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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

TRAVIS G. SIPPLE
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201300010
GENERAL COURT-MARTIAL

Sentence Adjudged: 11 September 2012.
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: LtCol Richard D. Belliss, USMCR.
For Appellee: CDR Mary Grace McAlevy, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

20 June 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 in accordance with his pleas of attempted larceny, conspiracy, false official statement, and larceny in violation of Articles 80, 81, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 907, and 921. The military judge sentenced the appellant to confinement for 1,943 days, forfeiture of all pay and allowances, reduction to

pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended all confinement in excess of 18 months.[1]

The appellant raises two assignments of error: (1) that his sentence was inappropriately severe, and (2) that the military judge erred in denying him credit for illegal pretrial punishment in violation of Article 13, UCMJ.

After careful consideration of the record and the briefs of the parties, we agree that the military judge erred in denying the appellant credit for illegal pretrial punishment and that the appellant's sentence was inappropriately severe. We take corrective action in our decretal paragraph. After taking corrective action, we conclude the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant pled guilty to conspiring with Lance Corporal (LCpl) JQ and LCpl ZP to steal seven tool boxes, military property of a value greater than $500.00, to stealing those seven tool boxes, and to lying about the disposition of one of those toolboxes to an investigator. The appellant also pled guilty to attempting to steal seven additional toolboxes within weeks of the aforementioned theft.

Additional facts necessary to resolve the assigned errors are included therein.

II. Sentence Severity

The appellant asserts that the sentence approved by the CA is inappropriately severe and warrants relief under Article 66(c), UCMJ. We agree.

A court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964). Our determination of sentence

[1] To the extent that the convening authority's action purported to execute the dishonorable discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

appropriateness under Article 66(c), UCMJ, requires us 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. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy on the appellant and is the prerogative of the convening authority. *Healy,* 26 M.J. at 395.

We "are required to engage in sentence comparison only 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. Roach,* 69 M.J. 17, 21 (C.A.A.F. 2010) (citation and internal quotation marks omitted). "Closely related cases" include those cases involving coactors involved in a common crime or scheme. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id*.

The appellant's co-conspirators were both convicted, in accordance with their pleas, of one specification of conspiracy and one specification of larceny in violation of Articles 80 and 121, UCMJ. LCpl ZP was sentenced to seven months' confinement, forfeiture of all pay and allowances, and a bad-conduct discharge. LCpl JQ was sentenced to seven months' confinement, a $5,000.00 fine, and a bad-conduct discharge. Pursuant to a pretrial agreement, the CA disapproved the fine and suspended confinement in excess of six months in LCpl JQ's case.

We agree that the appellant's co-conspirators received significantly less severe sentences, that the three cases were "closely related," and that the sentences adjudged were "highly disparate." But, the Government carried its burden of showing a rational basis for the appellant's more severe sentence. Specifically, the record reflects that the appellant was a noncommissioned officer who conspired with two junior Marines to steal seven toolboxes and then actually stole those seven toolboxes with a total value of $13,601.00. The appellant was also convicted of two additional offenses that did not implicate those co-conspirators. First, he lied to an investigator about

the disposition of one toolbox which resulted in his plea of guilty to making a false official statement. Second, he also attempted to steal seven additional toolboxes worth $13,601.00.

However, after carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence awarded to be inappropriately severe for this offender and his offenses. *See* Art. 66(c), UCMJ; *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395; *Snelling* 14 M.J. at 268. We will take appropriate corrective action in our decretal paragraph by affirming only three years of the approved confinement.

III. Pretrial Punishment

The appellant avers that the military judge erred by denying him credit for illegal pretrial punishment in violation of Article 13, UCMJ. In support of his argument, the appellant notes the duration of his assignment to a work detail (189 days); the types of duty he was required to perform on that work detail including manual labor, trash pick-up, and scrubbing decks using "only a bucket of water and green scratch pads" prior to trial; a statement attributed to a superior officer that "he wanted [the appellant] doing something harder because [he was] in trouble"; and his performance of work detail duties for 79 days while on limited duty following knee surgery. He asserts that these facts are clear evidence of an intent to punish and constituted unlawful pretrial punishment. *Id*. at 14-17.

Article 13 prohibits: (1) the intentional imposition of punishment on an accused before his guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial or to prevent additional misconduct, i.e., illegal pretrial confinement. *See United States v. Mack*, 65 M.J. 108, 110 (C.A.A.F. 2007); *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003). The appellant's argument invokes only the intentional "punishment prong" of Article 13, which focuses on intent. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003) (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). "[A]bsent a showing of an expressed intent to punish, a particular condition reasonably related to a legitimate and non-punitive governmental objective,

does not, without more, amount to punishment." *Id*. (citing *Bell v. Wolfish,* 441 U.S. 520, 538-39 (1979)).

Whether the conditions of the appellant's work detail constituted unlawful pretrial punishment is a mixed question of law and fact. *Id.* The burden of proof is on the appellant to show a violation of Article 13, UCMJ. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

The appellant does not challenge and we are not inclined to disturb the majority of the military judge's findings of fact including: (1) that the command was justified in removing the appellant from his duty section in the warehouse once the larceny allegations surfaced and ensuring that he was gainfully employed during the normal work day; (2) that he was permitted to wear the uniform of the day; (3) that he was given normal liberty; and (4) that he was not required to muster while off duty. Appellant's Brief of 8 Mar 2013 at 11-13; Record at 27. However, he disputes the military judge's finding that there was no intent to punish him and the military judge's conclusion that there was "no illegal pretrial punishment." Appellant's Brief at 13.

