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

Before
R.Q. WARD, J. R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN M. FALK
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300031
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 September 2012.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejune, NC.
Staff Judge Advocate's Recommendation: LtCol J.W. Hitesman, USMC.
For Appellant: CDR Howard Liberman, JAGC, USN.
For Appellee: CDR James E. Carsten, JAGC, USN.

17 October 2013

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 found the appellant guilty, pursuant to his pleas, of three specifications of wrongful use of marijuana and two specifications of aggravated sexual assault in violation of Articles 112a and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 920. The military judge sentenced the appellant to twelve years confinement, reduction to pay grade

E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of four years, but otherwise approved the sentence as adjudged.

The appellant submitted two assignments of error, alleging that: 1) the appellant's guilty pleas to aggravated sexual assault were improvident as they lacked an adequate factual basis; and 2) the appellant's dishonorable discharge is disparately severe when compared to the closely-related cases of his co-conspirators. After consideration of the pleadings and the record of trial, we find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

On Monday, 2 May 2011, while on temporary duty in Missouri, the appellant and a group of fellow Marines met Ms. C and Ms. M at a local bar. Ms. M was celebrating her 21st birthday, and many people were celebrating the death of Osama Bin Laden. The Marines and Ms. M consumed a great deal of alcohol during their celebrations.

The group eventually left the bar and went to Ms. C's apartment. At the apartment, several of the Marines, including the appellant, engaged in sexual acts with Ms. M. These acts were videotaped by a different Marine, while yet another Marine, watched the sexual activity. Over the course of the video tapes Ms. M appears to become less and less responsive, ending in a video wherein the appellant is having intercourse with her while she is nearly motionless.

Several months later, while under investigation for the foregoing incident, the appellant was given a urinalysis test. The appellant's sample tested positive for THC, the metabolite for marijuana. He then tested positive for THC twice more over the next few months during subsequent urinalysis tests.

These acts, which form the basis for the charges and specifications in this case, were originally the subject of an earlier court-martial wherein the appellant entered mixed pleas. At that earlier trial he was found guilty, pursuant to his pleas, of three specification of wrongful use of marijuana, and was found guilty by a panel of members, contrary to his pleas, to two specifications of violating Article 120 and one specification of Article 125, UCMJ. That court-martial ended in

a mistrial, which in turn led to the parties reaching a pretrial agreement, and to the appellant's entry of the guilty pleas in question here.

Factual Basis for Appellant's Pleas to Aggravated Sexual Assault

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when he "fails to obtain from the accused an adequate factual basis to support the [guilty] plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We "afford significant deference" to the military judge in this area of inquiry, and ask whether the record as a whole demonstrates a "substantial basis" in law or fact for questioning the providence of the plea. *Id*. (citations omitted). If an accused is unable to remember the facts surrounding the offense with which he is charged, a military judge may still accept his guilty plea as provident if the accused is convinced of his guilt based upon the evidence available to him. *See United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971). While the facts as revealed by the accused must objectively support the guilty plea, a guilty plea will only be considered improvident if testimony or other evidence of record reasonably raises the question of a defense, or includes something patently inconsistent with the plea in some respect. *United States v. Roane*, 43 M.J. 93, 98-99 (C.A.A.F. 1995).

Although the appellant could not remember the events of the evening in question, he pleaded guilty based upon his having thoroughly reviewed the evidence against him. This evidence included not only a series of video and audio clips taken by one of his fellow Marines, but also testimony the Government presented at both the Article 32, UCMJ, investigation and the appellant's first trial - including testimony from the victim. When questioned about this by the military judge, the appellant indicated that "in those videos, I saw that I did engage in sexual intercourse with [the victim, and] that she was incapacitated to such a state that she could not communicate unwillingness or consent to the sexual acts that I was performing on her . . . ." Record at 73.

The appellant now argues that the videotapes of the sexual activity, referenced above and entered into evidence by the

Government as Prosecution Exhibit 2, show "that it is unclear that Ms. M was substantially incapable of consent" and that as a result, the videos "set up a matter inconsistent with the guilty plea." Appellant's Brief of 17 Jun 2013 at 10-11. We disagree. Nothing in the video clips is "patently inconsistent" with the appellant's plea. *Roane*, 43 M.J. at 98-99. Rather, the video clips show Ms. M primarily lying still while the appellant either digitally penetrates her or has sexual intercourse with her. A close up shows that her eyes are closed, at least until the light from the video camera is brought close to her face, at which time she raises her hand to shield her eyes. This imagery is not inconsistent with the appellant's providence inquiry or the stipulation of fact, both of which describe Ms. M as "heavily intoxicated" to the point of being "substantially incapable of declining participation in sexual intercourse and substantially incapable of communicating an unwillingness to engage in the sexual intercourse." PE 1 at 5; Record at 73, 77-78. Accordingly, we find the appellant's first assignment of error to be without merit.

Sentence Disparity

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). The burden is upon the appellant to make that showing. *Id.* If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id.* "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"). If the appellant meets this threshold, the burden shifts to the Government to demonstrate a rational basis for the disparity. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288.

Assuming without deciding that the appellant's cited cases satisfy the "closely related" standard, due to the "direct nexus between the service-members whose sentences are sought to be compared," *Lacy*, 50 M.J. at 288, we nonetheless find a rational basis for the disparity – i.e., the fact that all of the other cases involved significantly different charges or findings of guilt. Unlike the appellant, none of the other Marines were convicted of aggravated sexual assault and multiple instances of drug use. Lance Corporal (LCpl) CD was found guilty of indecent conduct (filming others having sex) and hazing. Appellant's Brief at 7. LCpl AD was found guilty of consensual sodomy in the presence of others. *Id*. LCpl W was found guilty of two specifications of wrongful drug use, but no sexual offense. *Id*. at 8. Lastly, Cpl G and Cpl T were both acquitted on charges stemming from the events in Ms. C's apartment. *Id*. at 7-8. Given these differences, the Government has more than met its burden to demonstrate a rational basis for the sentence disparity.

Conclusion

Accordingly, the findings of guilty and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court