

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

**Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**XAVIER K. WILLIAMS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100412
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 21 April 2011.

Military Judge: Maj Clay A. Plummer, USMC.

Convening Authority: Commanding Officer, 2d Maintenance Battalion, Combat Logistics Regiment 25, 2d Marine Logistics Group, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Maj J.R. Cherry, USMC.

For Appellant: CAPT Johnathan A. Bryan, JAGC, USN.

For Appellee: LCDR Clayton G. Trivett, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

20 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 special court-martial convicted the appellant, pursuant to his pleas, of one specification of wrongful appropriation and two specifications of larceny in violation of Article 121, Uniform Code of Military

Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in accordance with the pretrial agreement, suspended all confinement in excess of 60 days.

The appellant argues that his sentence is disparately severe relative to his co-accused, who received nonjudicial punishment. We disagree and find that no error materially prejudicial to a substantial right of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant and Private First Class (PFC) Calhoun entered an unlocked vehicle in a parking lot onboard Camp Lejeune. The appellant found and took a Navy Federal Credit Union (NFCU) check card and an iPod Touch, while PFC Calhoun took a credit card and some cash. Later that same day, the appellant used the NFCU card to purchase \$75.00 worth of gas for his and PFC Calhoun's cars. They then returned the check card to the vehicle. The appellant subsequently pawned the iPod touch for \$100.00. Prosecution Exhibit 1, Stipulation of Fact, at 2-3; Record at 19-32.

Sentence Disparity

The co-accused, PFC Calhoun, was charged with one specification of false official statement in violation of Article 107, UCMJ, and one specification of larceny in violation of Article 121, UCMJ. He received nonjudicial punishment that included forfeitures of \$383.00 pay per month for one month and restriction and extra duty for 14 days, of which seven days were suspended. Appellant's Brief of 4 Oct 2011 at 3-4.

In his assertion of sentence disparity, the appellant relies on the analysis established in *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999), arguing that his case is "closely related" to that of PFC Calhoun and that the sentences are "highly disparate." Appellant's Brief at 5.

We note, however, that the sentence disparity analysis established in *Lacy* applies only to court-martial cases: the issue of sentence uniformity is not presented when there is no court-martial record of findings and sentence that can be compared to the appellant's case. *United States v. Noble*, 50 M.J. 293, 294-95 (C.A.A.F. 1999). Because the charges against

PFC Calhoun were not referred to a court-martial, but instead disposed of with nonjudicial punishment, we cannot engage in the sentence comparison urged by the appellant.

Nevertheless, the appellant's claim does raise the issue of differences in the initial disposition of cases of co-accused servicemembers, an issue that can be viewed by this court in determining sentence appropriateness under Article 66(c). *Noble*, 50 M.J. at 295. We find the nonjudicial disposition of PFC Calhoun's charges to be closely related to the appellant's case. When cases are closely related, yet result in widely disparate dispositions, we must decide whether the disparity results from good and cogent reasons. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

Here we find good and cogent reasons for the disparity in the disposition of the cases. In addition to the offenses to which he pled guilty, the appellant was charged with several unrelated offenses that did not involve PFC Calhoun: a conspiracy with two other Marines to commit larceny, as well as the larcenies and attempted larcenies arising from that conspiracy. Charge Sheet. As part of a pretrial agreement with the convening authority, those specifications were withdrawn upon acceptance of the appellant's pleas of guilty to the charges before us, and dismissed with prejudice upon announcement of sentence. Appellate Exhibit I at 5.

Regardless of the ultimate outcome of the individual charges and specifications, this court finds that the convening authority had good and cogent reasons to refer the numerous charges against the appellant to a special court-martial, while disposing of PFC Calhoun's case with nonjudicial punishment, as PFC Calhoun was involved in only a subset of the offenses alleged against the appellant.

Considering the entire record, we find that this factor provides a rational basis for the disparity in disposition and in no way detract "from the appearance of fairness or integrity in military justice proceedings." *Kelly*, 40 M.J. at 570. We find no evidence of "discriminatory or otherwise illegal prosecution or referral." *United States v. Stotler*, 55 M.J. 610, 612 (N.M.Ct.Crim.App. 2001).

Finally, 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).

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court