

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

**Before
L.T. BOOKER, J.K. CARBERRY, D.O. VOLLENWEIDER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BENJAMIN R. HAMILTON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000589
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 April 2010.

Military Judge: CDR Kevin R. O'Neil, JAGC, USN.

Convening Authority: Commanding General, 3d Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: Col Kurt J.

Brubaker, USMC; **Addendum:** Maj Brett M. Wilson, USMC.

For Appellant: CAPT Diane L. Karr, JAGC, USN.

For Appellee: LT Kevin D. Shea, JAGC, USN.

28 April 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

VOLLENWEIDER, Senior Judge:

Appellant was tried and convicted, pursuant to his pleas, by a general court-martial (judge alone), of two specifications of distribution of a controlled substance, and one specification of possession of a controlled substance with intent to distribute, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. He was sentenced to confinement for forty months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

Appellant raises two assignments of error:

- I. APPELLANT IS ENTITLED TO RELIEF WHERE THE GOVERNMENT VIOLATED R.C.M. 701 BY FAILING TO PROVIDE AN INFORMANT'S STATEMENT IN RESPONSE TO A DEFENSE REQUEST FOR ALL STATEMENTS MADE BY POTENTIAL WITNESSES

- II. APPELLANT'S APPROVED SENTENCE WARRANTS RELIEF UNDER ARTICLE 66(c), UNIFORM CODE OF MILITARY JUSTICE, AS THE APPROVED SENTENCE TO FORTY MONTHS IS INAPPROPRIATELY SEVERE GIVEN THE TEN MONTH [sic] SENTENCE TO CONFINEMENT AWARDED TO THE INFORMANT

As relief for these errors, the appellant asks this court to disapprove the findings of guilt for the two distribution specifications, and to affirm only six months confinement.

We have carefully considered the record of trial, appellant's assignments of error and the Government's response, along with the entire record of trial, including a post-trial Article 39(a), UCMJ, session ordered by the convening authority. 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.

Background

On two occasions on board Marine Corps Air Station Miramar, appellant sold a controlled substance to his friend, Lance Corporal (LCpl) "Z". Unbeknownst to appellant, LCpl "Z" was then acting as a confidential informant for the Navy Criminal Investigative Service (NCIS), and these were controlled buys. Appellant was arrested, and his barracks room searched, where additional controlled substances were found.¹

Shortly after his arrest, on 7 December 2009, appellant's counsel submitted to trial counsel a written discovery request, which included the following language:

1(a) Any handwritten, typed or recorded statements by the accused or any other potential witness in connection with the investigation of this case, to include summaries of conversations with representatives of the government;

. . . .

¹ Appellant believed the substance was ecstasy. Laboratory tests revealed that the pills he distributed to LCpl "Z" was actually another controlled substance, N-Benzylpiperazine (BZP). The drugs found in his barracks room included both ecstasy and BZP.

1(i) Any known evidence tending to diminish credibility of witnesses including, but not limited to, prior civil convictions

. . . .

1(s) Any and all evidence in the possession of the government or otherwise known to trial counsel which may tend to: (1) Negate the guilt of the accused; (2) Reduce the guilt of the accused to the offense charged; or (3) Reduce the punishment.

The discovery request did not specifically ask for statements made by LCpl "Z". LCpl "Z" had indeed made a statement to NCIS, several weeks before the controlled buys from appellant.

The Government failed to provide that statement to the defense.² After appellant's trial, his defense counsel obtained a copy of LCpl "Z"'s NCIS statement. That statement included LCpl "Z"'s admissions that he had sold ecstasy on two occasions (including once to an NCIS agent), and that he had used ecstasy twice while he has been in the Marine Corps. According to the statement, the first time LCpl "Z" used ecstasy was six months earlier when appellant gave four pills to him at a rave. LCpl "Z" also alleged in his statement that he and appellant had been working on a deal whereby appellant would purchase ten vials of liquid LSD for \$4,000.00 and LCpl "Z" would sell it. The deal fell through because the supplier was arrested.

On 26 January 2010, appellant, in the presence of his civilian and military defense counsel, was interrogated by NCIS. The written results of that interrogation (introduced at trial on sentencing by appellant) confirmed the elements of the charged offenses. The report also indicates that when getting the drugs he transferred to LCpl "Z", he ingested two pills himself. It also states that the appellant had gotten drugs from LCpl "Z" in the past. Appellant told NCIS that he attended raves in San Bernardino County, and that he would take five to ten pills, space out, and take about two pills every hour thereafter.

