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

Before
R.Q. WARD, J.R. MCFARLANE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAMES C. WARNER
CAPTAIN (O-3), U.S. MARINE CORPS

NMCCA 201200495
GENERAL COURT-MARTIAL

Sentence Adjudged: 31 July 2012.
Military Judge: Col Deborah McConnell, USMC.
Convening Authority: Commanding General, U.S. Marine Corps Forces, Special Operations Command, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol C.B. Walters, USMC.
For Appellant: LT Carrie Theis, JAGC, USN.
For Appellee: LT Philip Reutlinger, JAGC, USN.

22 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 military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of attempt,[1] five specifications of conspiracy, one specification of willfully disobeying a superior

[1] The underlying offenses for the attempt specifications were housebreaking and wrongful disposition of military property.

commissioned officer, one specification of making a false official statement, two specifications of wrongful disposition of military property, four specifications of larceny, one specification of assault, one specification of presenting a false claim, one specification of making a false claim, one specification of obstructing justice, one specification of solicitation, and one specification of fraternization, in violation of Articles 80, 81, 90, 107, 108, 121, 128, 132, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 890, 907, 908, 921, 928, 932, and 934. The military judge sentenced the appellant to be confined for five years and to be dismissed from the naval service.[2] Pursuant to a pretrial agreement (PTA), the convening authority (CA) approved the sentence as adjudged but suspended all confinement in excess of twenty-four months and waived automatic forfeitures for the benefit of the appellant's family members. [3]

The appellant asserts four assignments of error.[4] 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.

Conditions During Pretrial Confinement

We first address the appellant's claim concerning his confinement conditions. Appended to the record are two unsworn declarations from the appellant made under the penalty of

[2] During trial, the civilian defense counsel raised a motion for appropriate relief due an unreasonable multiplication of charges (UMC). Before announcing sentence, the military judge found several specifications unreasonably multiplied, dismissed several offenses and merged others for sentencing purposes. Record at 299–305.

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

[4] These are: (1) that his sentence is inappropriately severe; (2) that conditions he suffered during pretrial confinement merit relief under Article 55, UCMJ, and the Eighth Amendment to the U.S. Constitution; (3) that the Government's noncompliance with a material term of the PTA merits relief; and (4) that the military judge who presided at the appellant's trial was biased due to her presiding over a companion case. The third and fourth assignments of error were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). As to the appellant's third and fourth assignments of error, we have reviewed the record of trial and find them to be without merit. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992).

perjury.[5] In these declarations, the appellant describes a number of substandard and unsanitary conditions during his stay in special quarters while serving pretrial confinement. These conditions range from insufficient heating and cooling to infestation of mice, rats, and cockroaches in his cellblock. He indicates that he "requested to [his] councel (sic) to have brought up the onerous conditions during [his] confinement period of 244 days at Camp Lejeune Brig." *Id.,* Declaration of 29 Feb 2013 at 1. He also indicates that he submitted "DD 510" grievance forms to brig guards but does not explain what, if anything happened as a result of his complaints. *Id*. In support of his claims, he appends to the record unsworn declarations made by two other prisoners describing similar conditions at the Camp Lejeune Brig special quarters unit.[6]

1. Illegal Pretrial Punishment

Although not articulated in his brief, the appellant's post-trial declarations complain of conditions during his pretrial confinement.[7] In a pretrial setting, Article 13, UCMJ, prohibits either punishment or confinement conditions that are "more rigorous than necessary to ensure the [appellant's] presence for trial." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). By its very terms the statute applies only to claims arising from pretrial settings. *United States v. Kreutzer*, 70 M.J. 444, 447 (C.A.A.F. 2012). By contrast, however, Article 55, UCMJ, and the Eighth Amendment focus on cruel and unusual punishment following conviction. *See United States v. Destafano*, 20 M.J. 347, 349 (C.M.A. 1985) (noting that Article 55, UCMJ and Eighth Amendment protect against cruel and unusual punishment following conviction); *United States v. Foster*, 35 M.J. 700, 703 (N.M.C.M.R. 1992) (finding that Article 13, UCMJ prohibits pretrial punishment and Article 55, UCMJ generally applies to punishment following conviction); *United States v. Fulton*, 52 M.J. 767, 770 (A.F.Ct.Crim.App. 2000) (holding that Article 13, UCMJ, provides proper framework for pretrial punishment complaints as both Eighth Amendment and Article 55, UCMJ, apply only following conviction at trial) *aff'd*, 55 M.J. 88 (C.A.A.F. 2001); *but see United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002) (holding that lawful

[5] *See* Appellant's Nonconsent Motion to Attach of 19 Apr 2013.

