IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER **K.K. THOMPSON** **E.B. STONE**

UNITED STATES

v.

Larry A. FRAMNESS
Chief Warrant Officer-2 (CWO-2), U. S. Marine Corps

NMCCA 200500152 Decided 26 April 2007

Sentence adjudged 3 February 2004. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.

LT BRIAN L. MIZER, JAGC, USN, Appellate Defense Counsel
CAPT BRIAN K. KELLER, USMC, Appellate Government Counsel

STONE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of three specifications of attempted premeditated murder, one specification of conspiracy to commit murder, one specification of dereliction of duty, one specification of false official statement, one specification of adultery, and one specification of endeavoring to influence the testimony of a witness, in violation of Articles 80, 81, 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, 907, and 934. The appellant was sentenced to confinement for life with the possibility of parole, forfeiture of all pay and allowances, and a dismissal. The convening authority (CA) approved the sentence as adjudged. The sentence limitation of the pretrial agreement, had no effect on the sentence. However, as a condition of his pretrial agreement, the appellant agreed to waive his right to be considered for clemency by the Navy Clemency and Parole Board until 14 May 2028, a period of 25 years from the date that the appellant was placed into pretrial confinement. In his action, the CA released the appellant from six (6) of the twenty-five

(25) year period that the appellant had agreed to waive consideration for clemency.

After carefully considering the record of trial, the appellant's eight assignments of error,[1] and the Government's response, we find that the appellant's eighth assignment of error has merit and we grant relief in our decretal paragraph. The relief granted, however, does not affect either the findings or the sentence approved by the convening authority. 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.

Background

The appellant was a Warrant Officer with the 3d Marine Air Wing, Marine Corps Air Station, Yuma, Arizona with eighteen years of service in the Marine Corps. He was a friend and neighbor with a fellow Chief Warrant Officer from his command, CWO2 Glass. While CWO2 Glass was deployed to Kuwait during 2001-2002, the appellant and CWO2 Glass's wife began a course of adultery. At some point the appellant asked Mrs. Glass to divorce her husband. Mrs. Glass told the appellant that she feared her husband's violent reaction if she were to ask for a divorce. From August to November 2002, the appellant and Mrs. Glass began to discuss various plans to murder her husband.

From August to November 2002, while CWO2 Glass was deployed to Kuwait, the appellant and Mrs. Glass decided to murder CWO2 Glass by getting CWO2 Glass very drunk and placing him behind the steering wheel of his truck and causing him to drive off a cliff.

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[1] I. APPELLANT'S CONVICTION FOR ATTEMPTING TO MURDER CWO2 GLASS ON 22 AND 23 NOVMEBER 2002 ARE LEGALLY INSUFFICIENT.

II. APPELLANT'S CONVICTION FOR CONSPIRACY TO COMMIT MURDER OF CWO2 GLASS IS LEGALLY INSUFFICENT WHERE WENDY GLASS WITHDREW FROM THE CONSPIRACY.

III. APPELLANT WAS DENIED DUE PROCESS WHEN THE MILITARY JUDGE DENIED APPELLANT'S REQUEST FOR A CONTINUANCE TO PREPARE FOR TRIAL.

IV. APPELLANT WAS DENIED DUE PROCESS WHEN THE MILITARY JUDGE DENIED APPELLANT'S REQUEST FOR A MITIGATION SPECIALIST TO ASSIST HIM IN PREPARATION FOR TRIAL IN WHICH HE FACED THE POSSIBILITY OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.

V. APPELLANT WAS DENIED DUE PROCESS WHERE THE UNITED STATES DESTROYED MATERIALLY EXCULPABLE EVIDENCE BEFORE TRIAL.

VI. LIFE IMPRISONMENT IS AN INAPPROPRIATELY SEVERE SENTENCE FOR APPELLANT'S INEPT ATTEMPTS TO TAKE THE LIFE OF CWO2 GLASS.

VII. APPELLANT'S SENTENCE TO CONFINEMENT FOR LIFE IS HIGHLY DISPARATE WITH WENDY GLASS' SEVEN-YEAR-SENTENCE TO CONFINEMENT.