On 10 March 2010, appellant signed a stipulation of fact admitting the elements of the charged offenses. The stipulation of fact includes the following language:

My defense counsels [sic] have explained to me the defense of entrapment. I understand that even though a cooperating witness who set up the drug transaction approached me, the facts of the case do not rise to an entrapment defense. "Z" did not harass, bribe, threaten, coerce, or intimidate me into selling him

² Appellant does not allege that trial counsel's failure to turn over LCpl "Z"'s statement was in bad faith.

drugs in any way. He just asked and I was willing to sell drugs to him. I had already bought the pills which I believed to be Ecstasy with the intent of selling them before "Z" asked me to sell to him.

Prosecution Exhibit 1 at 3, 4. While it is not in dispute that the trial counsel at some time prior to trial provided discovery to the defense, sans the LCpl "Z" statement, it is not clear when that occurred.

The discovery omission was first noted in a 27 June 2010 clemency letter from appellant's military defense counsel to the convening authority. By this time, the defense had apparently obtained a copy of LCpl "Z"'s NCIS statement. Defense counsel quoted RULE FOR COURTS-MARTIAL 701(a)(1)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), requiring the Government to provide any sworn or signed statement relating to the charged offenses, as the source of the trial counsel's duty to provide LCpl "Z"'s statement, and that the failure to provide the statement constituted legal error. The letter does not make reference to the defense's pretrial discovery request. The clemency request also argued that appellant's sentence was too severe in light of LCpl "Z"'s lower sentence at a special court-martial. The defense asked for reduction in appellant's confinement from eighteen to ten months, and offered to waive appeal if the clemency request was granted. The defense never applied to the trial judge for relief. Upon receiving the clemency letter, the convening authority, on 4 August 2010, ordered a post-trial Article 39(a) hearing to inquire into the defense's allegation that the Government failed to comply with mandatory discovery rules which affected the legality of the sentence.

The Article 39(a) hearing was held on 1 September 2010, before the same judge who tried and sentenced appellant. Prior to the hearing, the parties submitted prehearing briefs. Defense counsel's brief argued that the discovery error "cannot be rectified by the trial judge without material prejudice to the substantial rights of the accused." Appellate Exhibit VI at ¶ 1. Counsel's brief does not, however, state how holding a hearing could prejudice his client, other than by finding no remediation was necessary because the error did not affect the sentence. Counsel felt the only recourse was to leave the error for appellate review.³ No other remedy was offered by counsel.

Defense counsel was not much more helpful at the hearing. No new evidence was submitted. The parties agreed that the LCpl "Z" statement had not been provided by the Government prior to appellant's trial and that the failure to do so was not in bad

³ Obviously, as the convening authority had yet to act on the findings and sentence, the case at that stage was not ripe for appellate review. Counsel did not support his position with legal authority, and has never stated what relief he hoped to get from appellate authorities.

faith. After much prodding from the trial judge, defense counsel stated that the appellant was prejudiced by the discovery failure because had they had the LCpl "Z" statement prior to trial, the defense would have gone forward with an entrapment defense, because the statement showed appellant's lack of predisposition to distribute drugs.⁴ He indicated the statement would have corroborated the defense position that appellant was a recreational user who became involved in distributing drugs based on LCpl "Z"'s encouragement.⁵ He further indicated the statement would have allowed the defense to talk to a person identified in the statement, one "Chelf".⁶ Defense counsel declined the judge's invitation to withdraw from the pretrial agreement, which would have allowed appellant to plead not guilty at a new trial. The trial judge concluded that:

1. The LCpl "Z" statement did not exculpate appellant in any way, and added two additional drug transactions and an additional drug use. Therefore, the failure to disclose did not violate *Brady v. Maryland*, 373 U.S. 83 (1963).
2. Appellant's counsel were well aware of LCpl "Z"'s involvement in the charged transactions, and that LCpl "Z" was an NCIS cooperating witness. Nonetheless, they made no specific requests for information regarding LCpl "Z"'s involvement with NCIS. The discovery request made was general under the law.
3. Had the trial judge been aware of the LCpl "Z" statement prior to sentencing, the sentence awarded would not have been any less severe.

Appellant's brief to this court admits that appellant had previously purchased ecstasy from LCpl "Z". On appeal, appellant argues that the harm of nondisclosure was the inability to cross-examine the NCIS special agent (who testified on sentencing) on his testimony that LCpl "Z" had said he knew of a Marine selling ecstasy at MCAS Miramar and drugs at Marine Corps Base Twentynine Palms.⁷ For the first time in this case, the appellant's brief

⁴ It must be noted that LCpl "Z" says, in his statement, that it was appellant who introduced LCpl "Z" to ecstasy by distributing it to him.

