

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

**Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHNATHAN L. GRAVES
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201300178
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 1 March 2013.

Military Judge: Maj Nicholas A. Martz, USMC.

Convening Authority: Commanding General, 2d Marine
Logistics Group, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Capt A.L. Evans,
USMC.

For Appellant: CDR Michael C. Pallesen, JAGC, USN.

For Appellee: LCDR Brian C. Burgtorf, JAGC, USN.

30 September 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 special court-martial composed of a military judge convicted the appellant, pursuant to his pleas, of violation of a lawful general regulation, operating a motor vehicle while intoxicated, indecent conduct, adultery, and consuming alcohol

while under the age of 21¹ in violation of Articles 92, 111, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 911, 920, and 934. The sentence approved by the convening authority included 30 days confinement, reduction to pay grade E-1, forfeiture of \$600.00 pay per month for three months, and a bad-conduct discharge.²

The appellant's sole assignment of error³ avers that his sentence of a bad-conduct discharge is disparately severe when compared with the case of his co-actor, whose sentence did not include a bad-conduct discharge. Having reviewed the record of trial and the parties' pleadings, 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.

Background

The appellant and another male Marine, Private First Class (PFC) Bautista, were invited over to the home of Corporal (Cpl) P, a female Marine who they each knew. After all had consumed beer and mixed drinks, the appellant and PFC Bautista had sexual intercourse with Cpl P in the presence of each other and were each charged with, *inter alia*, a violation of Article 120, indecent conduct. According to the Government's response to the appellant's assignment of error, PFC Bautista was additionally charged with a violation of Article 134, but the nature of the misconduct was unknown. As punishment PFC Bautista received 35 days confinement, 30 days hard labor without confinement, 15 days restriction, forfeiture of \$300.00 pay per month for three months, and a reprimand. His sentence did not include a bad-conduct discharge.

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.

¹ The appellant was charged under the Federal Assimilated Crimes Act with a violation of North Carolina General Statute §18B-302, which prohibits the consumption of alcohol by anyone under the age of 21.

² Although disapproved by the convening authority, the appellant was additionally sentenced to 60 days hard labor without confinement, and 60 days restriction.

³ Assignment of error submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)

1985). We will not 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) (additional citation omitted). "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 (listing examples of closely related cases as including 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 burden is upon the appellant to make a showing that his case is closely related to another. *Lacy*, 50 M.J. at 288. If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id.* Co-conspirators are not entitled to equal sentences. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001).

Assuming *arguendo* the appellant has demonstrated that his case is closely related to that of his co-actor, PFC Bautista, who received lesser punishment, the record provides ample information for the Government to show a rational basis for the disparity. The record indicates that in addition to the indecent conduct charge, the appellant was also found guilty of operating a motor vehicle while intoxicated, adultery, and consumption of alcohol while under the age of 21. Finally, the appellant was a noncommissioned officer in the United States Marine Corps and two pay grades senior to PFC Bautista (hence the fraternization charge). We find that these facts provide a sufficient and rational basis for the difference between the appellant's sentence and that of his co-actor.

Conclusion

For the reasons stated above, the findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court