VIII. THE PRETRIAL AGREEMENT REQUIRES APPELLANT TO WAIVE HIS RIGHT TO BE CONSIDERED FOR CLEMENCY AND PAROLE, BOTH IMPORTANT POST-TRIAL RIGHTS, UNTIL 2028 AND IS THEREFORE UNENFORCEABLE. (Citation omitted).

Record at 469, 473-74; Appellate Exhibit LXXXIV at 2 (stipulation of fact).

In accordance with their plan, the day CWO2 Glass returned from his military deployment from Kuwait, Mrs. Glass rented a cabin in the Viejas Indian Reservation for the weekend. AE LXXXIV at 2. Mrs. Glass allowed her husband to drink to intoxication, drove her husband to where the murder was to take place and the appellant was hiding. Record at 469-71. Her husband, however, was not sufficiently drunk, and Mrs. Glass returned to her cabin and informed the appellant. Record at 471-74. The appellant and Mrs. Glass agreed to try their plan again on the following night. *Id*. The following night, on 23 November 2002, their plan was again thwarted when CWO2 Glass did not drink enough alcohol to be incapacitated. Record at 474, 477.

From February 2003 to 14 May 2003, while both the appellant and CWO2 Glass were deployed with their unit, the appellant and Mrs. Glass continued their illicit affair by sending romantic and lustful emails several times a day and by telephoning each other on their cell phones. Record at 228, 515; Prosecution Exhibit 1. The appellant assured Mrs. Glass that he would continue to find a way to kill her husband while both he and CWO2 Glass were deployed. Record at 228, 478-79, 514-15. On 12 May 2003, during a telephone conversation with the appellant, Mrs. Glass expressed that she now feared for the fate of her soul if she were involved in the killing of her husband. Record at 212-14 228-29, 480, 519, 525-26. Mrs. Glass made it clear to the appellant that she no longer wanted her husband killed. *Id*.

Despite Mrs. Glass's plea that she did not want to murder her husband, the appellant remained determined to kill CWO2 Glass. In the early morning of 14 May 2003, at Ali Al Salem Air Base, the appellant told CWO2 Glass that he needed him to assist in investigating some alleged misconduct by members of the command. Record at 537; AE LXXXIV. CWO2 Glass followed the appellant to a darkened guard shack at a remote part of the base. While CWO2 Glass was waiting in the shack, the appellant threw a hand grenade at him. The explosion caused shrapnel injuries to CWO2 Glass' neck, wrist, arm, and leg resulting in two surgeries. Record at 540-44; PE 2 (photographs of CWO2 Glass's injuries).

Withdrawal from Conspiracy

In his second assignment of error, the appellant argues that Mrs. Glass' withdrawal from their two-person conspiracy to murder her husband, set forth in Charge II, absolves the appellant of all criminal liability for that charge.[2] We disagree.

[2] In assignments of error I and II, the appellant asserts the issues as legal sufficiency. However, since the appellant plead guilty, we must review the military judge's decision to accept or reject an accused's guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly

Charge II alleges that the appellant and Mrs. Glass conspired to kill CWO2 Glass between 1 August 2002 and 14 May 2003 and that they committed numerous overt acts in the furtherance of the conspiracy. Specifically, Charge II alleges that during the charged period the appellant "drove the roads in the Viejas Indian Reservation area with Mrs. Glass, timed the routes, picked a cliff location where they planned to place Chief Warrant Officer 2 Glass in a vehicle and push him off a cliff; and at Ali Al Salem Air Base, Kuwait, Chief Warrant Officer Framness lured Chief Warrant Officer 2 Glass to a guard shack where he threw a live grenade at him and caused it to explode." During the military judge's inquiry into the providence of the appellant's pleas, it was revealed that Mrs. Glass withdrew from the conspiracy on or about 12 May 2003. Record at 480-82. Mrs. Glass' withdrawal occurred after commission of all of the overt acts listed in the charge, except for the grenade attack at Ali Al Salem Air Base. As a result, the words referring to the grenade attack at Ali Al Salem Air Base were lined out and withdrawn from the specification. Record at 481-82. The appellant stated to the military judge that he had no objection to the withdrawal and completed the providence inquiry without further comment on this incident. Record at 482.