⁵ Appellant did not make this argument on sentencing or anywhere else in the record; appellant's unsworn statement does not suggest this, ignores the fact that appellant first distributed ecstasy to LCpl "Z", and ignores the part of LCpl "Z"'s statement regarding the scheme to buy and sell liquid LSD that does not indicate mere recreational drug use.

⁶ Appellant identified "Chelf" during his own NCIS interrogation.

⁷ The entire testimony at issue reads as follows:

Q: Okay. How did he become a target?

A: We had a confidential witness come into the office and tell us that he knew of a Marine on base that would sell ecstasy or that

asks us to disapprove the two drug distribution specifications, and to approve only confinement for six months, as a remedy for the discovery error.⁸

Discovery Omission

R.C.M. 701(a)(1)(C) requires the Government to provide to the defense "Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel." Additionally, prior to trial the defense asked for "[a]ny handwritten, typed or recorded statements by the accused or any other potential witness in connection with the investigation of this case, to include summaries of conversations with representatives of the Government[.]" AE V at ¶ 1a. The Government has admitted it did not provide LCpl "Z"'s NCIS statement to the defense. The question before us is whether the Government's omission requires a remedy under the facts of this case. We have determined that appellant is not entitled to a remedy, and that the error was harmless.

The Supreme Court has ruled that withholding evidence that is material to guilt or punishment violates a criminal defendant's right to due process of law. *United States v. Brady*, 373 U.S. 83, 87 (1963). Evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 129 S. Ct. 1769, 1782-83 (2009). "A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). This materiality standard covers the "no request," "general request," and "specific request" cases. *Id.* Automatic reversal based on a *Brady* violation is inappropriate. *See id.* at 674, 676-77. Where the likelihood that the withheld information would have affected the verdict or sentence is remote, relief on appeal is not required. *Cone*, 129 S. Ct. at 1785. The standard to be applied on appeal is "whether there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different." *Id.* at n. 19 (citation omitted). *See also United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008); *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). Here, in light of the evidence in the entire

was selling ecstasy aboard MCAS Miramar and also that he had knowledge of him selling other types of drugs in Twentynine Palms. The appellant's counsel did not cross-examine the agent on this, and trial counsel did not use this information in sentencing argument.

Record at 58.

⁸ Appellant appears to be asking this court to disapprove his punitive discharge, reduction in rate, and forfeitures in addition to reducing his period of confinement.

record, we are satisfied that the nondisclosure was harmless beyond a reasonable doubt.⁹

Appellant argues that had he had LCpl "Z"'s statement prior to trial, "the possibility exists that appellant may not have pleaded guilty to the charges or may have asserted a defense of entrapment." Appellant's Brief of 30 Sep 2010 at 11. Other than the possibility of his assertion of an entrapment defense, the appellant does not state how not having the statement had an effect on his plea decision. Therefore, we will examine the defense of entrapment and how it relates to the facts in this case.

The entrapment defense is set forth in R.C.M. 916(g): "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." "[E]ntrapment has two elements: government inducement and an accused with no predisposition to commit the offense." *United States v. Howell*, 36 M.J. 354, 358 (C.M.A. 1993) (citation omitted). Inducement is more than merely providing the appellant the means or opportunity to commit a crime, or deploying artifice or stratagems. Only "circumstances suggesting overreaching by [the] government agent or any pressuring by him of appellant to commit these offenses" will suffice. *Id.* at 360. The Court of Appeals for the Armed Forces has stated:

Inducement is government conduct that "creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." . . . Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship." . . . Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and stratagem.

United States v. Hall, 56 M.J. 432, 436-37 (C.A.A.F. 2002) (quoting *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992)). A Government agent's repeated requests for drugs do not, in and of themselves, constitute the required inducement. *Id.* (quoting *Howell*, 36 M.J. at 360). When a person accepts the opportunity to commit a crime without being offered extraordinary inducements, he demonstrates his predisposition to commit the

⁹ For this reason, we will not discuss at length whether the defense's discovery request was "general" or "specific." We do find the request was general, in that it did not specifically ask for information regarding LCpl "Z", who the defense knew was the Government's cooperating witness, nor did it specifically ask for information regarding the person to whom appellant allegedly sold drugs (the defense knew that was LCpl "Z").

type of crime involved. See *United States v. Lubitz*, 40 M.J. 165, 167 (C.M.A. 1994); see also *Howell*, 36 M.J. at 358.

