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

Before
M.D. MODZELEWSKI, R.G. KELLY, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSHUA P. JACKSON
AIRMAN (E-3), U.S. NAVY

NMCCA 201200418
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 June 2012.
Military Judge: CAPT John K. Waits, JAGC, USN.
Convening Authority: Commander, Naval Air Force Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT F.D. Mitchell, JAGC, USN.
For Appellant: LCDR Shannon A. Llenza, JAGC, USN.
For Appellee: CDR Kevin L. Flynn, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

14 February 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, convicted the appellant, pursuant to his plea, of aggravated sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for 4 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved

the adjudged sentence. The pretrial agreement had no effect on the sentence.

The appellant asserts that the sentence was unjustifiably severe. After careful examination of the record of trial and the pleadings of the parties we are satisfied 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 occurred.

Severity/Disparity of Sentence

The appellant argues that his sentence should be reduced because it is inappropriately severe in comparison to other cases similar in nature and seriousness. Appellant's Brief of 28 Dec 2012. The appellant raises issues of severity and disparity, and we will discuss both.

Severity

Article 66(c), UCMJ, requires us to independently review the sentence of each case within our jurisdiction and only approve that part of the sentence that we find should be approved. *United States v. Baier*, 60 M.J. 382 383-84 (C.A.A.F. 2005). We are required to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses, as well as the character of the offender, keeping in mind that courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the CA. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The appellant pled guilty to aggravated sexual assault and faced a maximum sentence of thirty years confinement. He admitted to inserting his index finger into the vagina of the wife of another Sailor while a guest in their home. He did so after finding her unconscious on the bathroom floor of her master bedroom. His assault lasted approximately twenty seconds and ended only when the victim's husband intervened.

In making this determination, we have also considered the testimony of character witnesses who testified favorably regarding the appellant's work ethic and military bearing, and the documentary evidence offered by the appellant during

sentencing. Our careful consideration of this evidence does not lessen the severity of the appellant's conduct, or the traumatic impact of this conduct upon the victim and her husband. We find the adjudged sentence is appropriate after considering the seriousness of the offense and the character of the offender.

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 appellant has the burden 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, service members involved in a common or parallel scheme, or "some other direct nexus between the service members whose sentences are sought to be compared").

For comparison purposes, the appellant cites three cases involving charges of aggravated sexual contact, and gives a factual background of the respective cases. In each case, the defendant received a sentence of less than four years confinement. The appellant asserts his case is closely related to the cited cases because of the seriousness and nature of the offense. However, the appellant has not demonstrated a "direct nexus" between those cases and his case. He simply argues that these offenders committed aggravated sexual assaults, and received lesser sentences than he did.

The appellant's cited cases are neither disparate nor closely related. We are confident that the appellant received the individualized consideration to which he was entitled and was sentenced accordingly.

Conclusion

The findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court