Article 81, UCMJ, establishes the crime of conspiracy in the military. It does not contain any discussion of the effect of the withdrawal of a member from the conspiracy on the remaining criminal liability, if any, of the remaining members. Thus, the appellant argues that, under Article 81, because the conspiracy in his case consisted of only two parties, the appellant and Mrs. Glass, and because Mrs. Glass withdrew from the conspiracy, the conspiracy ceased to exist thereby absolving the appellant of liability for the charge. Additionally, the appellant argues that because Part IV of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), is a product of the President, and not the Congress, we are bound to observe Part IV of the MCM only to the extent that it does not restrict the rights of service members.

The appellant is incorrect. Part IV of the MCM addresses the issue of withdrawal and indeed provides that, "a party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy." While we agree with the appellant's general proposition that the Manual need not be observed where it restricts the rights of service members beyond that of the UCMJ, we do not agree that the provision of Part IV of the MCM regarding the effect of withdrawal of a party to a conspiracy is an impermissible restriction of a service member's rights. To the contrary, when read in isolation as the appellant

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erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). We will find a military judge abused his discretion in accepting a guilty plea only if the record shows a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J 23, 24 (C.A.A.F. 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

urges us to do, Article 81, UCMJ provides no relief to the remaining member of a conspiracy in a two-person conspiracy upon the withdrawal of the other co-conspirator. Only when read in conjunction with Part IV does an accused gain relief under Article 81 as to overt acts committed only by the other co-conspirator(s) but not committed by the accused. Therefore, the Manual provision operates only to absolve the appellant of conspiracy with regard to overt acts committed after Mrs. Glass' withdrawal on or about 12 May 2003, which is exactly what happened below. In any event we note that the language regarding the grenade incident at Ali al Salem was withdrawn from Charge II, and therefore any conspiracy involving the events of Ali Al Salem ceased to exist, as a matter of law, before the court-martial. The appellant, however, remains liable for the charges of conspiracy regarding his and Mrs. Glass' two previous attempts to murder CWO2 Glass in California. This assignment of error is without merit.

Denial of Continuance Request

In his third assignment of error, the appellant claims he was denied due process when the military judge denied his continuance request. We disagree. At an Article 39(a), UCMJ, session on 5 December 2003, the defense moved to continue the trial to 1 March 2004 from the planned trial date of 26 January 2004, in order to prepare for trial. Record at 253. The military judge indicated that he was inclined to deny the continuance request since there were three defense attorneys assigned to the case and they had had ample time to prepare. *Id*. at 263-64. At a later Article 39(a) session, the defense requested another continuance to ensure their explosives expert would be able to complete testing before the trial began. *Id*. at 419; AE LXXVII. The military judge denied the defense request for a continuance because of speedy trial concerns since the accused was in pretrial confinement. Record at 425. The military judge, however, ordered that the explosives expert be available as a defense investigative assistant for eight hours to review the evidence. *Id*. at 433-36. Although the military judge denied the continuance request, he indicated that if the defense needed more time for their expert to complete testing of the explosives evidence then he would reconsider a continuance. *Id*. at 306, 435, 443-44. The appellant did not request another continuance and subsequently entered non-conditional pleas of guilty to all charges and specifications pursuant to a pretrial agreement. *Id*. at 448, 451. The appellant acknowledged that he understood by pleading guilty he waived appellate review of most of the motions he had raised and that he had discussed this issue with his defense counsel. *Id*. at 503-04

A voluntary plea of guilty on the advice of counsel waives all nonjurisdictional defects in all earlier stages of the proceedings against an accused. *United States v. Lewis*, 12 M.J. 877, 878 (N.M.C.M.R. 1997). Regardless of whether the appellant waived the issue, the standard of review for the denial of a

continuance request is whether the military judge abused his discretion. *United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993). In applying this test, before granting relief, an appellate court must conclude that the military judge's ruling was clearly arbitrary, unreasonable, or erroneous. We find that the military judge did not abuse his discretion in denying the continuance.