[6] *See* Appellant's Nonconsent Motion to Attach of 17 May 2013.

[7] At trial, the appellant was credited with serving 247 days of pretrial confinement, from 20–23 November 2011 and 1 December 2011 until 31 July 2012. Charge Sheet; Record at 227. The appellant's reference to "244" days directly corresponds to this latter period of pretrial confinement.

pretrial confinement does not per se constitute cruel and unusual punishment under Article 55, UCMJ and Eighth Amendment) (citation omitted). Although the appellant now invokes statutory and constitutional protections against cruel and unusual punishment, we find his complaint more properly framed as an allegation of illegal pretrial punishment under Article 13, UCMJ.

2. Waiver

At trial, neither the appellant nor his counsel raised any issue concerning these conditions even though both addressed other aspects of the appellant's pretrial confinement.[8] More importantly, civilian defense counsel specifically declined to raise any related motion when asked by the military judge.[9] Last, detailed defense counsel made no mention of any onerous confinement conditions in a lengthy clemency petition following trial.[10]

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue,* 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993)). "Whether a particular right is waivable; whether the [appellant] must participate personally in the waiver; whether certain procedures are required for waiver; and whether the [appellant's] choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733 (citations omitted). Although there is a presumption against waiver of a constitutional right, that presumption is not applicable here. The waivable right[11] at stake here is the statutory protection against illegal pretrial punishment, not the constitutional right against cruel and unusual punishment

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[8] Record at 259, 267, 269 (the appellant refers to the solitary nature of his pretrial confinement); Record at 297, 298 (civilian defense counsel references the appellant's rehabilitative progress while in pretrial confinement).

[9] Record at 227. The exchange went as follows:

> MJ: Defense, do you have any motion requesting relief from unlawful pretrial punishment or restraint?
> CC: No, Judge.

[10] *See* Detailed Defense Counsel ltr 5811 DSO of 6 Nov 2012.

[11] *See United States v. Inong*, 58 M.J. 460, 464 (C.A.A.F. 2003) (holding that Article 13, UCMJ claims not raised at trial are waived on appeal absent plain error).

under the Eighth Amendment. Still, even in a constitutional context counsel may waive a constitutional right on behalf of an appellant in non-exceptional circumstances. *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008). Under the circumstances of this case, we conclude that the civilian defense counsel's response to the military judge affirmatively waived appellate review of this issue.[12]

Unlike *Harcrow*, the law under Article 13, UCMJ at the time of the appellant's trial was well-settled. *United States v. Harris*, 66 M.J. 166, 167-68 (C.A.A.F. 2008); *King*, 61 M.J. at 225. During his unsworn statement, the appellant made numerous references to his pretrial confinement without once referring to these now complained of conditions. Civilian defense counsel likewise drew on the appellant's lengthy pretrial incarceration in an effort to display his rehabilitative progress. Rather than seek relief for an Article 13 violation, both the appellant and his civilian counsel opted to use his pretrial confinement in mitigation. And when the military judge specifically inquired, the appellant remained silent when his counsel declined to raise the issue of unlawful pretrial punishment or restraint.[13] We conclude, therefore, this presents an appropriate case for us to apply waiver.

Sentence Appropriateness

The appellant next argues that his sentence is unjustifiably severe and we should invoke our power under Article 66(c), UCMJ, to grant him relief. We review sentence appropriateness *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We review each sentence for appropriateness "to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005)

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[12] Unlike other courts, the military courts of criminal appeals are not bound by the waiver doctrine due to the "awesome, plenary *de novo* power of review" granted to them by Article 66(c), UCMJ. *United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010) (citing *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)). Even if we declined to apply waiver, we find no plain or obvious error, *Inong*, 58 M.J. at 465, particularly in light of the fact that the appellant never complained of these conditions until appeal. *See United States v. Crawford*, 62 M.J. 411, 416 (C.A.A.F. 2006) (noting that appellant's failure to raise Article 13, UCMJ claim prior to appeal was "strong evidence" that statute was not violated).

[13] Although the appellant now alleges that he asked his counsel to raise this issue at trial, we find remand for further fact-finding unnecessary. Even if true, the appellant's post-trial assertions fall short of meeting his burden in establishing an Article 13, UCMJ, violation and thus entitlement to any relief. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

(footnote and internal quotation marks omitted). We do 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 *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)).

