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.

EDWIN A. RODRIGUEZ
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300127
SPECIAL COURT-MARTIAL

Sentence Adjudged: 12 December 2012.
Military Judge: Maj Elizabeth Harvey, USMC.
Convening Authority: Commanding Officer, 3d Battalion, 11th Marines, 1st Marine Division (REIN), Marine Corps Air Ground Combat Center, Twentynine Palms, CA.
Staff Judge Advocate's Recommendation: Col D.K. Margolin, UMSC.
For Appellant: CDR Howard Liberman, JAGC, USN.
For Appellee: LT Ian MacLean, JAGC, USN.

29 August 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 conspiracy, violating a lawful general order, larceny, and breaking restriction, in violation of Articles 81, 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 921, and 934. The appellant was sentenced to four months' confinement, reduction to pay grade E-1, and a bad-conduct

discharge. The convening authority (CA) approved the sentence as adjudged, and, except for the punitive discharge, ordered the sentence executed. In accordance with a pretrial agreement, the CA suspended all confinement in excess of ninety-two days.

The appellant asserts two assignments of error. First, he asserts that his sentence of a bad-conduct discharge is disparately severe when compared with the cases of his co-conspirators, who received summary court-martial sentences. Second, he asserts that his sentence should be set aside, due to the military judge failing to properly announce findings prior to sentencing.

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.

I. Background

The appellant and three other Marines were riding in a taxicab in Naha City, Okinawa, Japan, on April 17, 2012. At one point, the taxicab driver stopped and exited his vehicle to ask for directions from another taxicab driver. The appellant entered into an impromptu conspiracy with the three other Marines to steal the driver's wallet from the center console of the taxicab. The appellant took the wallet, gave it to the Marines in the backseat, and later distributed the money among the four Marines. The total value of the money in the wallet was approximately $500.00. The appellant and his co-conspirators were later apprehended by the Japanese authorities.

After the incident, the appellant's commanding officer placed him on pretrial restriction. Twice the appellant violated the conditions of his pretrial restriction, once by acquiring and consuming alcohol, and once by having an unauthorized visitor in his barracks room. Additionally, while on restriction, appellant was caught with ten rounds of 5.56mm ammunition in his barracks room, in violation of a lawful general order prohibiting unauthorized storage of ammunition in the barracks.

Further facts relevant to disposition of this case are developed below.

II. 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 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). "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"). 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).

The appellant has demonstrated that his case is closely related to that of his co-conspirators, who received lesser punishment. However, the record provides ample basis for the Government to show a rational basis for the disparity. First, unlike his co-conspirators, the appellant was the instigator of the larceny. He is the one who had the idea to steal the wallet, and he is the one who talked the other Marines into joining both the conspiracy and the theft. Moreover, the appellant was convicted of an additional, unrelated charge of having ammunition in his barracks room – a crime not committed by his co-conspirators. These facts provide a sufficient and rational basis for the difference between the appellant's sentence and those of his co-conspirators.

III. Failure to Announce Findings

At trial, the military judge failed to announce findings prior to sentencing. Recognizing her error, the military judge held a post-trial Article 39(a) session on March 15, 2013, approximately three months following sentencing. At the Article 39(a) session, the military judge announced the specific findings on the record. The session was held after consultation with trial counsel and defense counsel in R.C.M. 802 conferences. The appellant was consulted, waived his right to

appear in person at this session under R.C.M. 804, and attended telephonically. Record at 99-100.

R.C.M. 922(a) provides that "[f]indings shall be announced in the presence of all parties promptly after they have been determined." R.C.M. 922(d) requires that erroneous announcements of findings be corrected and a new announcement made "before the final adjournment of the court-martial in the case." R.C.M 1102(b)(1) allows for "proceedings in revision" which "may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial." Such corrective action must be "without material prejudice to the accused."

In an analogous case, *United States v. Jones*, 46 M.J. 815, 817 (N.M.Ct.Crim.App. 1997), we held that the military judge "not entering findings as to those offenses to which the appellant had pleaded guilty" was "precisely the type of problem which R.C.M. 1102 is designed to rectify." Indeed, we commended the military judge "for reopening the trial to resolve his oversight." *Id.*

Here, the military judge, in accordance with R.C.M. 1102, remedied her error on the record. Appellant alleges no material prejudice arising from this three month delay in specific findings being announced, nor do we find any prejudice from such delay.[1] Accordingly, this assignment of error is without merit.

IV. Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court

[1] RULE FOR COURTS-MARTIAL 1102(d) provides that "[t]he military judge may direct a post-trial session any time before the record is authenticated." Although the military judge apparently directed the post-trial session after authenticating the record, we can discern no prejudice from this oversight, nor has the appellant alleged any.