Denial of Mitigation Specialist

In his fourth assignment of error, the appellant contends that he was denied due process when the military judge denied his motion for a mitigation specialist. Appellant's Brief of 7 Mar 2006 at 10; AE LVII. At an Article 39(a) session, the mitigation specialist testified that if she were retained by the defense team, she would assist in gathering information from the appellant's family in Montana and assessing the impact upon the appellant of his father's alcohol abuse. AE LVII. The defense argued that a mitigation specialist was necessary in this case because the appellant was facing the possibility of a punishment of life without parole if found guilty, and that the defense had a limited amount of time (one and one half months) to prepare before the trial date. Appellant's Brief at 10; Record at 264.

The military judge denied the defense request for a mitigation specialist finding that preparation for mitigation was well within the norm of defense counsel's routine duties and that in this case, three defense counsel had been assigned to the case since May 2002. Record at 194-95, 264.

The appellant now claims that the mitigation specialist would have investigated the appellant's "years of abuse and neglect." Appellant's Brief at 10; Record at 189. The appellant further claims that the trial defense counsel were ill-equipped to prepare a case in mitigation. Appellant's Brief at 10. We disagree.

Under RULE FOR COURTS-MARTIAL 703(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), service members "are entitled to expert assistance when necessary for an adequate defense." *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994). Our superior court applied a three-part test to determine whether expert assistance is necessary. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). The defense must show: "(1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). On appeal, a military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion. *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001).

We have thoroughly reviewed the record of trial and the contentions of the parties. After review, we conclude that the military judge did not abuse his discretion. The military judge in this case was scrupulous in ensuring that the appellant received proper assistance in the preparation of the sentencing phase of his trial. The military judge granted appellant's request for one of his defense counsel to travel at Government expense to Montana for one week to investigate the appellant's family background. Record at 264. Moreover, the military judge granted the appellant's request for a specific forensic psychiatrist, Commander Jacovich, to assist in analyzing the appellant's background and his potential for rehabilitation. AE LIVXX; Record at 251-53, 258-61. Indeed, the appellant's trial defense counsel acknowledged that this particular forensic psychiatrist was highly qualified to assist him in understanding the appellant's background and its potential effects on the appellant. Record at 253. Finally, the military judge granted the appellant's request for two of his family members, a brother and cousin, to testify at sentencing about the appellant's background, including his father's alcoholism and its affect on the appellant. *Id*. at 246, 583-84, 590-92. This assignment of error is without merit.

Destruction of Evidence

In his fifth assignment of error, the appellant contends that his due process rights were violated when the United States destroyed the guard shack at Ali Al Salem Air Base that was the scene of the appellant's attempted murder of CWO2 Glass. Appellant's Brief at 11; Appellate Exhibit XXVII. On 21 May 2003, the defense filed a discovery request to preserve the guard shack in the condition it was on the morning of 14 May 2003. AE XXVII at 1-2; Record at 391. On 9 June 2003, the Government denied the request stating there was no necessity in preserving the shack since physical evidence, photographs, and diagrams had already been collected by the NCIS agents. Record at 384-87. The Government subsequently destroyed the crime scene along with most of the area known as Camp Snake Pit on Ali Al Salem Air Base in accordance with a preexisting agreement with the government of Kuwait to return the land to its original condition. AE XXVIII at 1-2; Record at 384-387.

At the Article 32, UCMJ, hearing, a Navy SEAL and an Ordnance Officer at Naval Special Warfare Center, testified that he did not believe that the grenade thrown by the appellant was a fragmentation grenade and was more likely a diversionary grenade. AE LXIX at 8. Therefore, in his Motion for Appropriate Relief (AE XXVII), the appellant contended that the shack contained "exculpatory evidence" that would have shown that the grenade used by the appellant was not a fragmentation grenade. In his motion, the appellant requested that the appropriate relief provided by the court should be to dismiss the affected specifications and charges since the Government deliberately destroyed the guard shack and that the defense had no comparable

evidence available. AE XXVII; Record at 391-92. The Government in their response denied bad faith based upon the preexisting agreement with the government of Kuwait. The Government also noted that it had preserved and produced all evidence that they collected from the guard shack. AE XXVIII; Record at 392-93. Instead of employing the drastic measure of dismissing the charges, the military judge granted the defense's request for a forensic expert to assist the appellant and offered to entertain an appropriate instruction to the members. AE LX; Record at 393-94.

