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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

PAUL QUEVEDO
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200288
GENERAL COURT-MARTIAL

Sentence Adjudged: 2 March 2012.
Military Judge: LtCol Gregory L. Simmons, USMC.
Convening Authority: Commanding General, 3d MAW, Marine Corps Air Station Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col P.J. Betz, Jr., USMC.
For Appellant: LtCol Richard Belliss, USMCR.
For Appellee: CDR Monte G. Miller, JAGC, USN; Maj Paul M. Ervasti, USMC.

31 October 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 conspiracy to commit unauthorized absence, unauthorized absence, wrongful possession of Spice and drug paraphernalia, wrongful possession, use, and distribution of marijuana and cocaine, and wrongful possession of testosterone propionate, in violation of Articles

81, 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 892, and 912a. The military judge sentenced the appellant to confinement for 10 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. According to the terms of a pretrial agreement, the convening authority (CA) suspended all confinement in excess of 48 months. He otherwise approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant raises one assignment of error, averring that his unsuspended sentence to 48 months confinement is unjustifiably severe when compared with his co-conspirator's adjudged sentence, which included confinement for 20 months, and warrants relief under Article 66(c), UCMJ.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Art. 59(a), UCMJ.

Background

The appellant and Private Andre D. Brown, the co-actor whose case he cites on appeal, pled guilty to six similar specifications involving conspiracy to commit unauthorized absence, unauthorized absence, possession of drug paraphernalia, and possession and use of cocaine and marijuana.[1] The appellant also pled guilty to one specification of wrongful possession of Spice, two specifications of wrongful distribution (one each of cocaine and marijuana), and one specification of wrongful possession of illegal steroids. Private Brown pled not guilty to four similar specifications, which were withdrawn according to his pretrial agreement. Appellant's Brief of 24 Aug 2012 at 4, Appendix C. Although the appellant and Private Brown both pled guilty to possession of cocaine and marijuana, there was evidence that the appellant possessed approximately 41 grams of cocaine and 59 grams of marijuana, at a street value of approximately $4,000.00 each. Prosecution Exhibit 1 at 5-6; Record at 120. Private Brown, on the other hand, possessed 1 to

[1] The appellant's case was originally referred by the same convening authority "[t]o be tried jointly in conjunction with the case of U.S. v Private Andre D. Brown." They were arraigned together on 11 January 2012; however, on 2 March 2012, the appellant moved successfully to sever the charges in accordance with RULE FOR COURTS-MARTIAL 905(b)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 2, 26.

2 grams of cocaine, and 2 to 3 grams of marijuana. Appellant's Brief, Appendix B at 4-5.

Sentence Appropriateness

Sentence appropriateness is reviewed *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We review each sentence for appropriateness "to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (footnote and internal quotation marks omitted). This court is not required, however, 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 *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). The appellant bears the burden of demonstrating that Private Brown's case is "closely related" to his case and that the sentences are "highly disparate." *Id.* If the appellant succeeds in meeting this burden, the Government would then have to show that there is a rational basis for the disparity. *Id.*

The Government concedes and we hold that these two cases are "closely related";[2] however, the appellant has not met his burden in demonstrating that his sentence is highly disparate from that of Private Brown's. The fact that there was a different outcome does not require us to find that the sentences were highly disparate. "Sentence comparison does not require sentence equation." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001) (citations omitted)).[3] Moreover, co-conspirators are not entitled to equal sentences. *Id.* at 261. To warrant relief, a sentence must exceed "relative uniformity" or give rise to the level of "an obvious miscarriage of justice or an abuse of discretion." *United States v. Swan*, 43 M.J. 788, 793 (N.M.Ct.Crim.App. 1995) (citations omitted). Instead, we find

[2] Cases are "closely related" when they involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentence are sought to be compared." *Lacy*, 50 M.J. at 288.

[3] In *Durant*, the Court of Appeals for the Armed Forces found no abuse of discretion by the court of criminal appeals in affirming the appellant's sentence to 30 months confinement and a dishonorable discharge after pleading to two specifications of larceny, while his co-actor – who initiated the criminal scheme – pled guilty to eight counts of larceny and received merely reduction in rank and a fine. 55 M.J. at 258-60.

many good and cogent reasons in the record that explain the disparity between the two sentences.

While Private Brown pled guilty to similar offenses to that of the appellant, the appellant was convicted of four specifications that were withdrawn in Private Brown's case. The appellant possessed Spice with a street value of approximately $10,000.00 and some quantity of vials of illegal steroids purchased via a foreign website, neither of which Private Brown possessed. Record at 85-87, 120. Most notably, however, is that the appellant distributed drugs whereas Private Brown did not. "The distribution of drugs to others 'reflects an utter disregard for the permeating effects of the substances.'" *United States v. Pitkoff*, No. 9901328, 2002 CCA LEXIS 128 at *19, unpublished op. (N.M.Ct.Crim.App. 27 May 2002) (quoting *United States v. Harvey*, 12 M.J. 626, 628 (N.M.C.M.R. 1981)). While Private Brown lived with the appellant, the appellant was the one who leased the apartment and used it as a place from which to distribute illegal drugs. Record at 73. As our past decisions indicate, a distributor may be punished more harshly than a closely-related possessor, *Harvey,* 12 M.J. at 628, as can a greater possessor compared to the possessor of a smaller amount, *United States v. Penn*, No. 200401065, 2008 CCA LEXIS 311 at *14-15, unpublished op. (N.M.Ct.Crim.App. 30 Sep 2008).

This significant degree of criminality resulted in a higher maximum punishment for the appellant, to include a dishonorable discharge which is reserved for offenses "usually recognized in civilian jurisdictions as felonies." RULE FOR COURTS-MARTIAL 1003(b)(8)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). The test for determining whether sentences are highly disparate "is not limited to a narrow comparison of the relative numerical value of the sentences at issue, but may also include consideration of the disparity in relation to the potential maximum punishment." [4] *Lacy*, 50 M.J. at 289. We have also held that it was not highly disparate for a noncommissioned officer to receive a greater punishment than a junior enlisted member, even where both distributed illegal drugs. *United States v. Lewis*, No. 200600045, 2007 C.C.A. LEXIS 422 at *9, unpublished op. (N.M.Ct.Crim.App. 11 Oct 2007), *set aside and remanded on other grounds*, 66 M.J. 470 (C.A.A.F. 2008). The record further reflects that, except for the conspiracy to commit an

[4] Each distribution offense carries with it a maximum of 15 years confinement. Even after the military judge in the appellant's case *sua sponte* reduced confinement from 77 years to 42 years during the presentencing phase due to an unreasonable multiplication of charges, Record at 137, the punishment was still significantly higher than Private Brown's maximum sentence.

unauthorized absence, the appellant and Private Brown each actually operated independently of the other, with no concerted effort to achieve a common goal. Appellant's Brief, Appendix B. While both cases were initiated and acted upon by the same CA, their pretrial agreements were appropriately dissimilar in keeping with the varying degree of criminality.[5]

All of these circumstances justify the appellant's sentence, and the appellant did not carry his burden to persuade us otherwise. Accordingly, we find that the respective sentences are relatively uniform considering the respective offenses and are not highly disparate. The findings and the sentence are correct in law and fact, and there was no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Conclusion

We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court

[5] The CA agreed to suspend all confinement in excess of 48 months for the appellant, while he agreed to suspend all confinement in excess of 24 months for Private Brown. Private Brown's pretrial agreement had no effect on the sentence adjudged because the military judge sentenced him to 20 months of confinement.