

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

**Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOEY W. LO
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201200401
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 May 2012.

Military Judge: Maj Clay Plummer, USMC.

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

Staff Judge Advocate's Recommendation: Maj J.N. Nelson,
USMC.

For Appellant: LCDR Brandon Boutelle, JAGC, USN.

For Appellee: Maj David Roberts, USMC; LT Lindsay P.
Geiselman, JAGC, USN.

26 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 pleas, of aggravated assault, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant was sentenced to confinement for 16 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved

the sentence as adjudged but, pursuant to a pretrial agreement, suspended confinement in excess of 366 days.¹

The appellant raises one assignment of error: that his approved sentence is inappropriately severe given his documented mental health conditions. We disagree.

After careful consideration of the record of trial and the pleadings of the parties, we conclude that the findings and 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 Super Bowl Sunday in 2011, 29 Palms, California, the appellant was involved in an altercation with Lance Corporal (LCpl) "NC." Various Marines, including the appellant and LCpl NC, had attended a Super Bowl party at Game Stop/Charley's Subs, Building 1517, an on-base eating establishment, and were awaiting bus transportation back to Camp Wilson. While the victim and a group of Marines were waiting for their transportation, the appellant approached the group, and was greeted by the victim who clapped him on the shoulder, saying, "What's up, Corporal Lo" and asked the appellant if he had seen the game.² This apparent lack of a proper military greeting by a Lance Corporal of Marines offended the appellant, a Corporal of Marines, who then immediately drew his knife, confronting the victim about his lack of military bearing. The appellant drew in very closely to LCpl NC's body, a scuffle ensued between them, and the appellant slashed LCpl NC across the forehead, resulting in a deep tissue wound measuring 5.5 centimeters in length and requiring 27 stitches to repair.

During the providence inquiry the appellant described that his actions in using the knife were only in an effort to scare his victim. But, the appellant admitted that through culpable negligence he slashed LCpl NC in the forehead as the victim tried to duck out of the way of the knife. The Government's sentencing evidence portrays the appellant's actions as those of a man who went on a rage after being disrespected by a junior Marine. Witnesses and documentary evidence describe the

¹ To the extent that the convening authority's action purports to execute the bad-conduct discharge, it is a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

² Record at 66.

appellant as "snapping," and reflect that he grabbed the victim, held a knife to his throat, slashed his head with the knife, while yelling how junior Marines should respect rank and exhibit proper courtesies to seniors.

Sentence Appropriateness

The appellant asserts that his approved sentence, which includes a bad-conduct discharge, is too severe based upon his documented mental condition.³ Upon *de novo* review, we disagree and decline to grant relief.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We independently determine the appropriateness of the sentence in each case we review. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

Here, the appellant engaged in violent behavior utilizing a six-inch fixed blade knife against a junior Marine whom he viewed as having been disrespectful toward him. As a result of the appellant's actions, the victim suffered a deep cut on his face that required numerous sutures, leaving his face permanently scarred. Luckily, even though the appellant wielded a knife in front of LCpl NC's neck, he was not more seriously injured or killed.

While clemency is the prerogative of the convening authority, our duty is to affirm only those sentences which we deem fair and just. We acknowledge that the appellant presented evidence of some mental health issues since returning from his deployment to Afghanistan. However, despite the disrespect he may have viewed from a junior Marine, the appellant's response was abhorrent. Rather than handling the situation in the mature manner one expects of a noncommissioned officer, he reacted in a

³ We note that the appellant underwent a RULE FOR COURT-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) examination prior to court-martial that determined he was competent to stand trial and responsible for his actions. Upon inquiry by the military judge during trial, the defense indicated it did not desire to raise a mental responsibility defense.

violent manner by assaulting a young junior Marine in the presence of numerous other Marines.

In allowing for the nature and seriousness of the offenses and the character of the offender, after careful consideration of the record of trial, the matters submitted in extenuation and mitigation, and the appellant's record of service, including his deployment to Afghanistan, we are convinced that justice was done and that the appellant received the punishment he deserved. *Healy*, 26 M.J. at 395. Granting sentence relief at this point would be engaging in an act of clemency, a prerogative reserved to the CA, and we decline to do so. *Id.*

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court