Despite having been granted an expert consultant regarding explosives and presumably obtaining the expert's opinion on the matter, the appellant did not raise the issue in a motion for appropriate relief at trial. Instead, the appellant entered a provident plea of guilty to the offense of attempted murder by fragmentation hand grenade. Accordingly, as the issue was not raised below and the appellant entered a provident plea of guilty, we find this issue was waived. AE LXXXIV at 3-4, 8-9. Even if we did not find that the issue was waived, the appellant has not explained how his inadvertent selection of a less lethal murder weapon is in any way "plainly exculpatory" of a charge of *attempted* murder.

This assignment of error is without merit.

Sentence Severity

In his sixth assignment of error, the appellant alleges that his sentence to confinement for life is inappropriate. In support, the appellant refers in summary manner to two unrelated cases which apparently resulted in sentences less severe than that of the appellant's. The appellant however, fails to provide any legal or factual analysis comparing his case to those he has referenced. Additionally, the appellant argues that confinement for life with the possibility of parole is inappropriate for offenses that did not result in death or serious injury. The appellant prays that this court reduce the term of confinement to 28 years. We disagree and decline to grant relief.

The appellant was convicted, among his other convictions, of multiple and divers premeditated attempts to murder the husband of his paramour which culminated in a grenade attack conducted while the husband was serving in combat in the defense of his nation. These offenses were reprehensible acts conducted in a cold-blooded and persistent manner under the most dishonorable of conditions. Accordingly, they are deserving of a severe sentence. After reviewing the entire record, we easily conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982).

Sentence Disparity

In his seventh assignment of error, the appellant alleges that his sentence is highly disparate from that of his paramour, who was convicted of related offenses. We disagree and decline to grant relief.

Sentence comparison is appropriate in closely related cases involving highly disparate sentences. *United States v. Lacy,* 50 M.J. 286, 287-288 (C.A.A.F. 1999). Where we find sentences to be highly disparate in closely related cases, we must determine whether there is a rational basis for the differences between the sentences. *Id.* The appellant bears the burden of demonstrating that cases are closely related and that the sentences are highly disparate. *Id.* Once the appellant has met his burden, the Government must show that there is a rational basis for the disparity. *Id.*

In determining whether or not the cases are closely related, we have before us no legally reliable evidence of either the charges for which Mrs. Glass was convicted, or the sentence that she received for those offenses. Instead, attached to the record, is what appears to be a copy of a report from an internet newspaper, "YumaSun.com," indicating that Mrs. Glass was convicted in an unnamed federal district court of charges of conspiracy to murder her husband while he was stationed in Iraq. While we have no reason to believe that the article is not what it appears to be, an internet newspaper report of the outcome of Mrs. Glass' trial, we have severe reservations of our ability to rely on such a report to make the judicial determinations set forth above. Even if we assume that the reporter correctly reported that Mrs. Glass received a sentence to confinement of seven years, the report, by its own terms, does not provide a complete list of the offenses of which Mrs. Glass was convicted. Without knowing the exact offenses for which she received the sentence of seven years, a determination of sentence disparity is legally impossible. Any attempt to make a comparison of Mrs. Glass' sentence to that of the appellant's sentence, without a definitive accounting of Mrs. Glass' actual convictions, would amount to naked judicial speculation. Accordingly, the appellant has not met his initial burden. This assignment of error is without merit.

Waiver of Clemency and Parole

In his eighth assignment of error, submitted in summary form, the appellant alleges that his pretrial agreement contains an impermissible requirement, that the appellant waive his right to be considered for clemency and parole until 2028. AE LXXXII at 1-2. This is indeed an impermissible requirement. In *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007), the Court of Appeals for the Armed Forces determined that any term and condition that would deprive an appellant of parole and clemency consideration is unenforceable under R.C.M. 705(c)(1)(B). Accordingly, we find

that the terms of the pretrial agreement purporting to effect waiver of clemency by the appellant are null and void. Consistent with our superior court's analysis in *Tate*, we further find that the terms and conditions at issue may be stricken without impairing the balance of the agreement and the plea. *Id.* at 10-11. The remaining terms of the agreement may be enforced.

Conclusion

The remaining assignment of error is without merit. The findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge WAGNER and Senior Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court