

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, T.R. ZIMMERMANN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GIBRALTAR MOORE, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100670
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 August 2011.

Military Judge: LtCol Stephen F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Division (Rein), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Maj V.G. Laratta,
USMC.

For Appellant: Maj S. Babu Kaza, USMCR.

For Appellee: CDR Kevin L. Flynn, JAGC, USN; LT Benjamin J.
Voce-Gardner, JAGC, USN.

24 May 2012

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 wrongful distribution of a controlled substance, and one specification of obstruction of justice in violation of Articles 81, 112a, and

134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The approved sentence included confinement for twenty-four months, reduction to pay grade E-1, total forfeitures, and a bad-conduct discharge.

The appellant raises one assignment of error, that his sentence was disproportionate to the sentences of his co-conspirators and accordingly warrants relief under Article 66(c), UCMJ. We have examined the record of trial, the assignment of error, 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.

Factual Background

On 11 December 2010, the appellant agreed to help Private (Pvt) R distribute the controlled substance commonly known as ecstasy. Prosecution Exhibit 1 at 5. Specifically, the appellant agreed to drive Pvt R to a location to pick up the drugs and then to a rave party to sell the ecstasy, as Pvt R did not have his own vehicle or a driver's license. Pursuant to their agreement, the appellant drove Pvt R and Pvt R's roommate, Pvt N, to a restaurant where they purchased the ecstasy, and then to a party, where Pvt R sold the drug. *Id.*

On 15 December 2010, Pvt R texted the appellant, asking him to remove a number of ecstasy pills from Pvt R's barracks room. The appellant suspected that Pvt R was under investigation, as he had heard rumors and seen unmarked cars in the barracks parking lot. The appellant went to Pvt R's barracks room, removed two bags containing approximately 150 pills, and then delivered them to another Marine, Pvt H. Pvt N was in the barracks room when the appellant went to retrieve the pills. *Id.* at 2-3.

The appellant now seeks to compare his sentence with the outcome of two other cases: Pvt A, who was tried by a special court-martial, and Pvt N, who was administratively discharged for an unrelated violation of Article 112a. The appellant does not now seek to compare his sentence with that of Pvt R, but the court notes that Pvt R pled guilty to a greater number of distributions and attempted distributions, and that his sentence included fifty-four months confinement and a dishonorable discharge. Defense Clemency Request of 6 Dec 2011 at 3.

Sentence Disparity

A. Standard of Review

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). "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, servicemembers involved in a common or parallel scheme, or "some other direct nexus between the servicemembers whose sentences are sought to be compared"). The appellant must show that: 1) his case is closely related to other cases, and 2) his sentence is "highly disparate." *Id.* If the appellant meets these two challenges, then the Government must show a rational basis for the disparity. *Lacy*, 50 M.J. at 288.

This sentence disparity analysis applies only to court-martial cases: the issue of sentence uniformity is not present 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). If cases are closely related, yet result in widely disparate disposition, we must instead decide whether the disparity in disposition results from good and cogent reasons. *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994).

B. Analysis

Turning first to the issue of whether the appellant's sentence was highly disparately when compared to that of Pvt A, we find that it was not.

Pvt A was convicted at a special court-martial pursuant to his pleas of distribution of ecstasy, drug use, and conspiracy. He was sentenced to a bad-conduct discharge, confinement for 10 months, and forfeitures of \$978.00 pay per month for 10 months. Applying the first step in the *Lacy* analysis, we find that the appellant's case was not closely related to that of Pvt A. The

appellant and Pvt A participated in separate acts of drug distribution with Pvt R on different occasions. Pvt A was not involved in the conspiracy and distributions of 11 December 2010 or in the obstruction of justice on 15 December 2010.

Assuming *arguendo*, however, that the appellant's case was closely related to that of Pvt A, the sentences of 10 months for Pvt A and twenty-four months for the appellant are not "highly disparate." Even if the cases were closely related and the sentences highly disparate, that disparity is rationally based, given the appellant's obstruction of justice. The appellant obeyed Pvt R's directive to remove the ecstasy pills in his barracks room immediately prior to the execution of the search authorization. He intended to jeopardize an ongoing drug trafficking investigation, and succeeded. The drugs were never recovered, and, but for Pvt N's cooperation, the investigation may have been significantly compromised. We conclude that the appellant's sentence is not highly disparate from the sentence of Pvt A, and that even if it were, there is a rational basis for the disparity.

We turn next to the disposition of Pvt N's case. Pvt N was not charged with any offenses arising from the distributions on 11 December 2010. Instead, he was administratively discharged for unrelated drug use with a characterization of service as other than honorable. In this closely related case, with a widely disparate disposition, we find good and cogent reasons for the disparity. *Kelly*, 40 M.J. at 570.

Although Pvt N was involved with the appellant and Pvt R in the distributions on 11 December 2010, he clearly was not involved with Pvt R at the same level as the appellant. When Pvt R needed someone to quickly remove the evidence from his barracks room on 15 December 2010 before it was searched, he called the appellant, and not Pvt N, who was his roommate and actually physically present in the room. It was the appellant who removed the evidence and jeopardized the investigation. It was Pvt N who cooperated with investigators when they arrived to execute the search warrant, who told them that the appellant had removed drugs from the room, and who assisted them in quickly locating and apprehending the appellant. Record at 99; Investigating Officer Report of 7 Mar 11 Para. 12(b) (testimony of Naval Criminal Investigative Service Special Agent John Hartman and SA Eric MacLennan). Although the appellant argues that "no actual damage to the investigation was done" by his obstruction of justice, Appellants' Brief of 28 Feb 2012 at 7, in fact critical evidence was never recovered, Record at 100.

More importantly, because of the appellant's obstruction of justice, the investigators would never have known of the missing evidence and its removal, but for the cooperation of Pvt N.

Considering the entire record, we find that these factors provide a rational basis for the disparity in disposition and in no way detract "from the appearance of fairness and 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) (citation and internal quotation marks omitted). Finding no reason to question the decisions by the convening authority on the disposition of these cases, we decline to grant relief.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court