We begin our analysis by noting that the military judge's findings of fact omit reference to evidence of intent to punish submitted by the appellant that was not rebutted by the Government at trial. Therefore, we will augment the findings of the military judge as follows:

> Corporal J's claim that he was informed by his staff noncommissioned officer, Staff Sergeant T, that Major M (the Company Commander) had said that "painting was too easy [for the appellant and his two suspected co-conspirators] and that he wanted these Marines doing something harder because they were in trouble" was not rebutted by the Government. Appellate Exhibit VI at page 18.
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> The appellant performed working party duties at the direction of his chain-of-command for 79 days while in a limited duty status including doctor directed limitations on physical activities, *inter alia*, including "[Physical Training]," "field duty," "work parties, standing watch, or formations." Appellate Exhibit VI at pages 37-50; Prosecution Exhibit 1 at 2, ¶¶ 18-19.

> Five witnesses, including four noncommissioned officers, submitted statements that the appellant was routinely required to scrub the deck of the supply company spaces, in apparent public view, with a hand-held pad and bucket of water along with his two alleged warehouse larceny co-conspirators. Appellate Exhibit VI at pages 14, 18, 24, 28, 32.

The military judge properly concluded that *United States v. Smith*, 53 M.J. 168, 172 (C.A.A.F. 2000) provided the appropriate legal framework for determining whether illegal pretrial punishment occurred. Applying *Smith*, he then found that "there was no intent to punish . . . or stigmatize the [appellant] while he was pending disciplinary actions." Record at 27. We disagree. Although there is some support for this finding with respect to duties performed on or after 29 February 2012, when the appellant was returned to full duty, there is scant evidence in support of this conclusion relevant to the 79 preceding days when the appellant was apparently in a limited duty status. PE 1 at 2, ¶¶ 18-19; AE VI at pages 45, 54-67; AE VII at pages 1-13.

The repetitive cleaning duties, including painting of items not in need of painting and routine scrubbing of the deck in the Supply building with a handheld pad and bucket of water along with his two alleged warehouse larceny co-conspirators, were excessive. AE VI at 14-33. The Government has advanced no "legitimate and non-punitive [military purpose]" for this duty, and we find none. *United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003) (citing *Bell*, 441 U.S. at 538-39). In addition, both at trial and on appeal the Government has not addressed the impact of the appellant's limited duty status.

After reviewing the totality of the circumstances concerning the appellant's assignment to the working detail, the statement attributed to Major M, the evidence of the appellant's limited duty status and the absence of any evidence in rebuttal of same, and applying the four considerations outlined in *Smith*, 53 M.J. at 172, to the facts and circumstances of this case, we find evidence of an intent to punish the appellant prior to trial. *See Pryor*, 57 M.J. at 825 (citing *Bell*, 441 U.S. at 538-39).

We also find that this work, performed as it was by persons under investigation for theft from a Supply Battalion warehouse in view of their fellow Supply Battalion Marines, was also humiliating and degrading and constituted a form of pretrial

punishment. Therefore, we conclude the appellant has carried his burden to show the intentional imposition of punishment before his guilt was established at trial in violation of Article 13, UCMJ. *See Mosby*, 56 M.J. at 310; s*ee also Smith*, 53 M.J. at 172 (citing *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987) (apprehending individuals in front of unit formation and then ridiculing them was punishment under Article 13)); *United States v. Palmiter*, 20 M.J. 90, 96 (C.M.A. 1985) (prohibiting a pretrial detainee from wearing clothes except undershorts or requiring him to sit at a desk from 0400 to 2200 was considered improper punishment).

Having determined that the appellant was subject to illegal pretrial punishment, we turn to the remedy appropriate to redress this circumstance. Our task is complicated by the limited evidence presented by the appellant at trial and the absence of detailed findings of fact by the military judge.

The duration and frequency during which the appellant was required to scrub the deck of the supply building cannot be clearly ascertained from the record. The affidavits and attached statements include some inconsistencies and ambiguities. Additionally, the appellant produced scant evidence concerning the duration or frequency of those duties. The appellant requests that we set aside the dishonorable discharge or, in the alternative, award confinement credit for each of the 189 days that he served on the work detail. Appellant’s Brief at 17. Either alternative would be an unwarranted windfall for the appellant, particularly in light of the absence of any pretrial restraint or conditions on his liberty, and the legitimate military purposes for most of the appellant’s assigned duties.

Based upon the record before us, we will award 63 days constructive credit against confinement based upon the 189 days that the appellant served on the work detail and was required to perform degrading duties, including 79 days while in a limited duty status. *See United States v. Lee*, 61 M.J. 627, 629-32 (C.G.Ct.Crim.App. 2005) (requiring appellant to clean the pier with a foxtail and to remove puddles with a hand-held sponge in front of his former shipmates, was a form of punishment warranting 10 days constructive credit).

IV. Conclusion

Accordingly, we affirm the findings and so much of the sentence as includes confinement for three years, forfeiture of

all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The appellant will be credited with 63 days constructive credit against confinement for pretrial punishment in violation of Article 13, UCMJ.

For the Court

R.H. TROIDL
Clerk of Court