The appellant cites disparity between his and the closely-related cases of sentence and three other co-conspirators.[14] We therefore conclude that these and the appellant's case are "closely related." In taking his action on the appellant's sentence, the CA considered these three other cases and their respective sentences "[a]s a matter of sentencing parity."[15] The appellant now bears the burden of demonstrating that his sentence is "highly disparate" in comparison to his co-conspirators, and if he succeeds in this regard then the Government must demonstrate a rational basis for the disparity.[16]

We first examine whether the appellant and Sgt R's sentences are "highly disparate" and we conclude that they are not. The fact that there was a different outcome is not enough, for "[s]entence comparison does not require sentence equation." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001) (citations omitted)).[17] Moreover, co-conspirators are not

[14] The appellant references the sentence of three co-conspirators in his brief: Sergeant (Sgt) R, Sgt WAS, and Sgt PS. He argues that of all three co-conspirators, Sgt R's case was the most similar to his own, but that all three sentences should be considered.

[15] General Court-Martial Order No. 012-15 of 19 Nov 2012 at 12-13. Sgt R pleaded and was found guilty at a general court-martial of one specification of Article 80, one specification of Article 81, three specifications of Article 108, and one specification of Article 134, UCMJ. He was sentenced to a dishonorable discharge, confinement for 40 months, reduction to pay grade E-1, and a fine of $2,500.00, payable within six months or serve an additional six months confinement. No indication is given as to what action was taken on Sgt R's sentence. The promulgating order also lists the sentences of Sgt WAS and Sgt PS both of whom were convicted pursuant to their pleas at special courts-martial. Sgt WAS received a sentence of confinement for three months, forfeiture of $994.00 pay per month for three months, and reduction to pay grade E-1. Sgt PS received a sentence of forfeiture of $600.00 pay per month for four months, reduction to pay grade E-3, restriction for 30 days, and to be reprimanded.

[16] *Lacy*, 50 M.J. at 288.

[17] In *Durant*, the Court of Appeals for the Armed Forces found no abuse of discretion by the Court of Criminal Appeals in affirming the appellant's sentence to 30 months confinement and a dishonorable discharge after pleading to two specifications of larceny, while his co-actor – who initiated the

entitled to equal sentences. *Id.* at 261. To warrant relief, a sentence must exceed "relative uniformity" or give rise to the level of "an obvious miscarriage of justice or an abuse of discretion." *United States v. Swan*, 43 M.J. 788, 793 (N.M.Ct.Crim.App. 1995) (citations and internal quotation marks omitted). We find no such indication here. Sgt R's sentence of 40 months confinement, reduction to pay grade E-1, a fine, and a dishonorable discharge is not far removed from the sentence received by the appellant.[18] Accordingly, we find that the two sentences are not "highly disparate." We next turn to the latter two co-conspirators identified by the appellant, Sgt WAS and Sgt PS.

Next, we turn to the remaining cases. Even assuming that these sentences are "highly disparate" when compared to the appellant's, we find good and cogent reasons for the disparity. While both of these co-conspirators received far lesser sentences than the appellant, the record reveals a far lesser degree of criminal enterprise between these two co-conspirators and the appellant. The appellant pleaded guilty to attempted housebreaking based on his counseling Sgt R on Sgt R's plan to break into a unit warehouse with Sgt WAS. Record at 67-77; Prosecution Exhibit 1 at 2. When pleading guilty to criminal solicitation, the appellant explained to the military judge how he asked Sgt WAS to illegally manufacture a suppressor for his hunting rifle. Record at 173-78; PE 1 at 11-12. None of the offenses to which the appellant pled guilty named Sgt PS and the record contains little if any reference to the appellant's involvement in any criminal enterprise with Sgt PS. The substantial difference in the number of offenses for which the appellant was found guilty in comparison to these two cases alone provides a good and cogent reason for any disparity.

Based on our consideration of the entire record, we are satisfied that the appellant's sentence as approved by the convening authority is appropriate to this offender and his offenses. *Baier,* 60 M.J. at 384-85.

Conclusion

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criminal scheme – pled guilty to eight counts of larceny and received merely reduction in rank and a fine. 55 M.J. at 258-60.

[18] In claims of sentence disparity, military courts of criminal appeals consider adjudged sentences "because there are several intervening and independent factors between trial and appeal—including discretionary grants of clemency and limits from pretrial agreements—that might properly create the disparity in what are otherwise closely related cases." *United States v. Roach*, 69 M.J. 17, 21 (C.A.A.F. 2010).

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

For the Court

R.H. TROIDL
Clerk of Court