marine. All three of these Marines had pretrial agreements, with the appellant having the lowest, a 10-month cap on confinement, with the others capped at 12 months and two years respectively. Disparities in the charges and outcomes of two companion cases contested at general

courts-martial do not inform our analysis. The outcomes at the special courts-martial, albeit without the eventuality of a dishonorable discharge in play, received confinement terms similar to that provided by the appellant's pretrial agreement. We hold that the sentences of the assumed companion cases are not highly disparate.

Finally, after giving "'individualized consideration' to this particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender,'" which included a prior nonjudicial punishment, we are convinced the appellant's sentence was appropriate. *Snelling*, 14 M.J.at 268.

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.

For the Court

R.H. TROIDL
Clerk of Court