"Entrapment is designed to prevent the conviction of the 'unwary innocent' induced by government action to commit a crime. It does not, however, protect the 'unwary criminal.'" *United States v. Skarie*, 971 F.2d 317, 320 (9th Cir. 1992) (emphasis added) (citation omitted). Appellant has not pointed to any evidence in the record to indicate that he was not predisposed to distribute drugs to LCpl "Z" and he has not shown how he was improperly induced to sell drugs to LCpl "Z". To the contrary, we have appellant's own statements to NCIS that he willingly sold to LCpl "Z", and that he regularly purchased ecstasy from LCpl "Z". LCpl "Z"'s statement indicates that not only did appellant introduce LCpl "Z" to ecstasy by giving it to him at a rave, but also that appellant had conspired with LCpl "Z" to possess and distribute LSD. The statement shows appellant using LSD as well. LCpl "Z" did not testify against appellant at trial, so it cannot be argued that appellant was hindered in cross-examination. Essentially, the record indicates that LCpl "Z" asked appellant to sell drugs to him on two occasions, and on each occasion, appellant said "OK," then did it. We are unable to independently discern anything in the record generally, or in LCpl "Z"'s statement, even suggesting that appellant was not predisposed to commit the offenses to which he pled guilty. Nor are we able to discern anything in the record to indicate that appellant was improperly induced to commit these offenses. Appellant's entrapment argument is without merit.

As the final reason for finding actionable error, appellant states:

Although LCpl Z's statement did address Appellant's prior use of controlled substances, contrary to the assertion of the NCIS agent, it did not indicate Appellant had ever distributed illegal drugs for profit, or to anyone other than LCpl Z. This information, at a minimum, could have been used by trial defense counsel to try and negotiate a more favorable pre-trial [sic] agreement or the resolution of the charges at a lower forum.

Appellant's Brief at 12 (footnote omitted). This argument does not resonate for a number of reasons.

Appellant was not charged with distributing drugs for profit. LCpl "Z"'s statement showed only that appellant had previously distributed drugs to him, that appellant had used LSD, and that the two were scheming to sell liquid LSD, apparently for profit. With the evidence in record at trial, even without the statement, appellant's counsel could have argued that he never had a profit motive when distributing drugs. Having the statement in hand would certainly not have aided appellant in seeking a better deal from the Government.

Sentence Severity

Appellant contends his sentence is inappropriately severe because he took responsibility for his actions, cooperated with investigators (including offering to perform controlled buys), and his conduct in the brig before and after his trial was good. He requests that we approve only six months of his sentence to confinement. We disagree and decline to grant relief.

"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). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and 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)).

Appellant stands convicted of distributing 10 pills of BZP to a fellow Marine on one occasion, 12 pills on another day, and possessing in his barracks room, with the intent to distribute, 30 more BZP pills and 3 ecstasy pills. He offers no excuse for these offenses, all of which occurred on board a Marine Corps base.

His disciplinary record includes two prior nonjudicial punishments for relatively minor offenses. Appellant's unsworn statement on sentencing reveals significant drug use in addition to his charged offenses. He introduced a fellow Marine, LCpl "Z", to the use of ecstasy. His statement to NCIS, introduced by the defense at trial, indicated still additional significant drug use. Appellant purchased drugs from fellow Marines. He received at trial a sentence that was less than one twelfth of that authorized for the crimes he was charged with and pleaded guilty to.

After carefully reviewing the entire record, we conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395; *Snelling*, 14 M.J. at 267.

Sentence Disparity

Regarding appellant's contention that the adjudged sentence is disproportionate and unjust when compared the sentence of LCpl "Z" for his own, separate, offenses, we disagree. We are not required to "engage in sentence comparison with specific cases 'except in those rare instances in which the 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)). When we compare sentences of companion cases, we initially determine if the cases are closely related, and if so, then we determine if the sentences are highly

disparate. Appellant bears the burden of demonstrating that the cases are closely related and highly disparate. *Lacy*, 50 M.J. at 288. If 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.

We have previously held "that companion cases are those in which the several accused are charged with engaging in, or the facts establish that they committed, criminal conduct involving a concerted effort to achieve a common goal. Although such cases need not be alleged as conspiracies, there need be a showing of some commonality of conduct such as to indicate trademark-like similarities of culpability." *United States v. Swan*, 43 M.J. 788, 791 (N.M.Ct.Crim.App. 1995). Appellant has made no attempt to show that his case and LCpl "Z"'s were related, and they certainly do not appear to be. To the contrary, they appear to be completely unrelated.

There is no evidence to suggest the sentences are highly disparate in any event. Appellant had a greater number of offenses before his court-martial. There is no indication of LCpl "Z"'s prior disciplinary or service records. We do know that LCpl "Z" performed controlled buys that may have resulted in a more favorable plea agreement. While appellant may have offered to do so, he did not expose himself to the physical dangers inherent in such transactions. We find no merit in appellant's argument and decline to offer relief.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge BOOKER and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court